

Family Group



ST JOHNS  
BUILDINGS  
BARRISTERS CHAMBERS

## FARMS AND ANCILLARY RELIEF

FRANCESCA FOTHERGILL

ST JOHNS BUILDINGS

24a-28 St John Street  
Manchester M3 4DJ  
DX 728861 Manchester 4

Tel: 0161 214 1500  
Fax: 0161 835 3929

16 Winckley Square  
Preston PR1 3JJ  
DX 714582 Preston 14

Tel: 01772 256100  
Fax: 01772 256101

21 White Friars  
Chester CH1 1NZ  
DX 19979 Chester

Tel: 01244 323070  
Fax: 01244 342930

Email: [clerk@stjohnsbldings.co.uk](mailto:clerk@stjohnsbldings.co.uk)

Website: [www.stjohnsbldings.co.uk](http://www.stjohnsbldings.co.uk)

## FARMS AND ANCILLARY RELIEF

*“There has always been Starkadders on Cold Comfort Farm”*

- *Cold Comfort Farm, Stella Gibbons*

Farming cases, as Wilson J said, are “notoriously difficult to resolve”. Farmers are generally asset rich and cash poor and these cases are beset with problems of illiquidity. Furthermore, there will, more often than not, be the need to consider issues of inheritance, trusts and partnership.

I propose in this paper to consider some of the evidential issues which I consider particularly important, to consider some solutions which may be adopted in these matters and finally to refer to some relevant authorities.

### IDENTIFYING THE ASSETS

It is particularly important to have a detailed analysis of the assets in a farming matter. Once they have been identified, they will need to be subject to valuation

#### Freehold land

- Properly identified on a map; make sure that the valuer checks whether the land registry documents are in fact a proper record of the landholding, errors occur all too frequently. If the land is unregistered, inspect the deeds. Note the existence of charges and restrictive covenants
- Are there any sporting or mineral rights?
- Is any of the land being rented out and if so, on what terms, for what rent and note entries in farm accounts. In the case of landlord and tenant being family members, is rent actually passing?
- If the land is being rented out, could vacant possession be obtained?  
Value on alternate bases
- Are there any planning consents, when do they expire?
- Is there development potential?
- Are there diversification possibilities, if necessary?
- What grade is the land, what is its market value per acre?
- Are there any off lying freeholds generating an income, e.g. cottages

### **Tenanted land**

- Be sure to clarify land which may be farmed, but not owned and to verify the terms of any tenancy
- Has the tenant carried out improvements for which he is entitled to compensation from his landlord?

### **Plant and Machinery (Dead stock)**

- Seek an inventory of tangible assets
- The realisable value of second hand farm machinery often exceeds its written down book value by a significant amount
- Is any being used for contracting? If so, what revenue is being generated
- What finance agreements are in place

### **Livestock**

- Beware the farmer who is “looking after” neighbours stock
- How many/where are they
- Are the numbers greater than prudent, given the market. Conversely, should livestock figures be increased, to make better use of buildings/land

### **Growing/Harvested Crops**

- Consider timing – time lag between planting/fertilising and sale can cause huge fluctuations in the farm accounts
- Arable crops can be sold forward on different arrangements, which is in place?
- Subject to macro economic considerations,

### **Variable inputs**

- Again subject to large fluctuations
- Check whether there has been any stockpiling of seed, fertiliser, feedstuffs, check budget as against actual figures

### **Single Farm Payment/Milk Quota**

- See the Rural Payments Agency documentation for the past 3 years for the SFP
- If land has been let, has it been let with or without the SFP
- What grants may be available for regeneration e.g. ESA/tier grants for repairs and renovations of agricultural buildings and for walling/fencing

**Stewardship Scheme:** is the farmer claiming payment under this scheme?

- The income foregone from land excluded from cultivation and included in this scheme can be exceeded by the grant received. This will depend upon crop prices
- There are differing levels of Stewardship Scheme, imposing varying obligations upon the farmer. Entry Level Stewardship is the least onerous.

## **EXPERT EVIDENCE**

### **1) Agricultural Surveyor**

You will need a respected valuer (rural/agricultural chartered surveyor FRICS). It may be necessary to have one surveyor co-ordinating the overall valuation exercise, using different valuers for certain aspects e.g. for the specialist valuation of a pedigree milking herd or the valuation of particular machinery.

