

**IT'S ALL DOWN TO THE FARM**

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## **1. OVERVIEW**

- 1.1 Farming cases are often ones that Counsel love to get our teeth into, due to their diversity, challenges and complexities. I am not sure if the Judiciary share the same view, who ultimately must navigate themselves through a world of trusts, locked in assets, high emotions, and thrown in to the mix, is a dollop of tax.
- 1.2 Farming divorce describes the separation or division of agricultural operations, assets, or responsibilities, often arising from changes in ownership, partnership structures, or family arrangements. This process carries significant consequences for the management, structure, and future operations of farming enterprises and separating families.

## **2. FARM ASSETS**

- 2.1 A key aspect of farming divorce is the division of farm assets. Careful management and accurate assessment of these assets are essential to achieving a fair and orderly transition.
- 2.2 Many lawyers are advised to attend the farm for a site visit from the outset, together with obtaining title documents and land plans from the land registry. To ascertain the extent of the assets and what they are.
- 2.3 One has to consider various aspects. In particular “What is the farm being used for?.”
- (i) Equestrian;
  - (ii) dairy;
  - (iii) crops;
  - (iv) livestock sales,
  - (v) fisheries on the land;
  - (vi) static or touring caravans;
  - (vii) this list is not exhaustive.

### **3. VALUATION OF FARMS**

- 3.1 Proper valuation of the farm and its components is a necessary step in the process, supporting equitable outcomes and helping to guide future decisions regarding the operation or restructuring of the agricultural business if assets are to be liquidised.
- 3.2 The chosen expert's report will provide not only a current market value for each component but may also offer recommendations for practical division or transfer of assets based on the operational realities of the farm. A thorough, agreed-upon valuation helps to reduce the risk of future disagreements and lays the groundwork for fair negotiations, ensuring both transparency and clarity for all parties.
- 3.3 **BR v BR (2024) 2 FLR 217** Peel J emphasised that experts, in the ordinary course of events, be jointly instructed.
- 3.4 Lawyers are therefore well advised to try and agree, from the outset, an expert valuer to prepare a through report, to address all the relevant elements: -
- land, buildings, machinery, livestock, crops in the ground, and any associated farming entitlements or subsidies.
  - intangible assets, such as milk quotas, development potential, and even goodwill, depending on the structure of the enterprise.
  - the basis of ownership, to enable consideration as to whether separate dwellings or pieces of land can separate and sold or transferred to the other spouse.
  - is any part of the land rented and if so, what is the significance of that income to the business.
  - valuation of the business, its liquidity together with anything that may cause an issue and how that could be addressed.

- alternative use of the land.
- taxation issues and how that could be mitigated and who should pay.
- means of marketing for sale to include looking at the current markets, potential of interested parties, in particular neighbouring farm owners. Separation of the plots of land; dwellings.
- future profitability.

3.5 When considering a valuation, the court may consider different approaches. In the recent case of **HO v TL (2024)2 FLR 200** Peel J at para 20 – 27 observed: -

*‘[23] Third, I suggest that the reliability of a valuation will depend on a number of factors such as: (i) whether there are applicable comparable, (ii) how “niche” the business is, (iii) whether the business is to be valued on a net asset basis (for example a property company) or one of the recognised income approaches (such as EBITDA or DCF), (iv) the extent of the parties’ interests, and accordingly their level of control, (v) the extent of third party interests, (vi) the relevance of any shareholders’ agreements, (vii) whether there is a realistic market for sale, (viii) the volatility or otherwise of the figures, (ix) the reliability of forecasts, and (x) whether the assumptions underpinning the valuation are seriously in dispute.*

*[24] Fourth, in practice the choices for the court will be, per Moylan LJ in Martin v Martin [2018] EWCA Civ 2866 at para 93: (i) “fix” a value; (ii) order the asset to be sold; and, (iii) divide the asset in specie. The latter option (divide the asset in specie) is commonly referred to as Wells sharing (Wells v Wells [2002] EWCA Civ 476).*

*[25] Fifth, whether a business should be retained by one party, or sold, or divided in specie will depend on the facts of each case. Relevant features will include whether the business was founded during the marriage or pre-owned, whether it has its origins in one party's non-marital wealth, whether the parties were both involved in its strategy and operation, the ownership structure of the business, whether Wells sharing is practical or realistic given that it will usually continue to tie the parties together to some extent, and how to ensure a fair allocation of all the resources in any given case'.*

- 3.6 Once a comprehensive valuation is established, the parties can begin exploring practical solutions for dividing assets. These can range from outright sale and division of the proceeds, to partitioning the farm into separate working units, or arranging for one party to buy out the other's share. The chosen approach will depend on the nature of the assets, the wishes of those involved, and the long-term vision for the farm's future. Each option carries distinct advantages and challenges, requiring careful consideration of financial, operational, and personal factors.

