FARMING & FINANCIAL REMEDIES

(Class Legal Webinar)

Brexit, Subsidies and Quotas – What now?

White v White – Whatever happened to equality?

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Brexit, Subsidies and Quotas – What now?

"In all affairs it's a healthy thing now and then to hang a question mark on the things you have long taken for granted." Bertrand Russell.

1. As if the uncertainty of a global pandemic were not complication enough the end of the transition period on 31/12/20 means that the UK has now left the EU and fundamentally changed its relationship with one of its closest political allies and biggest trading partner. There was a point in time at which this talk looked like it was going to be all about World Trade Organisation (WTO) terms, however we now have a trade deal. Sadly that does not mean that all question marks can now be removed, as the devil is in the detail and a lot of the detail of the future of farming outside the EU remains to be resolved.

2. Leaving the EU meant that the UK left the EU's Common Agricultural Policy ('CAP'). This paid UK farmers c. £3.5 billion per annum, 80% of which were direct payments. This was a significant source of income for some farmers to the extent that many UK farms would not have made a profit without CAP support. DEFRA

estimated in 2018 that without direct payments some 42% of farms had costs exceeding their revenue.

3. On average direct payments made up 9% of UK farm gross revenue between 2104 – 2017; however, this primarily benefited larger farms with 10% of claimants receiving 50% of the funding in England and 33% of farms receiving less than £5k each.

4. The importance of these payments also varied considerably by sector with the payments making up a large part of farm income for hill farmers, but not for poultry farmers[1].

5. The support was of varying importance between areas of the UK with Welsh farmers being most reliant on CAP payments and English farmers least reliant.

6. The extent to which the withdrawal from the CAP and the inevitable changes that this will mean will have an impact on individual cases therefore varies widely. The Government has guaranteed the overall annual farm budget for each year of this Parliament[2], although not thereafter which means that these payments will now be subject to changes as part of future government spending reviews.

7. As agriculture is a devolved area these changes also mean that each administration of the UK will be able to develop their own policies, meaning different conditions are likely to apply in England, Wales and Scotland with Northern Ireland clearly differing the most.

[1] Defra, Agriculture Bill: Analysis and Economic Rationales for Government intervention Figure 12

[2] HM Treasury press release, Farmers' £3 billion support confirmed in time for 2020, 30 December 2019

8. The extent to which payments to farmers will remain at current levels beyond the relatively short guaranteed period in the circumstances of a record financial deficit must also give us pause when looking at future profitability of farms and farming businesses.

9. Following Brexit the detail of the changes to financial support for farmers is largely contained in The Agriculture Act 2020 which received Royal Assent on 11/11/20.

<u>So what does the Agriculture Act 2020 do?</u>

10. It provides enabling powers for Ministers to develop new farm support approaches in England. New schemes to pay farmers for producing 'public goods' such as environmental or animal welfare improvements and delivering public benefits such as air and water quality, public access and productivity have been introduced. These are called Environmental Land Management ('ELM') Schemes. The list of purposes are set out in s.1 of the Act:

    1. The Secretary of State may give financial assistance for or in connection with any one or more of the following purposes—
        a. managing land or water in a way that protects or improves the environment;
        b. supporting public access to and enjoyment of the countryside, farmland or woodland and better understanding of the environment;
        c. managing land or water in a way that maintains, restores or enhances cultural or natural heritage;
        d. managing land, water or livestock in a way that mitigates or adapts to climate change;
        e. managing land or water in a way that prevents, reduces or protects from environmental hazards;

f. protecting or improving the health or welfare of livestock;

g. conserving native livestock, native equines or genetic resources relating to any such animal;

h. protecting or improving the health of plants;

i. conserving plants grown or used in carrying on an agricultural, horticultural or forestry activity, their wild relatives or genetic resources relating to any such plant;

j. protecting or improving the quality of soil.

2. The Secretary of State may also give financial assistance for or in connection with either or both of the following purposes—

a. starting, or improving the productivity of, an agricultural, horticultural or forestry activity;

b. supporting ancillary activities carried on, or to be carried on, by or for a producer

[…]

5. For the purposes of this section—

"ancillary activities" means selling, marketing, preparing, packaging, processing or distributing products deriving from an agricultural, horticultural or forestry activity;

"better understanding of the environment" includes better understanding of agroecology;

"conserving" includes restoring or enhancing—

(a) a population of a relevant species;

(b) in the case of animals or plants in the wild, a habitat;

"cultural or natural heritage" includes uplands and other landscapes;

"improving productivity", in relation to carrying on an activity, includes—

(a) improving the quality of any products deriving from the activity, and

(b) improving the efficiency of the activity in terms of the resources used in, or in connection with, it;

"livestock" includes any creature kept for the production of food, drink, oils, fibres or leathers, or for the purpose of its use in the farming of land;

"producer" means a person who carries on, or is to carry on, an agricultural, horticultural or forestry activity.

