Issue two | Autumn 2020

moore barlow

Ruralnews

Published by Moore Barlow · www.moorebarlow.com

Rural property in the New Forest
Looking for the Good Life? · Page 5

Farm succession planning
Keeping it in the family · Page 5

Thinking of buying a farm?
How we can help · Page 8

In this issue

Editorial Our momentum continues...

We still all find ourselves living through unprecedented times. Up to this latest lockdown in November 2020, many of us at Moore Barlow continued to work from home or combine office and home working. Our Moore Barlow offices were open and running at 40% capacity. As was The Engine Room, our café at Gateway, which was available for clients and contacts alike to meet in. Due to the second lockdown, our offices are closed again to external meetings and the majority of us are working from home where our jobs allow us to, but rest assured that we are all fully connected with each and working as normal on our matters. On this basis, our Rural Services team is still as connected as ever – both with each other and with our clients. We're functioning as usual and are here to offer you all the support, advice and help we can as we all navigate these challenging times.

I'm delighted to report that this issue of Ruralnews comes off the back of our Rural Services team achieving Band 1 status for Agriculture and Rural Affairs work in Chambers & Partners and Tier 1 status for Agriculture and Estates work in the national Legal 500 rankings of top teams. It's been seven years in the making for myself, Edward Whittington and Philip Whitcomb, and back in 2013 it was a mere pipe dream when we came together to set up our own Rural Services sector team dedicated to providing full legal services to our landowning, farming and Landed Estate client base. We've grown since 2013 to a core team of 11 dedicated agricultural lawyers and a wider team of 20-plus lawyers who support the full legal service we provide to the rural sector. There's a lot of momentum for us at the moment, and we see ourselves continuing to grow and serve the rural sector for decades to come as a leading national team for Agriculture and Estates work.

Our Rural Property team is currently seeing much transactional work in the country house sector at the moment. There was a surge during the Spring and Summer 2020 of buyers from the City purchasing their country homes with acreage either as their principal residence or a second home, to ensure they secure some space and peace in their lives post-lockdown in a City. These deals are now nearing completion, if not already completed for our clients, and more keep coming. These transactions in themselves offer further opportunities to collaborate and help document contract-farming arrangements, grazing agreements and/or agricultural tenancies over the land that comes with these homes, to local farming families.

Philip Whitcomb's agricultural tax and trusts team is giving much advice and support on succession planning, APR, BPR and the likes of CGT. Most people consider that APR will be reformed rather than cut in the next budget. However, Philip is advising clients that if they are planning any restructures, to do so before any changes, as it's certain that the relief will not be improved. It's clear that BPR is going to have alterations, and this will have a bigger impact as the Balfour test will adjust its percentages, which could affect up to 80% of landowning estates and large farms. For this reason, our team is also seeing a rush of section 4(1)(f) and 4(1)(g) surrenders and regrants of agricultural tenancies. They're new tenancies for the sake of IHT, but retain 1986 Act protection. Anita Symington explains more in her Agricultural Tenancy update.

Our employment team, as you can imagine, remain busy advising our clients on the consequences of furlough and redundancies, and our agricultural property litigator is becoming increasingly busy with rent-recovery instructions.

Otherwise, insolvency and restructuring of farming enterprises have to remain firmly on the radar as we can't predict the impact phasing out of BPS will cause, and our lead partner for this area, Heather Dobson, spoke at the ALA's national farming conference on this very subject.

All in all, we hope this edition will provide our readers with a flavour of current topical legal matters that we're involved with, and on which we're advising our clients and their advisers.

Please don't hesitate to contact me or anyone detailed in this edition for more information, for advice, or to discuss any plans that might require legal input. We look forward to working with you and continuing to support you, your families and your businesses.

All the best

Sarah Jordan | Partner 023 8071 8082

sarah.jordan@moorebarlow.com

Thoughts from our Managing Partner...

Why you've never had it (potentially) so good!

"I have never been as busy as this!" said one of our conveyancing partners recently – someone with 25 years' experience. "It's so frustrating not being able to find an office near our village, because this is where I see myself working for the next 20 years," says one of my City commuting friends. The pandemic is driving families and commuters out of cities into the countryside, and although the health crisis will eventually pass, some of these shifts in lifestyle and society are too good to give up, even when the face-masks are consigned to history. Why spend three hours a day commuting when you could spend it working and with your family in our beautiful countryside? These changes offer huge opportunities for us in rural communities: more people about during the day will mean more things bought locally, which is good for local trade, and office conversions should fly as never before.

One of my three big priorities is working on Moore Barlow's strategy for capitalising on these opportunities, and I would encourage all businesses and families to start doing the same. If you need help with facilitating these conversations, please get in contact – I'd be happy to recommend experts to help.

Edward Whittington
Managing Partner

023 8071 8026

edward.whittington@moorebarlow.com

Holiday time for Stamp Duty

In his Summer Statement the Chancellor announced a temporary reduction in residential stamp duty land tax (SDLT) rates in England and Northern Ireland. The reduction applies to contracts exchanged between 8 July 2020 and 11.59pm, 31 March 2021. It means that the nil-band rate (below which no SDLT is payable) is increased from £125,000 to £500,000. House buyers who do not own other residential property will pay no SDLT on the first SDLT £500,000 of their purchase.