#### 4. **LIQUIDITY**

- 4.1 Assessing the liquidity of farms is another critical consideration, as it determines the ease with which assets can be converted into cash to accommodate an award to the other party.
- 4.2 Unlike many other businesses, farmland, machinery, and livestock may not be readily sold without affecting the viability of the operation. Thus, balancing the need for liquidity with the desire to preserve the core functioning of the farm becomes a delicate negotiation, influencing both immediate outcomes and the long-term sustainability of agricultural enterprises.
- 4.3 There are many cases where the quantum of the award required a departure from equity due to the illiquidity of the business.

- 4.4 In **N v N (Financial Provision: Sale of Company) [2001] 2 FLR 69** Coleridge J at [71] acknowledged that illiquidity was a reason for departure from equality of division:

*'I am sure the House of Lords [in White] did not intend courts to exercise their far-reaching powers to achieve equality on paper if in doing so they, Samson-like, brought down or crippled the whole family's financial edifice to the ultimate detriment of the children (whose interests, of course, remain the top priority in this and every case). More than ever in the new climate, especially where the facts are similar to the present (where the award is likely to be larger than before White), the court, in my judgment, must be creative and sensitive to achieve an orderly redistribution of wealth, particularly where this involves the realisation of assets owned by either of the parties ...'*

- 4.5 **Wells v Wells (2002) 2 FLR 97 CA** Thorpe LJ stated:

*'In principle it seems to us that the separation of the family does not terminate the sharing of the results of the company's performance. That is easily achieved in any case in which the wife's dependency is met by continuing periodical payments. It is less easy to achieve in a clean-break case. In that situation, however, sharing is achieved by a fair division of both the copper-bottomed assets and the illiquid and risk-laden assets. After all, the wife was already a shareholder in Soundtracs and a substantial increase in her shareholding would at least have enabled her to participate in future prosperity by dividend receipts or capital receipts on sale or a cessation of trade. An increase in her share of the illiquid and risk-laden assets would have allowed a reduction in the Duxbury fund, if not in the housing fund. If profitability were not recovered, then both parties would share the experience of a marked reduction in standards of living.'*

- 4.6 **WM v HM (Financial Remedies: Sharing Principle: Special Contribution)**  
**[2017] EWFC 25, [2018] 1 FLR 313** Mostyn J stated:

*‘[29] I am aware that in Chai v Peng and Others Bodey J divided the “kitty” 60:40 in favour of the husband because the wife’s award would be largely cash or easily realisable assets: at para [140]. I do not adopt that approach. A valuation of an asset is the estimate of what it will sell for now. If it is perceived as being hard to realise then its value will be discounted to reflect that difficulty. It does seem to me to use discounted figures and then to move away from equality is to take into account realisation difficulties twice. Whatever the asset the only difference between it and its cash proceeds is, as Thorpe LJ once memorably said, the sound of the auctioneer’s hammer.’*

- 4.7 The appeal in **Martin v Martin [2018] EWCA Civ 2866, [2019] 2 FLR 291** Moylan LJ disagreed:

*‘[87] ... I propose to consider this in more detail, in particular because of the judge’s conclusion that there was no effective difference between the valuation of Dextra and its “cash proceeds” on a sale. The judge based his conclusion on the “auctioneer’s hammer” analogy and because he considered that the valuation was “the estimate of what it will sell for now” adding that, if “it is perceived as being hard to realise then its value will be discounted to reflect that difficulty” (at para [29]).*

*[88] I deal, first, with the judge’s reference to the “auctioneer’s hammer”. As Mr Marks demonstrated during the hearing, the judge’s reliance on what Thorpe LJ had said was misplaced and taken out of context. Thorpe LJ had not been referring to all assets but to a specific class of assets, namely “prime agricultural land”.*

4.8 The Golden Goose

4.9 In **N v N (Financial Provision: Sale of Company) [2001] 2 FLR 69** Coleridge J stated at p 80:

*‘There is no doubt that had this case been heard before the White decision last year, the court would have strained to prevent a disruption of the husband’s business and professional activities except to the minimum extent necessary to meet the wife’s needs. However, I think it must now be taken that those old taboos against selling the goose that lays the golden egg have largely been laid to rest; some would say not before time. Nowadays the goose may well have to go to market for sale, but if it is necessary to sell her it is essential that her condition be such that her egg laying abilities are damaged as little as possible in the process. Otherwise, there is a danger that the full value of the goose will not be achieved and the underlying basis of any order will turn out to be flawed.’*

