FARMING AND FINANCIAL REMEDIES (Class Legal Webinar)

Some farming issues relating to partnerships, companies, trusts and nuptial settlements

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Introduction

1. **"*Agriculture is our wisest pursuit because it will, in the end, contribute most to real wealth, good morals and happiness*"** wrote Thomas Jefferson to George Washington in the 1700s. Whilst agricultural pursuits conducted in the context of marital harmony may lead to such contributions, on divorce farming often proves to be a very divisive pursuit indeed. It then rarely contributes to wealth, good morals or general contentment….!

2. These notes deal with a few knotty problems in financial remedy cases involving farms and farmers; in particular, matters of cash-extraction and case-resolution. Farming cases have several characteristics that combine to justify a fair argument for a whole different set of rules for such matters to those set out in section 25 of the MCA 1973. However, whatever those characteristics may be, the resolution of farming cases must, of course, be conducted within familiar legal territory but often by touching upon lesser-used concepts and mechanisms.

3. Most farming cases that settle do so based on a family-based agreement, for example, with the remaining farmer and family members agreeing to a method – utilising wider family monies - to buy out the other party on a clean break.

4. For those that do not settle, thorny issues can arise involving partnership and company law, trust analysis and more creative approaches to extraction of value to the outgoing party.

5. A few examples of the problems often incurred in farming cases (beyond valuation) are as follows:

    a. The farm may be held within a company structure / there may be minority interests
    b. Shares in a company structure may be held by a number of different family members
    c. Farms (land and property) often have a non-matrimonial / inherited source
    d. The farmland and property may be subject to trust structures
    e. The farm may be the source of one party's income (and perhaps the rest of the wider family)
    f. Farmsteads may be tenanted or involve few assets of a realisable nature, otherwise being necessary for the income-generation of the farm
    g. Farmland may not be appropriate collateral for commercial lending
    h. The farm estate may contain properties suitable in size but not location for the separated party to live in
    i. The farm itself may meet a huge number of 'living' expenses otherwise payable from income received in a standard fashion [in a non-farming case]
    j. Farm income may be 'deflated' for tax purposes or to limit the [income] claims of the separating spouse

6. These notes highlight a few issues relating to partnerships, companies, and trusts/nuptial settlements in the wider context of value-extraction if the sale of part - or all - of a farm is not contemplated or plausible.

7. Value extraction is the conundrum of keeping the farm alive whilst providing for the departing party. It is a problem oft encountered, for example in **R v R (Lump Sum Repayments) [2004] 1 FLR 928**: the issue 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*"

PARTNERSHIPS

Partnership property / property of the partnership

8. Farms are often operated under a partnership.

9. Partnership law has some unusual features, several 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 value extraction after a divorce.

10. '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 being property *of the partnership*). This is necessary to determine what resources may realistically fall within section 25 MCA 1973.

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

12. 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. Partnership law is complex and this note provides a starting point for further investigations.

13. 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.

14. 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[1]. The partnership accounts – so often called on to analyse and discern the assets of the partnership – are not *necessarily* definitive! An example of this is the 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 at historic cost from 1998 until 2003 (when a new accountant removed it). The parents (Ron had sadly died) claimed that the appearance of the farm in the new accounts was a mistake. John did not claim that there was an express agreement that the farm was to be an asset of the new partnership but rather relied on an agreement implied from the parties' conduct.

15. The court in **Ham v Bell** 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. 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*..." 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*."

(From **Ham v Bell**, para 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.*

(From **Ham v Bell**, para 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 purposes of the partnership and in accordance with the Partnership Agreement. The legal estate of any such*

[1] Although the partnership accounts will often provide the best form of evidence of assets deemed by the partners to be 'assets of the partnership', this may not always be the case

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:

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 parents 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 incontrovertible 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 could be disregarded.

