Newsletter

BURGES SALMON

Food, Farming and Land Quarterly

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Welcome

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

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

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The right to avoid tax?

Page two of this quarter's edition carries an article on the equalisation of land values on development schemes. This is a hot topic at the moment as the development land market surges on. Whilst equalisation isn't motivated principally by the wish to minimise tax any structuring of this sort will have tax minimisation at its heart. Until recently most taxpayers knew that (legal) avoidance was acceptable and evasion was not. Many will have taken comfort in the often cited words in the 1936 Duke of Westminster case: *"Every man is entitled to order his affairs so that the tax [payable] is less than it otherwise would be"*. But in the last few years the dividing line has become more blurred – and previously acceptable practices may now fall on the wrong side . The reasons for this are numerous: the greater marketing of aggressive tax avoidance schemes; new legislation; the very public criticism of various celebrities and well-known companies who may have overstepped the invisible line; the emergence of the politician's mantra about "everyone having to pay their fair share" (whilst at the same time no doubt flipping their second homes to avoid CGT) – all these and other factors will have played their part. The majority of our tax work is at the benign end of the spectrum but we are alive to the issues both when advising clients on particular arrangements and on giving second opinions on schemes proposed by others to our clients. Tax advisors must now consider this new climate when dealing with all but the most basic tax mitigation or planning.

Tom Hewitt
Partner
+44 (0)117 902 2717
tom.hewitt@burges-salmon.com

Yogurt enters the Greek Wars

It is hard to imagine that yogurt could be so controversial, but the Court of Appeal has recently had to consider a spat between two international yogurt producers.

The case *(Fage UK Ltd v Chiobani UK Ltd)* concerned Greek yogurt. Fage is an established UK importer of yogurt from Greece. This is sold under the brand name TOTAL and is described as 'Greek yogurt'. Fage's sales in 2012 accounted for 95% by value of all yogurt sold in the UK as Greek yogurt. In September 2012 Chobani introduced into the UK yogurt which it described as 'Greek yogurt' that it had made in the USA. Fage sought and obtained an injunction to stop the Chobani product being sold in the UK as Greek yogurt. This was on the basis that Chobani was seeking to pass off its product as the genuine thing. Chobani appealed, but was unsuccessful. Why?

Fage's argument was that only yogurt made in Greece using traditional methods could properly be described as 'Greek yogurt'. It would be a

misrepresentation and misleading to consumers to try and pass off a yogurt made somewhere else as 'Greek yogurt'.

Chobani contended that the phrase 'Greek yogurt' is a general term and could be used to describe a yogurt made in the USA, particularly if it was made using methods traditionally associated with the manufacture of Greek yogurt.

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Greek yogurt is generally made from cow's milk and has a thick and creamy consistency achieved by a process known as straining. It should not contain any added sugar or sweeteners. It follows that it can be manufactured almost anywhere if the necessary ingredients and facilities are available. In the UK many retailers offer a yogurt manufactured outside of Greece as a 'Greek style yogurt' – the word 'style' denoting the difference. An important distinction is that 'Greek yogurt' commands a price premium as it is considered to have some additional value because of its provenance.

What is also of interest is that Greek yogurt does not have a PDO (protected designation of origin) or PGI (protected geographical indication) as the phrase' Greek yogurt' has never been used in Greece to describe the product.

The Court of Appeal found in favour of Fage on the basis that the judge at the original trial had rightfully concluded that Greek yogurt is sufficiently distinctive of a defined category of goods. The judge was persuaded by evidence from market research, trade experts and labelling conventions that Greek yogurt was generally considered to be a product that originated in Greece.

This case follows a long line of earlier cases on the proper description to be given to food and drink products, including Spanish champagne, British sherry and Swiss Chalet chocolate.

The legal protection given to foods in the EU is helped by the award of PDOs and PGIs to products from specific regions. But what this case illustrates are the lengths that some producers will go to in order to leverage off the goodwill that exists in products that come from a specific area.

For more information please contact:

Philip Davey
Partner
+44 (0)117 902 2741
philip.davey@burges-salmon.com

Development land - Equalisation of values

Over recent years we have seen a marked increase in the number of active development land projects. Many of these involve farmland and involve more than one landowner. One of the early questions in such projects is how to protect against one landowner benefitting from high value land uses (eg the prime residential element) whilst his neighbour is lumbered with the low value uses (eg. infrastructure and low cost housing). Unless something is done, then one or more landowners may do very much better than the others - despite the fact that they all own the land integral to the development of the whole.

