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WOODFINES SOLICITORS' NEWSLETTER FOR AGRICULTURAL LAW



Planning for the Future – Business Succession



Written by Peter Mount, Consultant

You are in business; farming, trading grain, selling fertiliser or crop protection products, or any of a variety of other activities related to agriculture.

What happens if:

- You die
- You want to retire
- You are so ill (mentally or physically) that you can't carry on?

None of us really want to spend too much time contemplating our own mortality (or think about taxes!). However, if you are in business, you need to apply these questions specifically to your business operations, in order to be prepared for any eventuality or future choices.

In the case of any of the above scenarios, the answer to what happens next depends partly on your business structure. The common options for this are:

- Sole Trader
- Partnership
- Limited Company

There are other possibilities, such as Industrial and Provident Societies and Limited Partnerships, but these are mainly used for special purposes.

Sole Trader

Many farmers inherit their business and then build up that business over many years. Often, when you want to retire, you will want to see the business continue and prosper, with many farmers hoping to pass on the business to one or more members of their family. Sometimes businesses are passed to senior staff who work in them, either as a gift or a management buy-out or they are, quite simply, sold. If all else fails, the objective will be to close the business down in good order.

However, whilst still in control of the business, it is important to have two things in place – just in case the worst happens. Firstly, have you made a Will, and does it deal with the business? If there is no family member who will want to take over, ideally the business will be sold for the benefit of your family. Can it be kept going for long enough to get a good sale and, if so, who will run it? Don't leave these questions behind as problems without solutions.

Also, if you become seriously physically ill or lose mental capacity to make decisions for your business, who has authority to deal with matters on your behalf? Having to go to the Court of Protection to resolve this question is time consuming and expensive, so it is important that you put a Lasting Power of Attorney in place so that someone you trust can deal with your affairs and your business if you can't.

Partnership

If your business is run as a partnership, it is important to check that you have a partnership agreement. If you don't, the partnership is governed by the Partnership Act 1890, which amongst other things, can mean that the death or resignation of any partner automatically dissolves the partnership and the business may be forced to be closed down and sold. This is not usually a result which anyone wants, so it is essential that there is a partnership agreement in place ahead of any potential issue.

If you have a partnership agreement, it should be checked to ensure that it is up to date. A farming partnership agreement prepared, for instance, in the 1970's, will not cover a number of issues common to modern farming and is long overdue for review.



Limited Company

If your business is run through a limited company, the legal issues to consider are a little different, unless you own all the shares and you are the only director. In that case, you should consider having a Will which considers your business, and a Lasting Power of Attorney in place, as with Sole Traders.

In a limited company, it is important that you know who owns the shares and who the directors are. They do not need to be one and the same, which frequently makes a limited company a better vehicle for tax planning. It also raises the possibility that members of your family can retain a continued financial interest in the business without having to be involved in management or with a limited role as non-executive director(s).

The extent to which your options are flexible will depend on the Articles of Association (the company's "rule book" which will be on record at Companies House) and, if there is one, any shareholders' agreement. If there are a number of directors and shareholders, the Articles will not generally be a satisfactory way of regulating succession and other arrangements, and so consideration should be given to sorting out a shareholders' agreement.

The question of who gets your shares (or at least their financial value) will normally be governed by your Will; which again prompts the question of ensuring you have one written, and that it is up to date.

For further information on any of the above points, please contact a member of our Agribusiness team.



Business Tenancies for Farmers: Avoid the Pitfalls



Written by Brian Hall, Consultant

A farmer has a number of unused buildings and wants to make use of them to generate some income. He finds a tenant who wants to use one of the buildings for business use. The farmer and his new tenant write down and sign some basic heads of agreement, but cover only the bare bones of the tenancy, i.e.:

- a) Which building the tenant is to occupy
- b) What the rent is to be
- c) The initial term – say 12 months, with an informal “rolling agreement” to continue thereafter, with either side being able to give two months notice if either party wants to terminate the arrangement.

This is not an untypical set up in the farming context. However, the arrangement falls into a protected tenancy under the Landlord & Tenant Act 1954, which automatically imports a number of statutory provisions and protections for the tenant. This includes that a fixed term tenancy lasting for longer than six months is not a fixed term, even where the written agreement says that it is. The tenant need not vacate when that initial period expires, but is allowed to hold over. The landlord (farmer) can only terminate the tenancy in accordance with statutory procedures, which involves giving at least six month’s notice to leave. Further, the grounds on which a notice to quit can be given can be quite limited.

Some of the most commonly used grounds for ending a tenancy include:

- persistent failure to pay rent (this means more than a bounced rent cheque or a bank slip-up on the odd occasion)
- allowing the property to fall into disrepair
- the landlord intends to re-develop (however, there is a burden of proof that the intention to develop extends well beyond the landlord’s initial thinking and would include the need to show plans having been drawn up and planning permission applied for if needed)
- consolidation of a number of small leases
- the tenant being offered suitable alternative accommodation
- the landlord requiring the premises for the purpose of his own business.

In each situation, the landlord must prove his case and some of the grounds are, in any event, allowable only at the discretion of the Court. Therefore, the dangers of setting up an informal arrangement or one which is not fully drafted should be of major concern when a landlord takes on a new tenant.