16. (From **Ham v Bell**, para 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 incidentally also demonstrated his ability to put his own point across when he needed to do so. (3) The conversation 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 apparent acceptance in his pleadings that the farmland was not a partnership asset until a reamended pleading 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 somewhat unconvincing attempt to depart from this in paragraphs 4, 5, 6, 9 and 18 in his second witness statement 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.

Partnership accounts and reliance

17. In all partnership cases, the partnership deed or agreement (if there is one) is the first port of call to determine how the partnership was constituted and the extent of the partnership assets. If the partnership accounts have been signed by the partners, there will often be a clause holding those partners to the accuracy of what is stated within those accounts. This clause can be very useful in satisfying the matrimonial court that certain assets or debts are indeed assets or debts 'of the partnership' (as opposed to being personal).

Look for the following type of clause, which should be included in any good partnership agreement:

> *"On the 31 day of January in each year an account shall be taken of all assets and liabilities of the partnership and a balance sheet and profit and loss account showing what is due to each partner in respect of capital and share of profits and salary shall be prepared and shall be signed by each partner who shall be bound thereby unless some manifest error shall be found therein within three (3) months in which case such error shall be rectified".*

Partners as a principal and agent

18. 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). 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. 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).

19. Query 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 payment of the money pursuant to the indemnity: may such a right represent a *chose in action* capable of transfer to a husband or wife non-partner pursuant to a property adjustment order?

VALUE EXTRACTION: LUMP SUM INSTALMENTS / LUMP SUM SERIES AND SECURITY

Value extraction

20. In a farming case, liquidity is often the most complex issue to overcome. On occasion, an agricultural expert may be instructed to provide an opinion on certain parcels of land that may be capable of sale while retaining a viable farming enterprise. Alternatively, commercial lending may be available to raise funds (and the burden is on the person with assets to demonstrate an inability to borrow on the security of them, see **Newton v Newton [1990] 1 FLR 33).** If these methods are impossible or impractical – but the farm is able to generate a decent income – a lump sum by instalments or a series of lump sums over time may be an option to satisfy the capital claims of the outgoing spouse.

21. **R v R [2004]** (above) remains the best example of a lump sum by instalments order in this context. In R v R the husband was a farmer running his activities through a family company (and with a 6.18% shareholding). The total value of the company amounted to circa £3.8m. There were few other assets of note. The husband had a realistic earning capacity of £60,000 p.a. by virtue of his shareholding and work. The company was unwilling to provide a 'family solution' sufficient to meet the wife's needs. The company paid for a significant number of the husband's usual outgoings.

22. In **R v R [2004]** (on appeal) Wilson J imposed the following:
    a. H to pay W a lump sum in monthly instalments (akin to a periodical payments order) for a period of 20 years to satisfy W's repayment mortgage obligations over that same period
    b. The lump sum by instalments, in contrast to a periodical payments order, provided for security beyond the re-marriage of the wife
    c. The lump sum acted to bind H's estate should he die
    d. The lump sum is variable as to timing and, in exceptional circumstances, quantum (but ensure the order is compliant with **Hamilton v Hamilton [2013] EWCA Civ 13** depending on whether it is a series of lump sums or instalments): "*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*…"
    e. H's 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)

23. This R v R solution requires sufficient income of the pater to enable such payments to be made (as payment is likely from the partnership income or, in a company case, from the salary and dividends of the farming party).

24. Practical matters to address if pursuing / defending an R v R solution:
    a. Obtain mortgage quotes for the payee
    b. Obtain approval in principle from the mortgage lender
    c. Focus on the viable income potential of the farm / other income of the payer
    d. Consider seeking an undertaking of the payer to act as guarantor
    e. Carefully draft security for the lump sum instalment payments (with a legal charge drafted and appended to any financial remedy order), for example:

"It is further recorded that the [payer] shall, pursuant to the undertaking at paragraph [x] above, and within 28 days of the date of this Order, execute a charge in the form annexed to this Order securing the obligations and payments described in paragraphs [x] against the [security name]. The [payer] further agrees that in the event of any default in performance of the obligations described in paragraphs [x] above going unremedied for a [insert], the [payee] shall immediately have the right to, at her/his sole election: (a) appoint a receiver under section 101 of the Law of Property Act 1925, and that such receiver shall have the power to sell the [security name]; or (b) to seek an order for sale of the [security name], to which the [payer] hereby irrevocably agrees to consent."