This is where equalisation comes in. There are a range of possible solutions all of which aim, in so far as is possible, to share the benefit of the upsides (i.e. the higher value land uses) as well as the downsides (i.e. the lower value uses). There are considerable benefits if this can be achieved, not least because it means that the neighbouring landowners will not be in competition for the high value uses because the benefit of them will be shared wherever they fall.

There are number of ways of achieving equalisation:

- In simple cases it may be possible to use a **gross area basis** whereby the landowners agree that the price they each receive will be calculated by reference to the value of the total site. But this approach can be difficult where there are numerous owners, more than one buyer or where the sale of development land is shared over several years.
- The second possibility is a **Jenkins v Brown pooling** arrangement. This involves all the owners pooling their land so that they each own a percentage of the whole site. This is the most perfect type of equalisation in many ways, however, it is not without its complexities, particularly when the arrangements for farming the land pending development are taken into account as well as how to unravel the pool if the development comes to nothing.
- Another possibility is to grant **cross options** so that if Landowner A sells part of his land, the developer has to pay Landowner B to release his option over the same land. This is a relatively straightforward solution, although it does have disadvantages for both Capital Gains Tax and Inheritance Tax.
- There are other arrangements that involve creating a s**pecial purpose vehicle** company into which the land is added and the landowners take shares. Again this can be appropriate in some circumstances.

The main thing to remember is that equalisation is complicated and could easily delay any deal with the developer. So consider equalisation early and agree how it should be dealt with well before terms are agreed with the developer or promoter.

For further information please contact:

Tom Hewitt
Partner
+44 (0)117 902 2717
tom.hewitt@burges-salmon.com

Richard Owen
Partner
+44 (0)117 939 2271
richard.owen@burges-salmon.com

Royal Agricultural University's Grand Idea business competition

Burges Salmon was proud to sponsor one of the prizes at the Royal Agricultural University's Grand Idea business competition. Kevin Kennedy attended the awards ceremony on 6 May 2014 at the RAU.

The winner was Elie Sear with her business Cuprum. This is a new equine bandage aiming to reduce box rest and the need for veterinary treatment for minor injuries. Elie is shown receiving her award from one of the UK's most high-profile recent food entrepreneurs, Levi Roots, whose fame has spread almost as far as his Reggae Reggae Sauce and who was able to give his personal perspective on entrepreneurship.

Innovation in this sector is critical and is one of the ways in which UK food and farming prospers now and will grow in the future. The range of business ideas reaching the final, including a beef jerky business, an online trading portal and app and a "free from" food enterprise, show that innovative thought is being applied in the broadest possible way.

These sorts of business will also go some way to encourage young people to choose this sector for a career and so help deal with the frequently expressed concern of where future generations of owners and employees are going to come from. This event showed some of our young entrepreneurs at their best.

For further information please contact:

Kevin Kennedy
Partner
+44 (0)117 307 6934
kevin.kennedy@burges-salmon.com

Where a right of way should be accessed

An express easement "over and along" a 30ft lane included access at any point along the lane, so that the neighbouring owner was prevented from building a wall alongside the lane.

Most solicitors would agree that good fences make good neighbours. However, in *Emmett v Sisson 2014 EWCA Civ 64*, one neighbour's attempt to erect a wall caused more strife than peace in Hereford.

Mr and Mrs Emmett owned a private drive which served their land as well as Mr and Mrs Sissons' land. The drive ran along the boundary between their respective pieces of land but was situated only on the Emmetts' land. The Sissons had the benefit of an express easement over the Emmetts' drive.

The Emmetts wanted to build a high brick wall along the boundary, leaving an entrance at one end so that the Sissons could still use the drive to access their property. The Sissons objected, despite the fact that the Sissons had already built a low brick stone wall along the drive way on their side of the land.

The Court of Appeal determined that the easement included the "relative luxury" for the Sissons of being able to access their land from any point along the driveway, and that a wall between the driveway and the Sissons' land would interfere with that right.

It was held that the wording of the easement had to be read in the context of the original intention of the parties and the setting of the land. In this case, there was an open boundary when the easement was created, the driveway ran along the edge of the Sissons' land and the Sissons were obliged to fence their land, except for the boundary along the drive way.

While this case is largely fact specific, it is a helpful reminder that an easement needs to be considered in the context of what was intended at the date when the right was granted. This issue could have been avoided if the conveyance had stated that the right of way was "over and along the route A to B accessed only from points A and B". Alternatively, the Emmetts could have put the wall on the other side of the driveway, no doubt saving much time and cost.

