Some issues in farming cases

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ISSUES 1 and 2

Extracting the cash (lump sums and variation of settlements)

1. Problems often arise beyond the mere assessment of value and the principle of division in farming cases.
2. These problems often focus on what I will call in this note 'cash extraction'.
3. Difficulties arise because the farm:
    a. May be held within a company structure / there may be minority interests
    b. Shares in a company structure may not be in possession by one party
    c. Has a non-matrimonial nature or element
    d. Is the source of one party's income (and perhaps the rest of the family)
    e. May be tenanted or contain few assets of a realisable nature
    f. May not be appropriate collateral for commercial lending
    g. May contain properties suitable in size but not location for the separated party to live in
    h. May meet a huge number of 'living; expenses otherwise due from income in a standard fashion (in a non-farming case)
    i. Income may be 'deflated' for tax purposes or to limit the claims of the separating spouse
4. Cash extraction, therefore – whether that is taken to mean lump sums or, in this context, periodical payments as well, can offer limited opportunities. Creativity is

required. It is assumed, for the purpose of this note, that a sale of part of, or all, the farm is not contemplated or plausible.[1]

5. Cash extraction was a problem encountered in **R v R (Lump Sum Repayments) [2004] 1 FLR 928**

The conundrum for the court was '*to contrive a raft of arrangements which enable the wife and 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'*

Lump sum payment by instalments

6. In **R v R [2004]** the solution adopted was to make an order to enable the wife to purchase a property of her own but subject to a mortgage. The following methods of implementation were adopted:

   a. H to pay W a lump sum in monthly instalments (akin to a periodical payments order)

   b. The lump sum by instalments, in contrast to a periodical payments order, provided for security beyond the death or re-marriage of the wife

   c. The lump sum is variable as to timing and, in exceptional circumstances, quantum (but ensure the order is compliant with the subsequent case of **Hamilton v Hamilton [2013] EWCA Civ 13**): "*in future, parties may consider that a recital at the beginning of an order which sets out the basis of the agreement in terms of a potential variation would put disputes of this type beyond doubt…"*

   d. Payment obligations were secured by the wife taking a first charge over the husband's shareholding in the farming company (although this is not in itself without its risks)

   e. This solution requires sufficient income to enable such payments to be made (as payment is likely from the partnership income or salary and dividends of the farming party).

Variation of a nuptial settlement

7. The court has power pursuant to section 24(1)(c) MCA 1973 to vary a nuptial settlement.

[1] As well as simply raising commercial lending or other family resources (the bank of Mum and Dad)

8. This power is wide and, potentially, very useful. It is a power I have talked often about (and used), however it is shrouded in complicated and often antiquated case law. This puts people off. That is unfortunate, as the power to vary a nuptial settlement can be of great use, both substantively and in extracting settlement.

9. A nuptial settlement is one that that is made on the parties to a marriage. It is often in the form of a trust, but need not be. In **Brooks v Brooks [1995]** it was described as *'a disposition….which makes some form of continuing provision for both or either of the parties to a marriage with, or without provision for their children….'*

10. The principles underpinning the variation of a nuptial settlement were summarised in the case of **Ben Hashem v li Shayif [2008]** (see below)

36. Counsel were agreed that the principles on which the section 24(1)(c) power should be exercised in a case such as this are set out in Ben Hashem v Ali Shayif [2008] EWHC 2380. They did not seek to persuade us to alter the formulation of them in that case by the then Munby J in any way. Their argument was rather about what was a proper application of the principles in the present case.

37. In Ben Hashem, Munby J surveyed the relevant authorities, then summarised the principles as follows:

"290. Surveying all this learning, identifying what is of enduring significance whilst ruthlessly jettisoning what has become more or less irrelevant in modern conditions, I can perhaps summarise matters as follows:

i) The court's discretion under section 24(1)(c) is both unfettered and, in theory, unlimited. As Miss Parker put it, no limit on the extent of the power to vary or on the form any variation can take is specified, so it is within the court's powers to vary (at one end of the scale) by wholly excluding a beneficiary from a settlement, to (at the other end) transferring some asset or other to a non-beneficiary free from all trusts. She points to E v E (Financial Provision) [1990] 2 FLR 233 and C v C (Variation of Post-Nuptial Settlement: Company Shares) [2003] EWHC 1222 (Fam), [2003] 2 FLR 493, as illustrations of property held on trust being transferred free from any trusts to the applicant, in E v E a sum of £50,000 and in C v C shares in a Cayman company.