It is possible to exclude the protective provisions’ of the 1954 Act provided that the landlord, before the tenancy arrangement is concluded, serves notice in a specified form. Receipt of this notice has to be acknowledged by the tenant and the requirement is there to ensure that the tenant specifically accepts that at the

end of the term, the axe comes down and the landlord can require possession. The landlord does not have to give any form of notice, the tenancy expires purely by effluxion of time. In effect, by serving the special notice in advance of the tenancy, the tenant is given a cooling off period and a warning that fixed term means fixed term.

If the tenant, despite the fixed term notice, simply continues in occupation after the end of this fixed period (and the landlord may be happy with this for some time), the tenant becomes a “tenant at will” and can be asked to leave at any time. The only concession is that a reasonable amount of time is given for the tenant to remove any goods, equipment or furniture that may be in the premises. From the tenant’s point of view, this is an uncomfortable position to be in so should be avoided wherever possible!

Of course, it is essential to consult a solicitor when drafting tenancy agreements to make sure you avoid the pitfalls allowing tenants to stay on after their fixed term ends.

For find out more or obtain advice, please contact a member of our Agribusiness team.

Farming partnership - do we need a partnership agreement?



Written by Neil Gibbs

Traditionally, trading as a partnership was the most common form of structure used within the agricultural sector. It was logical as it worked well with the farm being run as a family operation.

This family connection has meant that the need to document or record the terms of the partnership was regularly dismissed as being unnecessary, and often it was not appreciated that family members were in partnership.

What is a Partnership?

"Partnership is the relation which subsists between persons carrying on a business in common with a view of profit."

There is no legal requirement for a partnership agreement and, unlike a company or a limited liability partnership, no formalities are needed to form a partnership. The requirements for a partnership to exist are not a modern creation and have not changed since the Partnership Act 1890 (the Act).

A partnership will therefore exist where two or more people (or companies or other legal entities) agree to enter into and run a business together and start to pursue that activity, and this is exactly where the danger lies. If you don't have a formal agreement, the terms of the partnership are governed by the Act which is an antiquated statute and may not reflect what you might have understood between you to be the case.

Common Issues in the Absence of a Partnership Agreement:

Partners wanting to leave

If someone wants to leave and the relations between the partners have broken down or in some cases become hostile, the Act provides that the partnership must be dissolved, all the assets sold and the proceeds split between the partners. Whilst the partners can agree otherwise, this is hardly helpful if they have become hostile, as all the partners have to agree.

Death of a partner

Again in the absence of an Agreement, death has the potential effect of dissolving

the partnership although here there is generally a greater possibility of resolving matters by negotiation and agreement. However, there can still be arguments about "promises" made or "assurances" given and about valuation of the deceased partners' share and the estate's entitlements. It should be noted that there can be conflict between the terms of the Partnership Agreement and the terms of a deceased partners' will.

Mental or physical incapacity

If a partner becomes mentally or physically unable to work in the business, there is no way of removing them from the partnership under the Act and the only option would be to dissolve the partnership. This is a very drastic way of resolving what should be a relatively simple problem and one which ideally would be addressed quickly and with the least cost and issues.

Behaviour/conduct issues

Where a partner behaves in a way which damages the partnership and the business, again, the only way for the other partners to resolve matters is to dissolve the partnership or negotiate the misbehaving partners' exit from the business. The Act contains no provision allowing a defaulting partner to be sacked and this gives the defaulting partner a strong position in any negotiations as anyone advising them will know that they cannot be removed and the only alternative is dissolution which is time consuming and very expensive. A well drafted agreement can not only include a provision for expulsion of a partner but also eliminate other concerns which may arise out of the dismissal.

Sharing of profit

The Act presumes that profit (and for that matter, losses) are shared between partners in equal shares in the absence of clear evidence to the contrary. This may not



actually reflect what has been agreed orally or for that matter done in practice. Where a dispute arises or partners fall out, this is often used to negotiate a better bargain or set out a basis for entitlement.

Basic Farm Payments

Basic Farm Payments (which replaced Single Farm Payments earlier this year) are personal property and are not attached to land. They will not show on a partnership's balance sheets and therefore in the absence of a partnership agreement, ownership will not automatically follow on from ownership of the land.

There are of course other reasons which may make it advantageous to ensure a partnership agreement is in place, particularly in a family run operation. Estate planning is always something to consider, a Partnership agreement can help you to make the most of any tax reliefs available to you including Business Property Relief and Agricultural relief.

For all these reasons, if you are in a partnership, you should consider having a formal agreement, which can address these and many other relevant matters before issues arise. Whilst the cost can vary depending on the complexity of the agreement, many partnerships have very straightforward requirements which can be reduced to simple agreements.

At the same time you may want to consider converting the partnership to a limited company or limited liability partnership to move away from the partners being personally liable for all and any losses or liabilities of the partnership. It is therefore prudent to consider all options.

Finally on the subject of partnership; partnership agreements, like wills, do go out of date and should be regularly reviewed and updated. Certainly documenting any changes, additional partners or retirements and even down to recording assets of the partnership is sensible.

For further help or advice, please contact a member of our Agribusiness team.

Bedfordshire Young Farmers' Rally

Woodfines will again be hosting lunch for our guests at this year's Bedfordshire Young Farmers' Rally, jointly with Frontier Agriculture.

This year's Rally will be held at Manor Farm in Pertenhall, on **Saturday 21st May 2016**.

If you are attending this year's Rally, and would like to join us for lunch, please contact Nicola O'Loughlin on 01234 270600 or email noloughlin@woodfines.co.uk

Get in
Touch


Woodfines
SOLICITORS

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