For further information please contact:

Alastair Morrison
Partner
+44 (0)117 939 2258
alastair.morrison@burges-salmon.com

Shared parental leave

Many employers may already be bewildered by the various types of family friendly leave available to employees. For example, fathers entitled to up to 2 weeks of paternity leave and may be entitled to 26 weeks of additional paternity leave. Parents are entitled to 13 weeks of parental leave in the first 5 years of their child's life. Those adopting children are entitled to leave. Mothers are entitled to compulsory, ordinary and additional maternity leave. It is a challenge for employers to keep on top of the various entitlements and the system is set to become more complicated with the introduction of a new shared parental leave and pay system due to be introduced for children due to be born or adopted on or after 5 April 2015.

The new system will allow parents and adopters more flexibility in how they care for their child in the first year. Eligible mothers and fathers will have the right to share up to 52 weeks' leave to care for their child (less any period that the mother has spent on maternity leave) and up to 37 weeks' shared parental pay. As you would expect, there are prescriptive requirements as to how leave can be taken, who can take it, the notice required and the protection afforded to employees including terms and conditions during leave, the right to return to work, rights on redundancy and protection from detriment and dismissal.

Draft regulations have been published and it is expected that they will come into force into October 2014. The Government intends to publish further guidance on how the system will work in practice later in the summer, but in the meantime, employers should prepare for the new system by preparing a shared parental

leave policy and reviewing existing family friendly policies. Those employers who currently provide enhanced maternity pay and benefits will also need to consider how they structure any enhanced shared parental pay and benefits.

It is essential that employers get to grips with the changes now. We have prepared a briefing which can be found here - **http://www.burges-salmon.com/practices/employment/publications/shared_parental_leave.pdf** - and we will be running seminars at our Bristol and London offices in June looking at how the new shared parental leave will work in practice. Details can be found on our website - **http://www.burges-salmon.com/seminars/default.**

For further information please contact:

Huw Cooke
Senior Associate
+44 (0)117 902 7719
huw.cooke@burges-salmon.com

ATED and 15% SDLT to be extended to include more houses

Since 1 April 2013, non-natural persons ("**NNPs**") holding UK residential property that was valued at more than £2 million on 1 April 2012 have been liable to pay a new annual tax on enveloped dwellings ("**ATED**" and NNPs buying residential property of that value have had to pay SDLT at 15% on the price of the dwelling). Both of these tax changes were introduced as part of a series of measures introduced in the 2012 Budget with the aim of discouraging the ownership of UK residential property through corporate envelopes.

At the same time, the charge to capital gains tax ("**CGT**") was extended to NNPs that are within the scope of ATED for disposals of high value residential properties. Before this measure, companies would have paid corporation tax (with current rates of 20% or 21%) on chargeable gains rather than CGT (at a rate of 28%).

Significant Extension to SDLT and ATED

In the 2014 Budget, the Chancellor announced that SDLT at 15% and ATED were to be significantly extended over the next two years to apply to residential properties purchased and owned by NNPs valued at more than £500,000. The new SDLT rate has been in place since 20 March 2014. For ATED, two new taxable bands will be created:

- Residential properties worth more than £1 million but not more than £2 million will fall within ATED from 1 April 2015 (the annual charge will be £7,000); and
- Residential properties worth more than £500,000 but not more than £1 million will fall within ATED from 1 April 2016 (the annual charge will be £3,500).

The annual charge for each of these new bands will increase in line with the rate of inflation, as with the existing bands.

The ATED-related CGT charge of 28% payable by NNPs on the disposal of property interests will also be extended to include these lower valued properties. Again, the extension of the charge will be in two stages. Disposals of enveloped properties with a value over £1 million up to £2 million will be subject to CGT from 6 April 2015 and disposals of enveloped properties with a value over £500,000

up to £1 million will be subject to CGT from 6 April 2016. However, CGT will only apply to gains that have accrued **on or after** those dates.

Implications and Next Steps

- These new announcements may result in significantly increased compliance costs for those "genuine" property businesses that are eligible for relief from ATED but nevertheless currently have to comply with the obligation to file a return. In recognition of this, the Government will be consulting on simplifying the administration of ATED for such businesses.
- Given that the ATED extensions have been announced well ahead of their introduction, there should be time for NNPs who may be affected to consider restructuring how their residential properties are held. However, it is important to seek advice prior to "de-enveloping" regarding available reliefs and the impact of removing properties from their current structures. In view of the IHT protection, for example, some individuals may feel that the relatively small annual charge (£7,000 on properties worth between £1 million and £2 million) compares favourably to any potential IHT exposure holding the property directly.

Relief for Farmhouses

NNPS who may be affected by the extension to the ATED charge should consider the availability of the various ATED reliefs.