ii) That said, the starting point is section 25 of the 1973 Act, so the court must, in the usual way, have regard to all the circumstances of the case and, in particular, to the matters listed in section 25(2)(a)-(h).

iii) The objective to be achieved is a result which, as far as it is possible to make it, is one fair to both sides, looking to the effect of the order considered as a whole.

iv) The settlement ought not to be interfered with further than is necessary to achieve that purpose, in other words to do justice between the parties.

v) Specifically, the court ought to be very slow to deprive innocent third parties of their rights under the settlement. If their interests are to be adversely affected then the court, looking at the wider picture, will normally seek to ensure that they receive some benefit which, even if not pecuniary, is approximately equivalent, so that they do not suffer substantial injury. As Sheldon J put it in the passage in Cartwright which I have already quoted: "if and in so far as [the variation] would affect the interests of the child, it should be permitted only if, after taking into account all the terms of the intended order, all monetary considerations and any other relevant factors, however intangible, it can be said, on the while, to be for their benefit or, at least, not to their disadvantage."

11. In farming cases, variation applications may be of importance, for example:

    a. The FMH may be a farmhouse, occupied by the married couple but held on trust, perhaps for the ultimate benefit of the children of the family. If this trust is a nuptial settlement, it may be open to variation to provide, at its extreme, access to the capital (the property equity) or otherwise to provide property security for life or some other term.

    b. If the farm land is held on trust (and a nuptial settlement), and the trust structure itself is being relied on as an impediment to sale, variation may 'free up' the land from the restrictions of the trust.

    c. If other assets of the marriage are held subject to a trust (nuptial), a variation application may release assets so as to enable the farm to be retained in specie.

12. A reported and useful example is the case of **P v P [2015] EWCA Civ 447** (on appeal from Mostyn J). The case concerned an appeal by the trustees of a post-

nuptial settlement against an order of Mr Justice Mostyn, which varied the settlement by way of financial remedy.

13. The trust property was a farmhouse, which had been the matrimonial home. The trust was established in 2009. The settlor was the husband's parents, and he was the principal beneficiary. Essentially, the trust provided that the husband could occupy the farmhouse during his lifetime, whereupon it would pass to other members of the settlor's family.

14. The husband and wife separated in 2012 and a joint residence arrangement was reached between them in relation to their child.

15. Mr Justice Mostyn varied the trust to provide that a sum of £23,000 was to be paid to the wife absolutely and that a sum of £134,000 was to be provided for the benefit of the wife for life, to be held by independent trustees, with the wife entitled to use the capital sum for or towards the purchase of a property for her occupation. The order would mean that the farmhouse, in which the husband intended to reside, would have to be sold, unless the husband's family were able to satisfy the order (which Mostyn J clearly considered was a possibility, if not a probability).

16. The trustees appealed. The CoA upheld Mostyn J's order. The variation of the settlement was fair and appropriate so as to provide for the housing need of the wife (or on Mostyn's analysis, to provide fair sharing):

P v P[2015]

54. The trustees' complaints must be evaluated in the light of the terms of the trust and the practical realities of how it would operate. I would make a number of observations in this regard. First, it is material to note that, had she remained married to the husband, although not a beneficiary of the trust herself, the wife would have enjoyed the benefit of the trust property for life by virtue of her occupation of it with the husband as the family home. Unlikely as it might have been in practice, in theory she could even have been added by the trustees as a discretionary beneficiary of the trust and an appointment made in her favour. The judge's order could be said to build upon this foundation in that it enabled her (and the child whilst with her) to continue to be housed in accommodation purchased with the assistance of an appropriate proportion of the trust funds, the balance being left available for the husband's needs. Secondly, although the beneficiaries other than the husband and the children had the chance of benefiting from the power of appointment in clause 4 of the trust, this gave rise to no entitlement and they would, in any event, have been likely to have to wait for a long time before they could hope to benefit. The entire trust property was used to house the husband and wife during the marriage and, given a free hand, the trustees would use it now to house the husband and his new family, so the beneficiaries could expect

nothing until the husband's death. In real life rather than legal theory, a life interest to the wife (who is of similar age to the husband) does not therefore prejudice them materially. Thirdly, it cannot be ignored that there were powers under the trust to transfer the property to the husband for his absolute use and benefit, thus depriving the other beneficiaries, and the husband's brother and his issue as remaindermen, of their chance of benefit. In the event that the husband chose to sell the property thereafter, it would be lost to the estate as well.