For second-home owners, the surcharge for additional properties is reduced so that for anyone buying a second home the first £500,000 will be chargeable at an SDLT surcharge of 3%, rather than the previous 5%. As a word of caution, please take specialist advice as to whether other SDLT bands or relief may be available when buying a property, particularly in mixed-use rural context.

Since the SDLT holiday was introduced, we've seen a large uptake in transactional activity in the residential market. The Government's own figures point out that residential sales rose 14.5% in July and 15.6% in August. Government thinking behind the SDLT holiday is that it will stimulate other economic activity, for example the purchase of retail, household and DIY goods.

How much the increase in market activity is due to the SDLT holiday or other factors is difficult to assess. SDLT holiday or not, lockdown has led many of us and our clients to reprioritise where and how we live, be that the need for facilities to work from home or the call for more recreational or green space. Whilst the SDLT holiday is a bonus for house buyers, we're seeing a knock-on impact on prices, with properties frequently being subject to bidding wars or selling over the asking price as demand increases. This means that some of the SDLT savings afforded by the temporary reduction are eaten up by higher purchase prices.

"As a word of caution, please take specialist advice as to whether other SDLT bands or relief may be available when buying a property, particularly in mixed-use rural context."

We all hope that coronavirus restrictions will be over by 2021. Even after they end, however, it seems inevitable we won't return to living and working as we did before, probably with home working to remain much more commonplace. It therefore seems likely to us that the high demand for well-connected rural and suburban family properties may continue even after restrictions on our movement hopefully subside.

Richard Hughes | Partner

020 3962 5855

richard.hughes@moorebarlow.com

Private Wealth update: Autumn 2020

I'm a Partner in the Private Wealth department at Moore Barlow, having joined the firm in June of this year. I moved from the role of Head of the Private Client department for a new challenge, but joining a newly merged firm during lockdown was one challenge I hadn't anticipated! It's been a very busy and exciting few months at Moore Barlow, not only in terms of the new opportunities but in the changes in the law relating to Private Wealth. A number of topical and relevant issues in this area are highlighted below.

Remote Witnessing
Due to COVID-19, many clients wanted and needed Wills put in place, but with stringent social-distancing and shielding practices, many were unable to leave their homes for months. The Wills Act 1837 had been in place for over 150 years, and with strict wording in respect of the way a Will must be executed. It has to be signed by the testator in the presence of at least two witnesses, who must be together at the same time. This hasn't been possible over recent months, a fact which has prompted further legislation to provide for remote witnessing. Although the change in legislation is welcomed, there is likely to be a rise in challenges against Wills as a consequence. Therefore, it is more important than ever that a solicitor plays a role in Will-making.

Awaited Budget
There is no Autumn Budget this year and whilst we await the next budget, there's much speculation about how the large COVID-created deficit will be filled. Clearly, taxes will have to rise. There's talk of potential increases in Capital Gains Tax, as well as the possibility of limiting the availability of Business Property Relief available against Inheritance Tax. If you are considering any form of tax planning, it would be wise to address this sooner rather than later.

Lasting Powers of Attorney (LPAs)
As of 17 July 2020, a new online system enables Attorneys of LPAs to obtain authorisation to make decisions on behalf of a Donor. Previously, Attorneys would have to send an original LPA (or a certified copy) to the relevant organisation, which was rather time-consuming. There are, however, safeguarding risks with this system, in that having almost instant access to use the LPA means that the system has the potential to be abused.

Naomi Wilkes | Partner
07436 187000
naomi.wilkes@moorebarlow.com

Crunch time for employers

Many employers had considered what their options might be as the end of furlough on 31 October 2020 approached and were ready to action them or already actioning them. Then came the unexpected announcement from the government that the scheme has been extended to 31 March 2021.

Businesses will have assessed whether or not they have work for their employees to return to. The extension of the furlough scheme may for some allow a further period of recovery before decisions on redundancy now need to be made. Redundancies may however be unavoidable for some employers if other options can't be found. As alternatives to redundancies employers might consider consulting with their employees in an attempt to agree alternatives such as reductions in pay, reduced working hours or part-time working. If these

can't be agreed, or simply aren't an option, employers may not be able to avoid redundancies, in which case they need to be managed well, and fair redundancy procedures must be followed.

This involves warning employees of the risk of redundancy and then consulting with them before any decisions to terminate their employment are made. If an employee feels they've been unfairly made redundant they could consider bringing an unfair dismissal claim. The reality is that it's likely to take an employee longer now to find another job, and this increases the risk of a disgruntled employee raising an employment-tribunal claim against their employer.

Many people have lost their jobs over the last few months, and many of those have already issued claims in the employment tribunal, overwhelming the tribunals with the high volume of claims. Employers simply can't afford to be complacent in these uncertain times: redundancies that are intended to result in cost savings could, if they're not managed appropriately, instead lead to expensive compensation awards.

Katherine Maxwell | Partner
023 8071 8094
katherine.maxwell@moorebarlow.com

From the old life to the New Forest?