9. What is immediately apparent is the lack of any specific subsidies, quotas or defined basis for payment. Direct payments to farmers are currently based on how much land is farmed. These will be phased out starting in 2021 over a 7 year period. Thereafter the government will produce a multi-annual finance assistance plan for at least the next 5 years[3]. The payments will be reported on annually[4] and the impact of the financial assistance must be monitored[5]. This gives no certainty as to how payments will be allocated in future.

10. The Act gives Ministers powers to intervene in agricultural markets in exceptional conditions, such as to provide farmers with financial support or operate public intervention and private storage aid schemes; How these powers will be used is as yet unclear as none of the detail has been prescribed.

11. The Act sets out measures to increase transparency and fairness in the supply chain for farmers and food producers. It does this by: introducing new requirements on collection and sharing of data; by placing fair dealing obligations on business purchasers of agricultural products; and by introducing new measures on Producer Organisations.

[3] s4 Agriculture Act 2020
[4] s5 Agriculture Act 2020
[5] s6 Agriculture Act 2020

However, the Act has increased the reach of the fair dealing measures so that any business purchaser must comply and a wider range of people selling products can benefit from the provisions; There is thus little sign of the suggested bonfire of the red tape that Brexit was supposed to provide.

12. The Act includes measures on marketing standards and carcass classification. For example, to amend or revoke EU and domestic legislation or to set new standards tailored to suit UK agricultural sectors. This includes clauses on certification of organic products. These broadly mirror existing provisions.

13. It also sets out provisions to enable the UK to meet its obligations under the World Trade Organisation Agreement on Agriculture. These measures will be largely superseded by the terms of the EU – UK trade deal, but a lot of the detail of that has yet to be worked out with detailed provisions being agreed over time sector by sector.

14. The Act gives the government considerable scope to make changes and the detail of how this and the new trading relationship with the EU will affect farms and farming businesses remains to be seen.

<u>What does this mean for our current and future cases?</u>

15. My view is that the key take-aways for farms on divorce are:

    i. <u>When it comes to farm businesses, past trading history may not be as good an indicator of future performance as previously</u>: this will depend on the extent to which the farm or farm business was supported by the CAP and the extent to which they can pivot to meet the new criteria for support that the government is proposing to phase in. The phase in period will provide some cushion but as most farmers think in terms of multiple generations this will need to be carefully considered.

ii. What about diversification? A lot of farm businesses have maintained profitability through diversification into other areas. The most profitable crop for farmers in parts of the South West and Wales has increasingly become tourists. The Agriculture Act suggests an emphasis on conservation and environment which may pose challenges for these businesses; however the importance of public access may provide increased support.

iii. The 7 year phase out of payments will need to be factored in to valuations of businesses: this is an absolutely crucial point in particular in current cases and in cases over the next 1 – 5 years during which (hopefully!) the detail of how the new payment scheme will work can be clarified and then factored in to valuation of agricultural businesses.

iv. Farm land values may well be affected given the significant shift in emphasis toward environmental factors in payments: some farms will find it easier to meet a new more environmental focus than others and this will inevitable have an impact on the way in which land is valued. Fields which has previously been considered of lower value as they were more difficult to access for, e.g. crop planting, may now be repurposed to meet conservation or environmental aims. The public footpaths running through land may now be seen as less of a nuisance and more a source of income.

v. Expert assessment and the selection of the right experts will be more important than ever: this follows as a matter of course from the points highlighted above. The smart land valuers and agricultural experts have already been working on understanding of the new standards and consideration of the impact of these. When it comes to farm land values in city-approximate areas I would also expect your experts to be able to give informed opinions on the changes in land values as a result of the recent

changes in planning regimes. Close scrutiny of expert assessments will be required in the near future to ensure that they have factored in the coming changes.

White v White – Whatever Happened To Equality?

"fairness, like beauty, lies in the eye of the beholder" – Lord Nicholls.

16. White v White [2000] 2 FLR 981 is arguably one of the most important cases in financial remedy law. It was the first case in which the House of Lords was asked to consider how the Matrimonial Causes Act 1973 should be interpreted. I have heard it said that every divorcing wife should be personally thanking Mrs White for her bravery. I have also more cynically heard it said that any financial remedy lawyer dealing with international divorce cases in this jurisdiction should be thanking her and it is certainly true that this case has been 'blamed' for making London the divorce capital of the world.