The layout of the report with regard to land valuation is important. The whole exercise is greatly assisted at trial by large scale maps which are easy to use in court. These maps should identify the land which is farmed, together with the farm house and any other properties or outbuildings. Photographs can also help, particularly if one is dealing with a case which may involve logistical problems, for example the proximity of the farm house, the former matrimonial home, in which it is proposed that the wife and children will remain, to nearby pig sheds, to be retained by husband.

The valuer may also in an appropriate case need to consider the best way of marketing the land in the event of a sale e.g. with regard to lotting or selling to neighbouring landholders.

### **2) Forensic accountant**

The court will in my experience be loathed to sanction the costs of a forensic accountant, even on a sje instruction, at FDA. The focus will be upon identifying and valuing the farm assets, before any further evidence is allowed.

If a forensic accountancy report is to be obtained, it will be necessary to identify to what end such a report is sought. This will depend to some extent upon the structure of the farming business itself and the orders which may be sought. I consider the possible business structures below. Since the value of a farm is largely asset-based, it is often unnecessary to consider a separate value for the business.

A forensic accountant *may* be of assistance in valuing the **minority interest in a farming company**. However, it will be rare that the sale of such an interest is proposed to the court.

Most farming companies are family owned. Thus, such a shareholding would be of little attraction to an outsider and the prospects of obtaining a sensible return on any investment may be considered remote in most instances. There is often no dividend income. Minority holdings do have a value, however, by reason of the fact that the asset base is often substantial. Thus an accountant may approach the valuation in a similar way to that adopted in a property investment company, albeit applying a large discount to reflect lack of influence over company affairs and the remoteness of dividends.

In general, there is a marked judicial reluctance to consider the realisation of minority interests in a farming company. Much will depend, of course, upon the availability of capital elsewhere or judicial willingness to consider a more creative solution.

### **Farm Partnerships:**

#### **Husband and Wife**

If the partnership is between husband and wife then this may well demonstrate a mingling of assets and the partnership may in some circumstances be properly characterised as part of the marital acquest. Obviously, much will depend upon timing, the length of the marriage and an analysis of relative contributions to the farming enterprise. If, for example, the husband has brought the land into the partnership<sup>1</sup>, then this will be an unmatched contribution by him. However, the relevance of this may be argued to diminish over time. The wife would of course argue that any increase in the value of that land during the course of the partnership is a marital asset, prima facie subject to equal division.

In **Miller; McFarlane** at para 149, Baroness Hale expressly refers to family businesses or joint ventures in which husband and wife work as “family assets”, to which the yardstick of equality would readily apply.

The husband and wife will not wish to continue to trade as partners. Thus there will need to be either dissolution of the partnership and a distribution of assets, or a sale of the business as a going concern, or more usually, the husband will take over the partnership assets and there will need to be a compensating payment to the wife by way of lump sum or property adjustment orders.

---

<sup>1</sup> I consider below the relevance of inherited property, often crucially important in these matters

### **Partnerships with third parties**

More often than not, the wife will be excluded from the partnership, which will be, for example, between the husband, his brother and father. The existence of a partnership involving third parties makes a fair division of assets more difficult to obtain.

A sale of a partnership interest in this context is unlikely to be readily considered by the court. The ongoing involvement of the husband in the farming partnership is likely to represent his income stream going forward. It would be more usual for the court to allow the husband to remain in partnership, to balance the capital elsewhere if possible and to provide for spousal maintenance if appropriate

If (and it will be rare) a forensic accountant's valuation of the partnership share is to be obtained, then there will need to be a consideration of those matters which do not appear on the balance sheet, such as increases in the value of property and good will. The partners' capital accounts will need to be scrutinised in addition, to ascertain whether they reflect the market value of the partnership assets.