As I write this from my home office in the New Forest, I'm looking out on a picture-perfect postcard of autumn, with ponies grazing and squirrels gathering nuts in the oaks surrounding my home. Through the pandemic, the housing market has seen an exodus of people moving out of the cities, looking for their very own place in the country – with fresh air, cosy nights by the wood-burner and maybe even a chicken or two scratching in the flower bed. The attractions of such a lifestyle swap are plain to see, but there are quite a few legal considerations to contemplate before making the jump.

Water, water (not) everywhere
Private water supplies regularly crop up with rural properties. Not every property is on mains water and very commonly rural properties are served by a private water pipe. It's important to check where the water source comes from, how water is billed and who has the responsibility for the cost of repair of the water pipe, and, ultimately, does the property have an easement for water? Often, private water goes hand in hand with not being connected to mains drainage, which Rebecca Langmead discusses more of in her article on page 8.

A slither of verge
People are often shocked to learn there may be no legal access to their property in the New Forest, as they have to drive across a slither of verge, which is actually Crown Estate-owned land. A licence from Forestry England may be required, and Moore Barlow can help ensure all the necessary licences are in place before exchange of contracts – which can save you thousands.

Snouts in the soil
You may wish to enjoy the wonderful view from the front room, but will you want a herd of cattle treading over your newly laid lawn? In the New Forest it's the home-owner's responsibility to stock-proof-fence out the animals, otherwise during pannage season – when pigs are released to eat up all the acorns – for example, you might find a dozen of them digging up the garden.

Right of neigh
You're bound to see various de-pastured animals grazing alongside the New Forest's roads, and you must pass them wide and slow. Uniquely in the New Forest, animals have the right of way, meaning the liability will lie with you and not the owner of the animal if you hit a cow, pony, donkey or pig. All animal accidents need to be reported immediately to the New Forest Verderers office.

Broadband-width
Lots of people want to work from home, now, and they must ensure their new property has adequate broadband width. Many places in the New Forest don't even have a mobile phone signal, which could leave you feeling rather isolated. As part of our pre-contract enquiries, Moore Barlow can check the current broadband speeds for the property.

Some things you can't change
If you're planning any changes or an extension to the property, Permitted Development rights are more restricted within the National Park, and recent changes to the householder permitted development rights don't apply in the Park. Neither are you free to convert a redundant farm building in the park to residential accommodation, which is possible in other parts of the country. We can check on the planning history of the property and ensure all relevant planning permissions are in place.

Byelaws abound
Living in the New Forest National Park is understandably appealing, with its breath-taking landscapes and natural beauty. Before embarking on your big move, let Moore Barlow advise you on the New Forest Byelaws, which serve to protect the Forest's fragile ecological habitats. For example, cycling is only permitted on cycle routes, and you're not allowed to ride off of these. On refuse collection days, all rubbish should be left within the perimeter of your home, otherwise you might see last night's remains of your takeaway being ruthlessly spread outside your gate by donkeys!

Finally, you may discover that your new property has rights of pasture. Let Moore Barlow's Rural Property team explain the nuances of buying property in the New Forest National Park.

Kerry Dovey | Associate
01590 625828
kerry.dovey@moorebarlow.com

Farm succession planning

The Moss family has farmed Manor Farm for 150 years and is a highly respected local family. They're just about to start the process of ensuring the farm and business move smoothly from one generation to another. They might wish to avoid the fate of a neighbouring farm, which is now on the market following family disagreements arising from not having followed a succession-plan process.

A number of recent studies have shown that farms lacking proper succession planning are less likely to survive in the future. There's little more disincentivising and disengaging for the younger farmer than not knowing what his parents or grandparents have in mind, and feeling they have no input into the strategic direction of the business. So what are the key components of succession planning?

Start early
Think about succession planning early: hasty succession-planning created under pressure can lead to family disagreements. A good plan allows you to anticipate and prepare for future events, and will take into account retirement incomes, support for incoming generations, motivation and off-farm alternatives for children who don't want to pursue farming.

An ongoing process
It's no good agreeing a plan and then forgetting about it: it needs to be a regular item on the family agenda. Over time, circumstances change, and new additions to the family, marriages, divorces, deaths and other changes, all necessitate a review of the plan. So even if you think nothing's changed, ensure the matter is discussed at regular intervals – ideally yearly and definitely once every three years.

Communication and involvement
A smooth transition will be borne out of agreement and discussion by the core family group. Conversely, the lack of discussion will cause poor communication between generations, leading to mistrust – and in the worst cases, litigation. The start of any planning should be a family meeting (sometimes with the use of an external facilitator), where individual members can express their views on the family's goals and ambitions, and where everyone is valued and knows what each member wants for the future.

Involve professionals
Though these decisions are for the family to make, it's vital that professionals – solicitors, accountants and land agents – are involved at the appropriate stages. This will ensure all relevant factors have been taken into account, and they can bring up options and ideas not considered by the family. It also allows for a less emotional and more detached approach to the decision-making process, and ensures any planning doesn't produce any unforeseen consequences which may have tax or other implications.