VALUE EXTRACTION: VARIATION OF A NUPTIAL SETTLEMENT

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

26. This power is wide and, potentially, very useful but is often shrouded in complicated and 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.

27. 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*….'

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

29. 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."

30. 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 farmland 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 to enable the farm to be retained in specie.

31. Care must be taken to discern which assets are actually held within the trust. Take the example of the matrimonial home, being a farmhouse. If the matrimonial home has been settled on trust, that trust may extend to the whole beneficial interest in the farmhouse or to just a right to occupy.

32. <u>D v D & Others and the I Trust [2011] 2 FLR 29</u>

33. In D v D the farm was valued at £3.2m gross of CGT and costs of sale. The farm was held by a trust: the core issue was what asset was held by the trust: the beneficial interest in the farmhouse or merely the husband's right to occupy?

34. The farm property had been occupied by H prior to marriage and, thereafter, as the FMH between 1995 and 1999. H denied any beneficial interest in the farm, stating that it was held (via companies) by the Trust for the benefit of his children and sister. He relied on a licence granted by the Trust as the basis of his occupation of the farm.

35. The parties had 2 children (14 and 13). W was 53 years of age and H 71. Parties met in 1989, married in 1994 and separated circa 1999. The parties remained in a sort of 'marital limbo' until 2005 when W pursued divorce proceedings.

36. The court made findings against H that he was "*without much compunction, accustomed to tailoring his evidence so as to fit the needs of the moment*" (para 22).

37. The court approached W's claim based on her financial needs due to the existence of pre-marital property (the farm).

38. The Trust had been established in 1997 with H as settlor (even though he denied this). The Trust owned the farm through two corporate entities. H claimed the beneficiaries were two others and the two children of the marriage.

39. The farm income was collected by H and used for his family (and not passed to the stated beneficiaries of the trust). H lived at the farm throughout. W did not suggest the trust was a sham, but the evidence showed that it had operated for the benefit of both H and H and W throughout its existence. The trust had no written terms. In 2004 H had attempted to obtain the farmhouse's transfer to himself from the trust for the purpose of raising funds to renovate cottages nearby and to buy a stud farm for the wife. It was clear evidence, therefore, that he felt able to direct the trustees "*to do his bidding*" (para 80).

40. The court determined that H and W derived a benefit from the farm because it provided a home for H throughout and for H and W from 1995 to 1999. The court also found that "*that both husband and wife lived off and, therefore, derived a benefit from the income which the whole of the farming (in its loosest sense) enterprise engendered. In line with the authorities which I have cited this produces a sufficient nuptial element to convince me that the entire property and, therefore, the trust which holds its ultimate title (through the two BVI entities) constitute a post-nuptial settlement which I am at liberty to vary as I consider fair and just after the application of the criteria set out in s 25 of the Act."*

41. The Trust was ultimately varied so as to provide to W a lump sum of £756,000 (£350,000 housing fund and £400,000 Duxbury fund) plus a payment towards W's costs.

42. **AB v CB & Another [2014] EWHC 2998 (Fam)** – appealed in P v P but without change to core determination of Mostyn J at first instance.

43. W aged 44 and H aged 41. On paper, H had almost no assets. H's family were from Pembrokeshire and they were a distinguished and landed bunch. The parties met in 1999 and moved to Pembrokeshire in 2002; married in 2003. They both worked in media consultancy through a joint business venture. The parties adopted a child in 2011 and another in 2012 but separated at the same time. H adopted the second child alone in 2014.