ISSUE 3

Particular features of [farming] partnerships

17. Critical to a correct analysis of a farming case in the sphere of financial remedies is a good understanding of partnership law (it being assumed that the farm is farmed in partnership for the purpose of this talk).

18. Partnership law has some unusual features, a number of which are useful to know (1) when considering how to assess the marital pot (2) in analysing accounts and (3) in determining how to achieve and implement financial extraction after a divorce. I will touch on a few of these key features below.[2]

'Partnership property'

19. 'Partnership property' or 'partnership assets' or 'joint stock' are all terms often used to refer to everything to which the partners can be considered to be entitled. These terms are used indiscriminately and interchangeably. However, it is important to be able to identify the difference between partnership property and separate property (that is, property owned by a partner but not of the partnership).

20. Purchase of property by one partner is his own name, for example, does not make such property partnership property unless it was purchased using partnership monies (or agreed to be held as partnership property). If he used partnership monies, the property will be held on trust for the co-partners, unless he can demonstrate that he is solely entitled.

21. In certain cases, assets or property purchased by a partner (not from partnership funds) that have been used by the partnership may be treated as partnership property. If the partner can be shown to have brought the property into 'common stock' and that it was *used and treated* as partnership property, it may so change its status to partnership property.

[2] Partnership law is complex and this note provides just a basic summary for the purpose of this talk.

22. The reverse of this coin is also important: it is perfectly proper for partners to share profits of a common endeavour but not to share 'ownership' of property generating those profits. The ancient examples include, for example '*coach proprietors who horse a coach and divide the profits….they may each make uses of horses which belong to himself alone and not to the [partnership]*' (Lord Lindley, and see Barton v Hanson (1809) 2 Taunt. 49). The same applies, for example, to the more modern example of the owner of a plot of land and a builder who together agree to develop and sell the land and to share the profit.

23. It can be seen how opaque the line can be between partnership and separate property, even if the owners are co-owners. It is also perfectly possible, for example, for a particular building on a farm holding (or the whole farm itself) to be owned by one partner but not to be an asset of the partnership, even if the partnership accounts include the farm as an asset. The partnership accounts – so often called on to analyse and discern the assets of the partnership – are by no means definitive……

24. This can be seen in the recent case of **Ham v Bell [2016] EWHC 1791 (Ch).** In Ham v Bell, Ron and Jean Ham bought a farm as partners (married) in the 1980s. They built and developed the farm adding to its acreage in both owned and tenanted land. Ron and Jean had three children. They all worked on the farm but the elder 2 made their own ways in life and the youngest, John, was brought into the partnership in 1997: initially as a 25% profit partner and subsequently increased to 40%. The issue in 2016 was whether the farm (an asset of Ron and Jean's original partnership) had become an asset of the new partnership with John. The farm had appeared in the accounts of the new partnership from 1998 until 2003 (when a new accountant removed it).

25. The court determined that the farm was not an asset of the new partnership, despite its presence in the accounts. That presence could be evidence of 'partnership' ownership, but such evidence could be disregarded if it was not reflective of the co-partner's intentions and agreements. In more detailed summary:

a. The fact that profits from an asset went into the accounts as new partnership profits did not mean the asset itself was necessarily partnership property, unless the asset was acquired using partnership profits

From Ham v Bell [2016]

41. In Geary v Rankine [2012] 2 FLR 1409 at paragraph 15, Lewison LJ said:

"The mere fact that there is a partnership in profits produced by a particular asset does not in-dicate that the asset itself is partnership property. It is a commonplace that one partner may own the property in which a partnership business is carried on. If the asset is acquired with profits generated by the partnership, that is a different proposition... "