Owning the farm or running it?
The ownership of the farm and the running of it as a business are two different things and there's no need for one to mirror the other. Sometimes the separation of the two entities will allow greater flexibility to plan for the future, and meet the aspirations of those family members not directly involved in farming, as well as those who are.

As for the Moss family, they have now had several successful meetings, engaging all generations of the family and a plan has been produced with appropriate input from the professionals. I'm confident that Manor Farm will remain a successful business owned by the Moss family for several generations to come.

Can you say the same about the farming business you're involved in?

Philip Whitcomb | Partner
01590 625808
philip.whitcomb@moorebarlow.com

Family Law and Property Transactions – Unregistered Land

As family lawyers, we work closely with colleagues in other teams to provide expertise to our clients going through relationship or marital break-up. This work could relate to company affairs, or ensuring our separating clients have their Wills and estate planning in order.

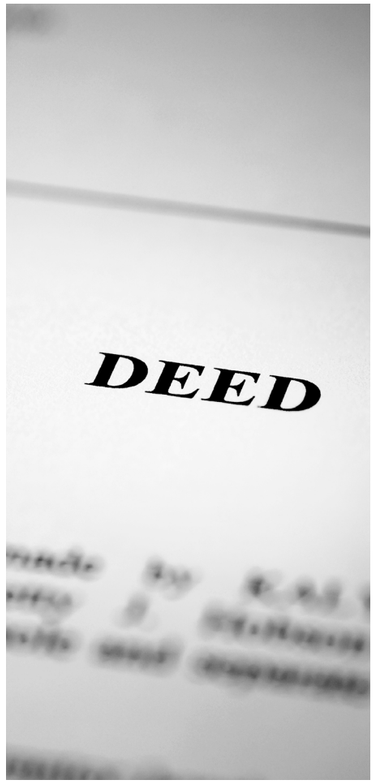
Such matters often involve our property team. In most relationship breakdowns there's at least one property – usually the main family home – to be considered as part of the overall financial settlement. It could be that it is to be sold and the net proceeds divided between the parties, or it could be transferred to one of the parties. Our property colleagues assist us with these transactions.

Nearly all the transactions we deal with in the family team involve properties registered with the Land Registry, which holds a record of who owns the property, when it was purchased and whether there are any mortgages on it, as well as other information. This information is updated with each transaction relating to that property and does away with the need to retain title deeds. Occasionally, however, we come across land and properties not yet registered with the Land Registry and one I have worked on recently involved unregistered farmland and residential properties.

When land and properties are unregistered, the only documents available to prove ownership are the title deeds going back over many years, showing ownership passing from one owner to another. In this case, the land had been within one family for many years, albeit different members of the family over time. In addition, some of the land was divided between family members, and used for different agricultural purposes. Some land and property was rented out to individuals not connected with the family.

As a family lawyer, it was quite a task to consider the 'lay of the land' within the context of how best to achieve a settlement by dividing it to provide a proportion to the former spouse, while ensuring that our client – and his family still using it – wasn't hindered in any way. We managed to settle the case before trial but it was certainly a team effort, and a case where expertise in family law and unregistered property was essential.

Beverley Cullis | Associate
01483 543214
beverly.cullis@moorebarlow.com



Surrey branch of the CLA

Earlier this year, I was very pleased to join the Surrey Branch of the CLA as a co-opted member of the committee, alongside Surrey President Bridget Biddell and Surrey Chair Lisa Creaye-Griffin.

The CLA comprises members across the rural and business communities of England and Wales. It has been instrumental in shaping Government policy on issues that matter to members, including Brexit, rural crime, housing, 4G and the rural economy. The role of the nationwide committees is to debate these issues and feed back to the central CLA teams that lobby government.

With the UK dipping into a post-lockdown recession, it's a critical time to be discussing rural issues, and particularly those relating to promoting the rural economy – the 'rural powerhouse', as the CLA describes it. Having the opportunity to be part of these discussions is a privilege.

Charlotte Brackley
Senior Associate
01483 464254
charlotte.brackley@moorebarlow.com

Agricultural Tenancy Reform Update

In an earlier edition of Rural News, we considered the proposals put forward in the Defra Consultation Paper on Agricultural tenancies. The most controversial of these proposals were:

- for AHA tenancies to be assignable by a Tenant at a premium where no eligible successor remained;
- the extension of the category of eligible relatives to include grandchildren (effectively adding yet another generation), nephews and nieces, cohabitees and their children;
- the removal of restrictive user clauses in AHA tenancies (causing a danger of lapse into a business tenancy under the Landlord and Tenant Act 1954); and
- a call for 100% APR relief be available only on lettings over 10 years.

When the Government published the long-awaited Bill earlier this year, practitioners were relieved to see the more controversial clauses not included: the Bill emerged from the Commons virtually unchanged. At the time of writing, the Bill has just finalised Report stage in the House of Lords. Lord Gardiner of Kimble stated that the Government had only brought forward provisions with broad industry support, which could be delivered immediately. He anticipated that, in future, there would be a separate, dedicated Agricultural Tenancies Bill, after further consultation with TRIG and the farming sector. He seemed to favour FBTs as more modern commercial agreements, more suited to diversification and environmental schemes rather than prolonging the AHA regime and encouraging innovative new entrants to the industry. He drew attention to the fact that TRIG was updating the guidance for Landlord and Tenants on diversification and environmental schemes, and commented that ELMS was being designed to be accessible to as many famers and land managers as possible.