44. In 2004 a property (a derelict cottage) on H's parent's estate was gifted to H and W: this was renovated by the pair with their own money and sold in July 2004. The profits were spent on repaying debts, £21,000 was spent on the new home (the farmhouse) and a further £21,000 was spent on the 'stuff of life'.

45. The farmhouse was also on the parent's estate. It was renovated by the pair, partly with the profit of £21,000. Title to the farmhouse was held by H's father and mother.

46. A Trust was established in 2009 in relation to the farmhouse. The intention of H's father in settling the trust was to grant a long lease to H. A disclosed letter to the bank manager from H's father stated as follows:

"Can I make progress on the above, if possible before the Christmas break, this concerns the transfer of the XX Farmhouse into trust to make provision for a home there for our younger son CB and his wife, something I have mentioned to you recently. This will make necessary the release of the house from the farm mortgage. Management of the housing development over the next few years will be a demanding full-time occupation and CB will need to live close by and attend the office there most days and this is the only suitable house available. The point of putting the house into trust is to ensure that in the long term it remains available as a farm or estate asset…."

47. The principal beneficiary of the trust was H and the discretionary beneficiaries were the parties' children and remote descendants. The Trust fund was just the farmhouse. The trust included a clause granting power to the trustees to transfer to H the ***whole or part of the trust fund absolutely.***

48. W claimed no knowledge of the trust until the divorce. However, Mostyn J was clear in his decision that she knew that the farmhouse was not owned by the pair, nor would it be owned by them. The Judge found that her understanding was that the parties could stay for their lives in the farmhouse, but it would then revert to the family estate.

49. Value of the farmhouse agreed at £325,000.

50. The trustees intervened in the case. They argued the trust was not a nuptial settlement or, if it was, the only element capable of variation by the family court was H's right to occupy.

51. The court noted that a settlement that affects property does not necessarily "*capture all of that property"* (para 46). What does this mean? The trust can extend to the beneficial interest in the property in full (or in part) or, for example, to a lease granted in relation to the property or to a mere right to occupy (a licence).

52. In **AB v CB** para 5.2 of the trust was the *killer clause* for H's case, although each case is a matter of construction. Para 5.2 provided that the trustees could "*at any time during the lifetime of CB as to the whole or part of the trust fund (so for these purposes that means the farmhouse) transfer it to him absolutely or…. raise money on it for his benefit as they may determine in their absolute discretion*." For Mostyn, J, this clause allowed the trust to be construed to include the whole benefit of the farmhouse rather than just the right to occupy the property for life (on licence or pursuant to a lease).

" Had clause 5.2 not been present I might have reached a different decision, it would then have been more borderline. However, the existence of clause 5.2, which gives the trustees the specific power to advance all of the property to the husband during his lifetime, in my view makes clear to me that this settlement as a whole, and all of the property which it captures, is to be regarded as a variable nuptial settlement."

53. The other important question to consider in any variation case is as to how the court should exercise its powers if a trust is deemed to be nuptial and variable? At this stage the court will need to revert to all the familiar section 25 factors along with a construction of the trust document itself and with an eye to the rights of other beneficiaries under the trust. Should the court vary the trust so as to extract cash or to provide a right to occupy to the other (non-occupying) spouse, for example?

54. It is useful to analyse a case by setting out the key for and against arguments on both sides

Analysis example…

For	**Against**
Clause 5.2	The intention of the settlor
Farmhouse is/was FMH	Knowledge of parties of ultimate reversion
Contributions made to FMH development	Farmhouse not largely the product of marital endeavour

55. In **AB v CB** the parties had invested £36,000 of marital funds in the development of the farmhouse along with W's own funds of £5,000. She was therefore entitled to £18,000 (50% of £36,000) + £5,000 outright.