### **3) Farm Management Consultant**

Evidence of this type can be invaluable. It should follow the obtaining of the valuation evidence, at the stage in the case at which the full asset base has been ascertained. A consultant of this type can advise on:

- the balance sheet (considering, for example, the value of the farming enterprise over the last 3 years) including suggestions as to a restructuring of debt
- the organisation of the day to day farm management (e.g. whether there is an over reliance upon paid labour, whether there should be a change in which crops are grown or which livestock is kept, on what basis)
- agronomics (strictly speaking the optimisation of decisions made by agricultural producers, considering matters of yield etc)
- whether there can be a restructuring so as to improve turnover and profit
- the effect of sale of a portion of the farm in terms of maintainable levels of profit and farm viability

## **Taxation consequences**

It will be important to obtain expert evidence as to the taxation consequences of any sale or disposal which is proposed. There should be detailed CGT calculations, with a proper consideration of what reliefs may be available.

The sale of a SFP entitlement will require a separate CGT calculation

## **INHERITED WEALTH**

The paradigm case in this regard is **P v P (Inherited Property) [2005] 1 FLR 576**.

It is to be noted that Munby J's reasoning was expressly approved by both Baroness Hale (para 148) and Lord Nicholls (para 20) in **Miller; McFarlane**.

The facts:

18 year marriage. Children 18 and 16.

H and W both involved in hill farming, on a farm which had been in husband's family for some time. Land vested in H's name, H and W farming in partnership. W played active role.

Munby J rejected the W's claim for provision on a % basis. His judgment emphasised:

- The bulk of the family's assets represented a farm which had been in the husband's family for generations and which was brought into the marriage with the expectation that it would be retained in specie
- The fact that although the farm business was put into the parties' joint names, the land and the other tangible assets were retained in the husband's sole name
- The fact that any other approach would compel a sale of the farm, with implications little short of devastating for the husband

Thus he concluded that the proper approach was to make an award based on the wife's reasonable needs for accommodation and income. The analysis resulted in the wife receiving only 25% of the family assets comprising a lump sum of £575,000 and maintenance of £4,000 p.a. per child and school fees.

The need for the husband to adopt a more realistic approach was also emphasised:

*“I accept it will be very difficult for the husband. But the brute fact is that if he is to achieve his ambition of keeping the farm, whilst still meeting his wife’s proper claims, he is going to have to adopt a more realistic – what I accept what is going to be for him a more painful – approach to the imperative need to release capital than he has thus far been willing to contemplate” (para 26)*

See also **White**; Lord Nicholls on inherited property:

*“...property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what might loosely be called matrimonial property.....In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property” .....*

*“Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant’s financial needs cannot be met without recourse to this property”*

In **Miller; McFarlane**, Lord Nicholls referred back to his earlier judgment and re-stated the real difference between (1) *“property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest, but more usually the matrimonial property, and (2) other property”*

The application of the approach adopted by Munby J in **P v P** can often have pretty unpalatable consequences for a wife. The level at which needs are determined will depend upon the overall asset base.

## LIQUIDITY

### Unlocking Value

#### 1) Sale of part or whole – the unthinkable?

If the farm can be shown to be unviable as currently constituted, then plainly an order for sale will be easier to obtain. **Moorish v Moorish [1984] 14 Fam Law 26** in which the husband was said to be running the farm in an entirely wasteful way, making sale inevitable

If the husband is to be deprived of his source of income, however meagre, it will be necessary to consider what other employment he could obtain, at what level of remuneration. It may be possible for him to continue to farm elsewhere as a tenant – see in this context **P v P (Financial Provision: Lump Sum) [1978] 1 WLR 483 at 488G**.

A proposed sale of a portion of land and the consequences thereof will need to be fully supported by expert evidence which should address, *inter alia*:

Are there outbuildings or cottages which can be sold without affecting the integrity of the farm?

What lump sum can realistically be raised for the wife, within what timescale is the land likely to sell?

What yield per acre is to be lost

What will be the overall projected effect upon farm turnover and net profit?

Which land does it make most sense to sell? Consider the grade of the land and its location

#### 2) Lump Sum by Instalments

##### **R v R (Lump Sum Repayments) [2004] 1 FLR 928 Wilson J**

Facts: 16 year marriage, 2 children left school and working.