Overall, only one hour of a three-day debate was spent on tenancies. There was one vote on an amendment by Baroness Mackintosh to provide a mechanism for FBT tenants to object to their Landlords' refusal to allow entry into financial schemes, but this was defeated.

What remains in the Bill?

Firstly, there are a number of changes to the Agricultural Holdings Act 1986. These cover detailed technical changes to the arbitration procedure for rent review, and the appointment of arbitrators including widening the categories of professionals who can act as arbitrators.

There are also provisions on disputes relating to a Landlord's refusal of consent for variation of the terms of the tenancy, enabling the tenant to apply for financial assistance or comply with a statutory duty. These provide the right for a Tenant to request arbitration on this refusal.

The minimum age of a retiring tenant for succession is abolished, and are Case A Notices to Quit (Council Farms). The age at which a Landlord can issue a Notice to Quit is changed from 65 to pensionable age. There is a new definition of eligibility to include training at college counting towards the principal source of livelihood test, and a new definition of suitability referring to an applicant's capacity to farm the holding to high standards of efficient production.

What will happen next?

We anticipate TRIG will continue to work on an industry consensus for further amendments to tenancy legislation, in a new Agricultural Tenancies Bill and Guidance Notes. In general, the Government appears supportive of longer-term lets to encourage investment and in providing a way for new entrants to become established. It is aware in designing ELMS that it has to be accessible to as many farmers as possible, and to encourage Landowner confidence in letting land. The TFA is likely to continue to press for longer fixed-term agreements, linked to availability of preferential IHT rates, the assignability of tenancies and the widening of the categories for eligible relatives on succession. Hopefully, there will also be a consultation on the definition of Agriculture.

The Agriculture Bill and the proposed new scheme of agricultural support raises some practical drafting issues, which we are raising with clients. Most tenancies have no provisions relating to agricultural support schemes or the standard BPS clauses with which we are familiar. Practitioners have, of late, tried to devise complex 'successor legislation' clauses to cover new schemes. Few that I have seen would cover the proposed ELMS concept, which will cover more than traditional agriculture and the concept of delinking. As practitioners we should seek, at every opportunity, to modernise definitions to provide for new environmental schemes generally, even though the detail may not yet be known.

The Bill provides for regulations to be introduced to make delinked payments and lump-sum payments. The annual payments will apply to all recipients of BPS at the time the measure is introduced; in most cases, therefore, we'll see a payment linked to the land become effectively a pension in the hands of the Tenant on the relevant date. Most current tenancy agreements provide for entitlements to revert to the Landlord at the end of the term, either for £1 or at market value. Should we try to provide for the Tenant to transfer to the Landlord, so far as possible, any sums arising under a delinked payment scheme, failing which a provision for redrafting by an arbitrator and or compensation to the Landlord?

We are currently seeing a rush of S4(1)f and 4(1)g surrenders and regrants of agricultural tenancies. These are exceptions to the general rule that all post-September 1995 tenancies will be FBTs not AHA tenancies. Section 4(1)f covers implied surrenders and regrants on a variation of a tenancy to add more land, or increase the term and Section 4(1)g new tenancies granted to AHA tenants. They are "new" tenancies for the sake of IHT but retain 1986 Act protection. It's important especially with S4(1)g agreements that they're not just a tax mitigation exercise. This is the perfect time to have a genuine reason to update the tenancy terms slightly to refer to the new environmental schemes.

The definition of Agriculture, in our view, needs to be addressed by TRIG and the Government, to be fit for the new regime. For 1986 and 1995 Act tenancies, "Agriculture" includes horticulture, fruit growing, seed growing, dairy-farming and livestock breeding and keeping; the use of the land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of the land for woodlands where the use is ancillary to the farming of land for other agricultural purposes.

For tax, rating and planning purposes there are different definitions. Forestry, for example, is not agriculture for tenancy or tax law but it is for rating purposes. Issues will clearly arise with Forestry not falling within the definition of agriculture, particularly with the current emphasis on tree-planting. Rewilding, too, could cause issues where the land may not be being used in a business. Energy crops could be held to fall outside the tenancy law definition, as could some of the activities under the ELMS scheme. It's important to remember that under an AHA tenancy, agricultural user covenants will be strictly construed, and that substantive diversification can result in conversion of the AHA tenancy to a business tenancy under the LTA 1954 Part II. FBTs permit greater diversification if use of the notice condition is satisfied. The test is still primarily agricultural, but the test has to be satisfied only at the commencement of the term.

Bearing in mind all these issues, there's clearly a lot of work still to be done in developing a modern agricultural tenancy regime that is suited to the new agricultural support and land-management proposals. We look forward to providing effective guidance for our clients.

Anita Symington | Consultant
020 3910 1327
anita.symington@moorebarlow.com

Farming tomorrow?