AB v CB Para 60. "Now, in my judgment justice in this case, reflecting the sharing principle in relation to the core element of matrimonial property and, at the same time, the existence of the trust and its purpose, entitles the wife to a further award, but not on an outright basis from the trust. Half of the net value of the farmhouse is £157,000. She will be getting £23,000 outright, so that leaves £134,000. That sum will be extracted from the trust and appointed to the wife, but on the terms of a life tenancy. There will be independent trustees, no power of advancement, and on her death the sum will revert to the estate. The details will need to be sorted out in circumstances which I will mention. It therefore follows that the trust will be varied to create a wife's fund, of which £23,000 will be outright and £134,000 will be on the life tenancy terms which I have mentioned."

56. Mostyn J also found that H's family would likely satisfy the order without having to sell the farmhouse (and, therefore, lose the home for H)

57. <u>AB v CB on appeal in P v P [2015] EWCA Civ 447 (the appeal had its focus partly on the rights of the third-party beneficiaries under the trust)</u>

Court of Appeal, P v P para *[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 cl 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."

<u>Postscript – important procedural stages/elements in relation to a variation of settlement application.</u>

Form E

(para 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 beneficiaries)

Children are 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.

MINORITY DISCOUNTS AND COMPANIES

58. If a farming enterprise is owned by and operated under a limited company structure, this will often be the subject of a valuation by an expert. If that limited company has shares divided between various family members, the expert may be asked to comment on the familiar notion of a [minority] discount to be applied to, for example, the husband's shareholding therein.

59. Beware of this principle. It may apply with force in certain cases but often the *family-type, multi-generational nature* of farming businesses – where most shareholders are, in reality, close family members with aligned objectives – a minority discount may be inappropriate.

60. A few useful cases (establishing general principles and not specifically related to farming) are as follows:

61. FRB v DCA [No 2] [2020] EWHC 754 (Fam)

62. The expert valued companies and provided an opinion on the application (or not) of minority discounts (which is ultimately a factual decision for the Judge). The expert applied a lesser discount than normal to reflect the fact that the purchaser would find a ready market for the shares within the family. All the shareholdings in the companies were held by entities completely under the wider family's control.

63. Cohen J stated that*: " para 120. This is the perfect example of the quasi-partnership to which a discount* ***will not attach.*** *I accept that if an outsider was to buy into one of these companies he or she would expect a discount, but it is in my judgment inconceivable that any outsider would either be permitted ownership or be interested in acquiring it. Nor could I imagine why an outsider would want to invest if he would not have any control. I refer also to what I say at paragraphs 133 onwards as to movement of resources. There is no history of family members acting to the detriment of other family members. On the contrary, they assist each other."*

64. **<u>RM v TM [2020] EWFC 41 (Robert Peel QC sitting as a Deputy High Court Judge)</u>**

65. W held a 24% shareholding in two businesses amounting to circa £364,000 (pro rata).

66. The issue arose as to whether a minority discount should apply to the valuation of W's shareholding as assessed by the family court. The case has some useful pointers when dealing with this question, which often cross-over with company law principles (emphasis in bold added):

67. *"59. Where I part from the SJE is his value of W's pro rata share of each business. She owns 24% which computes at £282,000 gross (A Ltd.) and £82,560 gross (B Ltd.). The SJE has applied a 50% discount to those figures to reflect the minority shareholding**. I do not agree. These are family businesses. The family is likely to act in concert on major decisions, such as sale; W has not involved herself and has always been content simply to fall in with the other shareholders. There is no suggestion that W would contemplate a sale of her shares alone. Their personal relationships are strong, with no evidence of major internal disputes or quarrels. They have rallied around W during the proceedings. This, in my judgment, bears all the hallmarks of a quasi-partnership and I will therefore not attribute a valuation discount (see Coleridge J in G v G [2002] EWHC 1339). In fairness, the SJE acknowledged that quasi-partnership was a matter for the court rather than him, he had not been instructed to comment on it, he had not considered it and it was outside his expertise."***

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<u>ST JOHN'S CHAMBERS</u>

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