For example, there is a specific relief (calculated on a daily basis) available in respect of farmhouses occupied for the purposes of a farming trade if:

- the farmhouse forms part of land occupied for the purposes of a farming trade carried on commercially with a view to profit; and
- the person carrying on that trade, or a person connected with him, is entitled to a single-dwelling interest in the farmhouse.

A day is a relievable day for the purposes of ATED if on that day the farmhouse is occupied by either:

- a farm worker (that is, an individual substantially involved in the day-to-day work of the trade, or the direction and control or its conduct) occupying if for the purposes of the trade; or
- a former long-serving farm worker (that is, broadly an individual who previously had been a farm worker for a period of three years or more or periods totalling three years or more in a five year period) or the surviving spouse or civil partner of such a worker.

Substantial involvement in the day to day work, or the direction and control of the conduct of, the farming trade equates to spending 20 hours a week (on average) throughout the year on those activities and is concerned with the time spent by an individual and not the time spent by a group of individuals occupying the farmhouse.

For further information please contact:

Nigel Popplewell
Partner
+44 (0)117 902 2782
nigel.popplewell@burges-salmon.com

Criminal squatters can still claim title to residential property

Even though squatting in residential property has been a criminal offence since 1 September 2012, the High Court in *Best v The Chief Land Registrar* decided that did not prevent the squatter from applying to register title to a house acquired by adverse possession of more than 12 years.

This decision sounds unexpected given firstly that under Section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 anyone living in a residential building and who knows or ought to know that they are trespassing commits an offence and secondly that there is a general proposition that English courts will not enforce a cause of action which arises from illegal or immoral conduct.

However the Court decided that if Parliament had intended Section 144 to affect the law on acquiring title to property by adverse possession it would have said so and provided for the consequences, which could otherwise be quite arbitrary. For example, Section 144 only criminalises "living" in the residential "building". Squatting in the garden of a residential building, or adversely possessing the building for a purpose other than to live in it, are not offences and would not require the Land Registrar to reject an application.

The Court has given permission for an appeal but, whatever the outcome, the position for commercial premises remains unaltered as squatting in such property is not an offence. Landowners should monitor their holdings and to take action promptly if it appears that an occupier is in possession without their consent.

For further information please contact:

Kevin Kennedy
Partner
+44 (0)117 307 6934
kevin.kennedy@burges-salmon.com

Renewable Energy - where is it all going?

There is no question that recent Government announcements, political posturing in the lead up to a General Election and new proposals under Electricity Market Reform have shaken the confidence of those in "traditional" renewable sectors which have been a huge source of growth and revenue for the landowner community in the last decade.

So what does this mean in practice? It is pretty clear that sentiment is moving against subsidies for large onshore wind projects, particularly south of the border. The Conservative Party have announced that if they win the next General Election subsidies for large onshore wind schemes will be dropped. The other major renewables onshore development which routinely involves landowners is, of course, solar and we have seen a boom in solar over the last few years, particularly in the ground mounted projects.

Government did not predict the levels of large scale deployment of solar which the UK has seen and in a recent strategy have signalled that they now wish to encourage large rooftop solar, rather than large ground mounted 5MW+ projects. In a consultation just published, it is proposed that the Renewables Obligation be closed to new 5MW+ solar projects from 1 April 2015. What we are likely to see is a head long rush by developers to build out projects over the course of the next year which will keep everyone, including landowners, and their advisors, very busy. For all those involved in the large scale solar development chain there is now a very clear window of opportunity.

Does this mean that onshore renewables is withering on the vine? Well the answer to that has to be no. There will still be subsidies available for many technologies and projects and we will have the new Contracts for Difference support under the Electricity Market Reform regime. It is clear that the large scale onshore developments will be more challenging and the incentives available may be materially less and more difficult to get hold of, but good projects will still proceed.

There is good news as well. It is very clear from all the political parties that there is an eagerness to support and incentivise community energy projects and the small scale Feed in Tariff still exists for the smaller solar, wind, anaerobic digestion and hydro projects. Entrepreneurial developers looking at installing and bringing forward renewables projects now need to have an eye on involving the community and making sure that the project is of a size and design such that it can contribute to onsite electricity usage and local generation.

Burges Salmon has consistently led the way with these types of projects in providing innovative power offtake solutions, onsite power arrangements and designing community ownership and investment structures for on-farm schemes.

For further information please contact:

Ross Fairley
Partner
+44 (0)117 902 6351
ross.fairley@burges-salmon.com

One Glass Wharf
Bristol BS2 0ZX
Tel: +44 (0) 117 939 2000
Fax: +44 (0) 117 902 4400

6 New Street Square
London EC4A 3BF
Tel: +44 (0)20 7685 1200
Fax: +44 (0)20 7980 4966

www.burges-salmon.com

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