The pandemic has led to greater appreciation of the countryside and of shopping locally, which is good news for the agricultural sector. Agriculture has long been seen as a secure investment, but now with so many companies encouraging home-working, we're seeing a bubble of buyers deciding to relocate to rural life on a farm.

If you've never purchased a farm or agricultural land, or not purchased one for many years, you should be aware of a number of things. As with any property purchase, it is up to the buyer to do their investigations and ask as many direct questions as they can about the property, and this guide is here to help flag up some of the pitfalls.

Due Diligence
In a normal residential transaction, the Seller would provide a Property Information Form", which gives the buyer information about the property, such as planning, services to the property and any details of disputes.

We often get presented with this form by a Seller's solicitor for a farm sale, and although it's adequate for the house, it doesn't provide nearly enough detail for the remainder of the farm. You'll see why, below.

We will always request replies to a full list of agricultural specific enquiries which cover (to name a few) occupancies, land schemes (Basic Payment Scheme, environmental schemes etc) and agreements with service providers across the land. It's very important if you're taking over the responsibility of land subject to such schemes or agreements, that you're aware of your responsibilities as the landowner.

Unregistered Land
We often find that a farm has been in a family for generations, and it's never been registered at the Land Registry, which means that if you ask the Land Registry who owns the farm they won't be able to tell you.

If you purchase a property now that is unregistered, it triggers compulsory first registration at the Land Registry. In order to prove ownership, you need the right title deeds, which prove original ownership. It's an additional layer of due diligence, and we have to be sure there are no loose ends so that when we submit the title deeds to the Land Registry we know you'll be the legal owner.

Listed Buildings
Listed Buildings crop up regularly – especially beautiful old farmhouses. The key point to note is, if a building is listed, you'll need Listed Building Consent before undertaking any work to the Property (including any structures falling within the curtilage of the Listed Building). If you're buying a listed property and planning on doing work to it, before you decide we'd always recommend speaking to a specialist planning consultant, who'll guide you as to whether it's possible or not.

Occupancies
I can't remember the last time I purchased a farm for a client and there wasn't at least one undocumented occupancy such as a grazier, livery or sporting arrangement on the land.

Often, the landowners have very good relationships with these people, but relationships can change, and you don't want to find yourself in a position whereby someone is occupying the land and you can't get them off. It's important to have formalised arrangements in place before completing on a purchase, so that you know the exact rights the occupier has on your land.

Drainage
In more cases than not, farms have their own private drainage systems. They often work perfectly well, but the laws on private drainage systems have changed this year, and if they don't comply with – or aren't considered exempt from – the rules, the whole system requires upgrading. Depending on the size of the farm and where the drains need to go, this can be a very expensive job.

We raise detailed drainage enquiries together with our agricultural enquiries, to determine whether a system is compliant. We also always recommend that the system is checked by a surveyor so that they can advise you of its condition and the costs of upgrading if necessary.

Rebecca Langmead | Solicitor
023 8071 8191
rebecca.langmead@moorebarlow.com

ALA Autumn Conference

Heather Dobson, a Partner in our Insolvency & Restructuring Team, addressed the ALA Autumn Conference on 4 November 2020. She spoke about the challenges facing farming businesses, which could lead to a restructuring or formal insolvency procedure. She also covered practical and legal issues that farmers who face financial difficulties need to be aware of. Look out for Heather's insights in our next edition of Rural news

Heather Dobson | Partner
023 8202 5017
heather.dobson@moorebarlow.com

When to knock out a lock-out agreement

High-value country property transactions have enjoyed a boom over the past few months, leading to an increasing trend towards the use of Exclusivity Agreements, also known as 'lock-out agreements'.

An Exclusivity Agreement is normally a tool used by a buyer to provide them with an exclusive opportunity to do due diligence on a property, and carry out contract negotiations during a specified period without threat of the seller continuing to market the property.
An Exclusivity Agreement is commonly entered into before a buyer's solicitor has started due diligence work on the property, but this can mean sellers spend time and money entering into an Exclusivity Agreement only for the buyer to drop out at a later date, after due diligence finds problems with the property. As a result, an Exclusivity Agreement is best used when a buyer is overwhelmingly set on a property, and unlikely to be put off by minor issues raised in the due diligence process.

If you'd like any advice on the use of these agreements, do get in touch.

Charlotte Brackley
Senior Associate
01483 464254
charlotte.brackley@moorebarlow.com

Close, but no CIGA

As a result of the Corporate Insolvency Governance Act 2020 (CIGA) which came into force at the end of June, protection has been greatly extended for customers in insolvency situations with regard to the supply of goods and services. Suppliers will no longer be able to terminate supply contracts or impose other conditions once a "relevant insolvency procedure" starts. Previously, there was only protection for the supply of "essential goods and services", but now, under CIGA, this protection extends to nearly all contracts for the supply of goods and services – the one major exception being financial services.
However, better protection for customers means increased commercial risks for suppliers.