H farming through long-established family farming company. H held 6.18% shares. Executors of estate of H's father held 53% shares on trust for the husband's mother for life and thereafter as to 5/8ths of those shares for the husband. H's mother was 77 years old and upon her death, H would hold 39.5% of the shares. Value of shares in possession and in remainder was £1,5 million

Farm on 2 sites, H in cottage on one site, W in farmhouse on other site, surrounded by H's relatives.

The court was faced with “*how to contrive a raft of arrangements which enable the wife with the children to vacate the farmhouse, to move to other accommodation and to live there at a reasonable level without disabling the husband from also living at a reasonable level. The bulk of the husband’s shares are not yet in possession and even when they fall into possession, they will represent a minority interest in a long-established family company which provides the husband with his livelihood. There are substantial question marks about the husband’s ability to realise the proportionate value of the very substantial assets which may on paper be ascribed to the shares*”

Ordered:

W to buy a property by way of mortgage. He to pay a lump sum in instalments all but one of which would be equivalent to the wife’s mortgage payments (240 instalments). The obligation was secured by the wife holding a first charge over the husband’s shares in the company. In addition husband to pay periodical payments.

*Para 38 “ For this wife to exit from a 16 year marriage, following a full contribution on her part, with her own exiguous resources plus a lump sum of only £30,000 would seem to me, even in the context of life long, rent free accommodation, to be wholly contrary to principle...for her to be condemned to a life-long relationship with the husband’s family company, whether under tenancy or under licence, would seem to me to be a miserable resolution..”*

### **3) Adjourned Lump Sum**

**Davies v Davies [1986] 1 FLR 497** An adjournment may be appropriate where there is a realistic prospect of the farm being sold, or the husband being bought out by business partners

### **4) Deferred Charge**

**Webber v Webber (1982) Fam Law 179** Wife awarded a quarter share, by way of charge in the farm business, to vest on the husband’s 65<sup>th</sup> birthday. Charge to lapse in the event of her remarriage or death

**Robinson v Robinson (1983) 4 FLR 102** Husband held to need all his resources to build up a Scottish shoot. A charge on the estate for the benefit of the wife was secured

## 5) Consideration of other potential assets

### **Thomas v Thomas [1995] 2 FLR 668**

The potential resources available to a spouse from family members or via a trust must be considered. There may be access to wealth but no absolute entitlement to it.

Plainly there are limitations. The authorities emphasise the boundary between improper pressure and judicious encouragement. The court will not put undue pressure upon a third party, but similarly does not act in total disregard of the potential availability of wealth from sources administered by others.

See also:

### **TL v ML (Ancillary Relief : Claim against Assets of Extended Family) [2005] EWHC 2860, Nicholas Mostyn QC**

#### **A v A [2007] EWHC 99 Munby J**

*“Can the wife demonstrate that, if asked, the trustees would be “likely” immediately or in the foreseeable future , to exercise their powers in favour of or in some other way for the benefit of the husband”*

*The court can encourage but it cannot compel*

*Judicious encouragement must not cross the line into improper pressure*

*The court must be careful not to jump too readily to the conclusion that the trustees will always accede to “judicious encouragement”*

In the case of trustees who are family members rather than professionals discharging their fiduciary duties and where there is an established history of advancement, a **Thomas** argument will be more likely to succeed.

## **BORROWING**

### **Agricultural Mortgage Corporation (AMC)**

Specialised lender, playing a significant role in the long term funding of farms. They offer specialised products with loans over extended terms (even to the next generation) at competitive rates

Approach them, together with existing lenders, to see whether further funds can be advanced. Have regard to the charges in place already and the affordability of additional sums with regard to the current trading performance of the farming business.

## **FARMER'S INCOME**

### **R v R (Lump Sum Repayments) at 931**

Note the observations of Wilson J “*this farmer, like many other farmers, quite legitimately enjoys payment by the company directly on his behalf in the form of benefits in kind of very many expenses which the rest of us have to meet out of our net income. Thus, of course he pays no rent for the farmhouse and the company pays water rates, council tax, electricity bills, gas bills, telephone bills, pays for health insurance and supplies him with a car..*”

In that case Wilson J placed a value of £20,000 upon these benefits. Ignore such entries in farm accounts at your peril.

**FRANCESCA FOTHERGILL**

**ST JOHNS BUILDINGS**

**8 MARCH 2009**