4.10 In farming cases, the Judge’s having to be creative in trying to achieve fairness and the sustainability of the farm. In doing so, the court have made several different decisions to include: -

- Orders for sale – **N v N (Financial Provision: Sale of Company) [2001] 2 FLR 69**
- Payments of lumps sums for a termed period – **R v R (lump sum repayments) (2004)1 FLR 928**
- Variation of trusts (nuptial settlement) – **Ben Hashem v Al Shayif (2009) 1 FLR**



- Awarding substantial periodical payments in return for a smaller lump sum - **P v P (inherited property) (2005) 1 FLR 576.**
- Hiving off and selling part of the farm or transferring to the other party
- Transferring part of the illiquid assets to the other party
- Adjourning lump sum application
- Assignments of tenancies
- Transfer of dwelling to the spouse or deferred charge.

## **5. TAXATION**

- 5.1 Taxation is a major factor in the context of farming divorce. The transfer or sale of agricultural assets can trigger various tax implications, including capital gains tax, inheritance tax, and potential stamp duties, each of which may significantly impact the final division of assets between parties.
- 5.2 Careful planning is required to minimize tax liabilities and structure transactions in a manner that is both compliant and efficient. Professional advice is highly recommended to navigate complex regulations and to ensure that tax obligations do not unduly burden either party or jeopardize the ongoing viability of the farming operation.
- 5.3 The Autumn 2024 Budget announced that Business Asset Disposal Relief (otherwise known as “Entrepreneurs’ Relief prior to April 2020) remain at the current rate of 10% on a lifetime limit of £1m of qualifying capital gains for the remaining 24/25 tax year. However, any disposals after 6th April 2025 will increase to 14%, increasing to 18% for disposals after 6th April 2025.

- 5.4 We are also of course aware that CGT rates have increased from the lower rate 10% to 18% for non and basic rate taxpayers; 20% to 24% to for higher rate taxpayers brining into line all asset classes. Residential property gains already being taxed at 18% and 24%.

## 6. TRUSTS

- 6.1 MCA 1973, s 24(1)(c) provides that the court may make an order ‘varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement ... made on the parties to the marriage’.
- 6.2 The use of trusts in the agricultural sector adds another layer of complexity during divorce proceedings. Trust structures are often employed to protect farm assets, facilitate succession, and provide for multiple generations within a family, but their presence can complicate the division of property.
- 6.3 Depending on how a trust is established and managed, beneficiaries’ interests may be contingent or discretionary, and the legal ownership of assets might differ markedly from practical control. This can make the identification and valuation of trust-held assets challenging, especially when considering tax implications and the rights of each party involved.
- 6.4 Careful legal analysis is required to determine whether assets within a trust should be included in the marital estate, and how their distribution might affect the future operation of the farm. In some cases, trust arrangements can be leveraged to preserve the integrity of the farm business, shielding core assets from forced sale or fragmentation.
- 6.5 However, this must be balanced against the principles of fairness, transparency, and compliance with relevant legal standards. When trusts are involved, collaborative planning and the engagement of skilled advisors become even more crucial to

navigating these intricacies and ensuring outcomes that respect both the intentions of the trust's founder and the legitimate claims of all parties.

6.6 **Ben Hashem v Al Shayif [2008] EWHC 2380 (Fam), [2009] 1 FLR 115** per Munby J set out the principles when considering a variation: -

*“[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 nonbeneficiary free from all trusts. [...].*

*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. [...]*

*[291] Miss Parker submitted that the central theme which permeates these authorities is that it is permissible for the court to invade third party interests within the confines of the trust structure, but only to the extent that fairness so requires. It is acknowledged that in the generality of cases, the court should indeed be slow to do so. Broadly speaking, I accept that submission”.*

## **7. LAND AND REGULATORY CONSIDERATIONS**

- 7.1 Beyond taxation, legal and regulatory issues often influence the process of dividing farm assets ie implementation of any such Orders made.
- 7.2 Issues such as title transfers, partnership dissolution, and compliance with agricultural regulations must all be addressed to affect a lawful and orderly transition. Ensuring that all legal documents are updated and that new agreements clearly outline the rights and responsibilities of each party is crucial to prevent future disputes.

## **8. EMOTIONAL AND COMMUNITY IMPACTS**

- 8.1 Finally, it is important to recognise that farming divorce extends beyond financial and legal domains. It often carries significant emotional repercussions for those involved and can affect the broader rural community. Farms frequently serve as both homes and livelihoods, and their division can reshape family dynamics, disrupt established routines, and alter the fabric of rural life. Open communication, access to support networks, and sensitivity to the human dimension are essential in managing these transitions with compassion and foresight.

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