During the "insolvency period":
• any term allowing the supplier to terminate for insolvency no longer has legal effect;
• any term allowing for "any other thing" to occur or allowing the supplier the right to do "any other thing" as a result of the insolvency no longer has legal effect;
• the supplier may not terminate the contract for any reason where a termination right was not exercised before the relevant insolvency procedure arose; and
• the supplier is prohibited from making continued supplies conditional upon any outstanding charges being paid for services before the insolvency period.

These changes to the law have permanent effect and have a major impact on customers and suppliers alike.

Under the new rules, "relevant insolvency procedure" means all traditional forms of insolvency procedure and the new moratorium and restructuring plan powers which directors have under separate provisions of CIGA. Another key term is "insolvency period", as this is the period when the new rules apply: it is simply defined as beginning at the start of a relevant insolvency procedure and ending when the procedure ends or the relevant insolvency practitioner leaves his/her office.

The number of exceptions to the new rules is very limited and so termination will now only be allowed to occur for insolvency during the insolvency period where:
• the supplier is a "small entity" (as defined) and only up until 30 September 2020; or
• the customer or the insolvency practitioner consents; or
• a court grants permission on the basis that continuation of the supply contract would cause the supplier "hardship" (hardship is not defined).

What to look out for:
Customers. Notwithstanding the new rules, customers need to ensure their supply contracts still retain termination clauses for insolvency as their right to terminate for supplier insolvency is unaffected. They should also make sure they don't give a supplier a new non-insolvency right to terminate that arises after the start of the relevant insolvency procedure – for example, non-payment in relation to continued supplies of goods or services – as the supplier can still terminate in these circumstances.
Suppliers. The new rules are more of a challenge to suppliers and they will need to ensure that:
• they are more vigilant than ever in monitoring the financial position of customers, and are prepared to terminate early before any relevant insolvency procedure begins;
• the contract has termination rights for non-insolvency reasons, such as non-payment, which may be used during the insolvency period;
• customers promptly provide any security required, as it will not be possible to terminate for a breach of this provision after the insolvency period comes into effect; and
• supply contracts allow for advance payments and/or shorter invoicing periods, and that each supply is subject to a new, separate order rather than being seen as a single continuous supply obligation.

Whilst CIGA has been introduced to protect customers in the supply chain, it remains to be seen whether the harsh consequences for suppliers make them more likely to trigger termination rights sooner than would otherwise have been the case, in order to avoid being caught by the new rules after the relevant insolvency procedure starts.

We can help advise on the impact of the new rules, and amend contract wording and management to mitigate their effects.

John Warchus | Partner
020 8332 8631
john.warchus@moorebarlow.com

COVID-19 rent arrears enforcement

To provide further clarity for landlords and tenants, on 19 June 2020 the Government published guidance for the commercial property sector, in the form of a Code of Practice. The Code of Practice is voluntary and encourages good practice between landlords and tenants, promoting payment of rent by tenants where this is possible, but also acknowledging that landlords are expected to support businesses unable or struggling to pay. The over-arching principles of the Code are co-operation between landlords and tenants; acting reasonably and responsibly; transparency, and conducting their dealings in good faith. The Code does not override property law and the underlying legal relationships governed by the lease, contracts and any guarantees in place between landlord and tenant. It does, however, place emphasis on its use as best practice. In relation to rent payment, it sets out that landlords should be mindful of the financial consequences of the coronavirus crisis impacting the ability of the tenant to pay, and that requests for rent concessions should be justified by tenants, and landlords refusing such requests should give reasonable explanation for their refusal. In considering a tenant's request to renegotiate their rent, the Code lists circumstances for landlords to bear in mind in terms of assessing the tenant's overall financial position. Importantly for landlords, these include the tenant's previous track record under the lease terms, and any concessions to the tenant already agreed. The Code is also clear that new arrangements that could be agreed by both parties could include a reversionary lease on reasonable terms, the removal of a break right in favour of the tenant, or an extension of the lease.

In terms of the expectation for landlords to act reasonably in relation to rent recovery, it can be concluded that the guidance within the Code is open to interpretation and will depend heavily on each individual circumstance, but that a tenant in trouble pre-COVID-19 is likely to remain a tenant in trouble post-COVID-19. Therefore, a tenant persistently in breach of rent payment obligations prior to the crisis is expected to have difficulty arguing that COVID-19 was to blame, and that where the crisis is genuinely to blame landlords are expected to be more lenient, and seek to reach an agreement, the form of which can be taken from those suggested in the Code.