42. To the same effect in Singh & Co v Nihar [1965] 1 WLR 412, Lord Pearce quoted with approval from the 19th Edition of Lindley & Banks as follows:

"...it by no means follows that property used by all the partners for partnership purposes is partnership property. For example, the house and land in and upon which the partnership business is carried on often belongs to one of the partners only, either subject to a lease to the firm, or without any lease at all. "

43. It was drawn to my attention during submissions that it is common for farming partnerships to farm land owned by one or more of the partners without the land being a partnership asset. For example, at paragraph 8.15 the learned authors of Blackett-Ord & Haren on Partnership Law (5th Edition 2015) state:

"Often (especially in farming partnerships) the most valuable assets used by the firm are owned by some or all of the partners outside their capacity as such partners".

44. Section 20 of the Partnership Act 1890 provides that all property originally brought into the partnership stock is called 'partnership property' and must be held and applied by the partners exclusively for the pur-poses of the partnership and in accordance with the Partnership Agreement. The legal estate of any such partnership property is held in trust so far as necessary. The persons beneficially interested in the land under the section. However, section 20 does not assist here, because it does not tell one how to decide if a particular item of property was, within the wording of section 20, "brought into the partnership stock".

45. Nevertheless, it is clear from Miles v Clarke [1953] 1 WLR 537, a case where there had been no express agreement as to what was partnership property, that property owned by one or more partner at the start of the partnership will only be treated as brought into the partnership stock if it is expressly or impliedly agreed between the partners. In that case it was said:

"These parties and their advisors so far as they thought about it at all always contemplated that the lease, the equipment and the studio furniture and stock in trade would all be brought into the common pool and there is an indication to that effect, but the fact is that nothing was ever finally agreed about it..."

"No more agreement between the parties should be inferred that is absolutely necessary to give business efficacy to that which has happened."

b. Nor did the fact that the value of improvements, and the acquisition of other land, went into the partnership accounts during the same period (1998 to 2003) that the farm appeared in them, mean there was an implied agreement that the farm was an asset of the new partnership

c. The wills of both husband and wife made clear that they considered they had retained personal ownership of the farm despite the new partnership, as they had each provided for part of it to be left to one of their daughters

d. The accounts themselves were merely evidence, not proof, of ownership of the assets recorded in them. If they did not reflect what the partners agreed – and the court ruled that they did not - they should be disregarded

From Ham v Bell [2016]

121. I shall briefly summarise some of the aspects of John's actions and omissions which are inconsistent with his assertion that he always believed the farm was an asset of the new partnership: (1) His apparent acceptance in conversations, in the presence of his parents and Mrs Scarrott, that the farmland on which a bungalow for him was to be built was farmland belonging to Ronald and Jean. (2) His discussions with Mrs Scarrott on 27 January 2009, as recorded by her in her attendance note dated 2 February 2009, which inci-dentally also demonstrated his ability to put his own point across when he needed to do so. (3) The conver-sation which he had with Mr Bell, which was predicated upon the basis that the farm was owned by Ronald and Jean. (4) Even though he knew in 2009 at the latest from his first solicitor that the farm had been taken out of the partnership assets, something which he also learnt in 2011 from his current solicitors, he did not raise the issue that the farm had been wrongly removed from the partnership account timeously. (5) His ap-parent acceptance in his pleadings that the farmland was not a partnership asset until a re-amended plead-ing in January 2013. (6) The clear references in paragraphs 16 and 61 of his first witness statement dated 11 September 2012, which suggested that he accepted that the farm was owned by his parents and his some-what unconvincing attempt to depart from this in paragraphs 4, 5, 6, 9 and 18 in his second witness state-ment dated 25 January 2013.

122. At best, John assumed, because it was what he wanted, that what was in the accounts was drawn into the partnership, but there never was any agreement, express or implied, to that effect.

Each partner as a principal and agent

26. Each partner is both a principal and an agent. He is **liable as a principal to the debts and engagements of the partnership** (and in respect of them is entitled to a contribution from his co-partners) **and as an agent of the partnership, he is entitled to be indemnified by the partnership against losses and expenses incurred for the benefit of the partnership**.

27. In other words, if the partners are equal partners, they are each equally entitled *and* liable in relation to partnership (section 24(1) Partnership Act 1890). The indemnity of the other partners is express in section 24(2) PA 1890).