Simon Beetham | Associate

023 8071 6036

simon.beetham@moorebarlow.com

Option	Summary	Current restrictions
CRAR	Under the Commercial Rent Arrears Recovery (CRAR) process, landlords can instruct an enforcement agent to go to a tenanted property to take control of goods and sell them to recover rent owed them by the tenant, up to the equivalent value of rent owed.	Pre COVID-19 CRAR was available to landlords after seven days of arrears. Since the moratorium on CRAR imposed via Government secondary legislation, CRAR can only now be used by landlords if more than 276 days' rent is unpaid, where the notice of enforcement is given on or before 24 December 2020, rising to 366 days of principal rent for notices from 25 December 2020 (being the equivalent of just over three and four quarters' rent, respectively).
Forfeiture	Most commercial leases include a clause giving the landlord the right to forfeit tenanted premises where the tenant is in rent arrears for a period. This involves allowing the landlord to peaceably re-enter the premises without notice, to end the lease and regain possession by changing the locks. The tenant can't apply to the Court for relief from forfeiture, and relief may only be granted if they pay the arrears in full plus the landlords' costs.	On 26 March 2020 the Government legislated to prohibit forfeiture by landlords over rent arrears until 30 June 2020. This suspension was extended to 30 September 2020 and then to 31 December 2020. The current suspension only applies to rent arrears recovery, and doesn't stop landlords taking forfeiture action over other breaches of covenants within the tenants' lease. In the current circumstances, what the Court considers a reasonable period for compliance with an s146 notice (a pre-requisite to forfeiture of a lease for breaches of covenant other than non-payment of rent) may be extended.
Rent deposit	Most commercial leases contain provisions relating to the drawing of a rent deposit when the tenant has not paid rent.	There are no restrictions currently in relation to drawdown on a rent deposit if one is available. Rent is still due from tenants and the provisions in the lease regarding deposits still apply and are unaffected by the legal measures implemented during the crisis. However, if the landlord draws on the deposit, and the tenant must return the amount withdrawn by the landlord, the landlord's ability to enforce this return by the tenant will be subject to the restrictions on rent recovery currently in place.
Guarantee	If the lease contains a guarantee provision, the landlord can seek to recover the rent from any third parties acting as guarantor of the tenant's liabilities under the lease.	No restrictions exist preventing seeking payment of the rent or other monies owed to the landlord under the lease from a guarantor. There is a prescribed process for this, which remains unaffected by COVID-19. However, if the guarantor is pursued for payment under the lease but this guarantor disputes payment under the terms of the guarantee, any enforcement action against the guarantor will be subject to the restrictions on rent recovery currently in place.
Statutory demand	A statutory demand – a formal written demand for payment of a debt owed – is often used as a quick and relatively low-cost method for landlords seeking to enforce non-payment of rent. Although not required as a prerequisite to a winding-up petition, statutory demands are typically used to put pressure on debtors to pay up prior to the commencement of legal proceedings – in the form of a winding-up petition – if they fail to pay.	The Corporate Insolvency and Governance Act 2020 introduces a temporary ban on statutory demands to form the basis of a winding-up petition presented at any point after 27 April 2020. This effectively voids all statutory demands served on debtors between 1 March and 30 September 2020, where they relate to debts arising as a consequence of the coronavirus pandemic, such as rent arrears.
Winding-up petition	A winding-up petition is essentially an application to the court for the winding-up of a company in debt, requiring the debtor company to be put into compulsory liquidation on the grounds that it's unable to pay the debt owed. A landlord owed rent by their tenant could present a winding-up petition; alternatively (and more commonly) a company debtor can be deemed insolvent following the service of a statutory demand not paid within 21 days.	The Corporate Insolvency and Governance Act 2020 also restricts winding-up petitions being presented in circumstances where COVID-19 has had a financial effect on the debtor company. Importantly, the restriction doesn't apply if the petitioner for the winding-up can establish that the company couldn't pay its debts even if COVID-19 had not affected it financially.
Debt proceedings	Debt proceedings involve issuing a debt-recovery claim in court to recover unpaid rent. For rent, such proceedings would typically be issued where the tenant has assets over which a charging order could be obtained, or it has goods that could be controlled using writs and warrants of control. This was an option seldom used by landlords prior to the restrictions on statutory demands and winding-up petitions, unless there was some dispute over whether the debt was due and owing (which would render the winding-up petition route unavailable).	There are currently no restrictions on issuing debt proceedings in court to recover unpaid rent. This may therefore become a more attractive option to landlords as it remains open, although it is a more protracted and costly process. As before the coronavirus crisis, ascertaining the debtor's financial status and ability to pay will be key to determining whether it's worth pursuing a claim.
Administration order	Creditors (including landlords) can make an application to court for administrators to be appointed to the debtor company.	No restrictions currently exist to prevent landlords applying for an administration order; however, this is a more costly and complex method than presenting a winding-up petition and has not been commonly used in practice by landlords.

Guildford
The Oriel
Sydenham Rd
Guildford
GU1 3SR
T (+44) 01483 543210
F (+44) 01483 464260

London
60 Cheapside
London
EC2V 6AX

T (+44) 020 3962 7333
F (+44) 020 3962 7444

Lymington
48 High Street
Lymington
Hampshire
SO41 9ZQ
T (+44) 01590 625800
F (+44) 01590 671224

Richmond
2 The Green
Richmond
London
TW9 1PL
T (+44) 020 8744 0766
F (+44) 020 8332 8630

Southampton
Gateway House
Tollgate
Eastleigh
SO53 3TG
T (+44) 023 8071 8000
F (+44) 023 8033 2205

Woking
Concord House
165 Church St E
Woking
GU21 6HJ
T (+44) 01483 748500
F (+44) 01483 729933

www.moorebarlow.com

Guildford London Lymington Richmond Southampton Woking