28. Query here the use of the indemnity if money is owed by Partner A to Partner B: Partner A may have a right to sue Partner B for the payment pursuant to the indemnity: such a right may be a chose in action capable of transfer to a husband or wife non-partner?

The capital account

29. The capital account may often be referred to in farming cases as being to the credit or deficit of one partner and, therefore, affecting their overall partnership 'share' (of capital).

30. A partner is broadly entitled to charge the partnership (and therefore, the co-partners) with sums legitimately expended by him in conducting the partnership business (**West v Skip (1749) 1 Ves. Sen 239**). This charge may appear to the paying partner's credit.

31. A partner may introduce capital to the partnership. This may be done by each co-partner at the commencement of the partnership or, for some reason, a partner may advance more than the other co-partners. If a partner introduces more capital than agreed – for example, to purchase farm equipment when the partnership did not retain sufficient partnership capital to do so – this additional payment is a loan owed to the payer and is not to be treated as an addition to the payer's capital (section 24(3) PA 1890).[3]

[3] And interest is charged at 5% according to section 24(3) PA 1890

Postscript –procedural niceties in relation to a variation of settlement application.

Form E

5.2 If you are seeking a variation of an ante-nuptial or post-nuptial settlement or a relevant settlement made during, or in anticipation of, a civil partnership, identify the settlement, by whom it was made, its trustees and beneficiaries and state why you allege it is a settlement which the court can vary.

Para 9.11 FPR procedural pitfalls children

Children to be separately represented on certain applications

9.11

(1) Where an application for a financial remedy includes an application for an order for a variation of settlement, the court must, unless it is satisfied that the proposed variation does not adversely affect the rights or interests of any child concerned, direct that the child be separately represented on the application.

(2) On any other application for a financial remedy the court may direct that the child be separately represented on the application.

(3) Where a direction is made under paragraph (1) or (2), the court may if the person to be appointed so consents, appoint –

(a) a person other than the Official Solicitor; or

(b) the Official Solicitor,

to be a children's guardian and rule16.24(5) and (6) and rules 16.25 to 16.28 apply as appropriate to such an appointment.

9.13 FPR

(1) Where an application for a financial remedy includes an application for an order for a variation of settlement, the applicant must serve copies of the application on –

(a) the trustees of the settlement;

(b) the settlor if living; and

(c) such other persons as the court directs.

(2) In the case of an application for an avoidance of disposition order, the applicant must serve copies of the application on the person in whose favour the disposition is alleged to have been made.

(3) Where an application for a financial remedy includes an application relating to land, the applicant must serve a copy of the application on any mortgagee of whom particulars are given in the application.

(4) Any person served under paragraphs (1), (2) or (3) may make a request to the court in writing, within 14 days beginning with the date of service of the application, for a copy of the applicant's financial statement or any relevant part of that statement.

(5) Any person who –

(a) is served with copies of the application in accordance with paragraphs (1), (2) or (3); or

(b) receives a copy of a financial statement, or a relevant part of that statement, following an application made under paragraph (4),

may within 14 days beginning with the date of service or receipt file a statement in answer.

(6) Where a copy of an application is served under paragraphs (1), (2) or (3), the applicant must file a certificate of service at or before the first appointment.

(7) A statement in answer filed under paragraph (5) must be verified by a statement of truth.

Adding or removing parties

9.26B FPR

(1) The court may direct that a person or body be added as a party to proceedings for a financial remedy if –

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

(2) The court may direct that any person or body be removed as a party if it is not desirable for that person or body to be a party to the proceedings.

(3) If the court makes a direction for the addition or removal of a party under this rule, it may give consequential directions about –

(a) the service of a copy of the application form or other relevant documents on the new party; and

(b) the management of the proceedings.

(4) The power of the court under this rule to direct that a party be added or removed may be exercised either on the court's own initiative or on the application of an existing party or a person or body who wishes to become a party.

(5) An application for an order under this rule must be made in accordance with the Part 18 procedure and, unless the court directs otherwise, must be supported by evidence setting out the proposed new party's interest in or connection with the proceedings or, in the case of removal of a party, the reasons for removal.

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