The Facts:

17. Martin and Pamela White were married in September 1961. She was 26 years old, he was almost 24. They had three children, one of whom died and two of whom were adults at the time of the case. The marriage broke down in 1994. A divorce decree nisi was granted in December 1995, and this was made absolute in May 1997. Cross-applications for ancillary financial relief were filed. Throughout their marriage Mr and Mrs White carried on a dairy farming business in partnership. They both came from farming families. The business was successful. At the outset each of them contributed, in cash or in kind, a more or less equal amount of capital, of about £2000. A year after their marriage they bought a farm of their own in Somerset: Blagroves Farm which comprised 160 acres of land together with a fine Jacobean house which was the FMH. The price was £32,000. Of this, £21,000 was borrowed on mortgage. Mr White's father made them an interest-free loan of £11,000, together with a further £3,000 used as working capital.

18. Over time, they bought further land, substantially increasing the size of the farm. Eventually the farm comprised 337 acres. Throughout, Blagroves Farm and all the land were held by the two of them jointly. The whole was treated as property of the farming partnership. In 1974 Mr White's father released his loan. Initially this was reflected in an increase in Mr White's partnership capital account. Ten years later Mr and Mrs White's capital accounts were merged into a single joint capital account. Blagroves Farm, with its live and dead stock and machinery, together with milk quota, were Mr and Mrs White's principal assets. At the end of 1996, when the applications came before Holman J, these items were worth, in round figures, £3.5 million.

19. Mr and Mrs White also farmed Rexton Farm as part of their partnership business. This farm also comprised over 300 acres. Rexton Farm was 10 miles from Blagroves Farm, but the two were run as a single unit. Rexton was part of the Willett estate. Mr White's father bought this estate in 1971 at an advantageous price, mainly with the assistance of borrowings. Later he transferred the estate into the joint names of himself and his three sons. The four of them held the estate in equal shares. Mr White's share of the cost of borrowing, in the form of interest and endowment premiums, was met, through a tenancy agreement, by the Whites' farming partnership. In 1993 Mr White acquired Rexton Farm, subject to a mortgage debt of £137,000, as his partitioned share of the Willett estate. Rexton Farm, as distinct from the farming business carried on at the farm, was held in Mr White's sole name. Unlike Blagroves Farm, it was not in joint names, nor was it treated as belonging to the Whites' partnership. Rexton Farm was worth £1.25 million.

20. Mr and Mrs White had also made pension provision for themselves. A substantial mortgage was outstanding on both farms. After deduction of estimated liabilities for capital gains tax and costs of sale, the overall net worth of Mr and Mrs White's assets was, in round figures, £4.6 million. This comprised, on the figures found and used by

the judge: Mrs White's sole property: £193,300 (mostly pension provision); her share of property owned jointly, either directly or through the partnership: £1,334,000; Mr White's share of jointly owned property: £1,334,000; and Mr White's sole property: £1,783,500 (mostly Rexton Farm).

The proceedings[6]:

First Instance:

21. At first instance Holman J decided that Mrs White *reasonably required*[7] £980,000. This was to be satisfied by payment of £800,000 and by her keeping her sole assets. On being paid this amount, Mrs White was to transfer all the jointly owned assets to Mr White. Thus, under this order, Mrs White was to receive slightly over one-fifth of their total assets.

22. Holman J's reasoning can be summarised as follows. Neither party had any earning capacity outside farming. Mrs White's wish to have enough money to enable her to buy a farm of her own was not a reasonable requirement. It was unwise and unjustifiable to break up the existing, established farming enterprise so that she could embark, much more speculatively, on another. Her housing and financial needs were a farmhouse type of home, with stabling and 25 acres of land for her horses, costing £425,000. She needed a net annual spendable income of £40,000. Capitalised, having due regard to her age, a net income of this amount called for a 'Duxbury' fund of £550,000. This provision for Mrs White would leave Mr White with an amount exceeding his reasonable requirements simply in terms of a home and income. But, additionally, he reasonably required to be able to continue farming in a worthwhile way. The financial contributions from his family made this reasonable.

Court of Appeal:

[6] The applications proceeded at all stages on a 'clean break' basis

[7] Emphasis added

23. Mrs White appealed to the Court of Appeal. Her appeal was successful ([1998] 2 FLR 310, [1999] 2 WLR 1213). The Court of Appeal (Butler-Sloss, Thorpe and Mantell LJJ) increased the amount of her payment from £800,000 to £1.5 million. On the judge's figures, and after deducting £310,000, representing the parties' costs in both courts, this meant that Mrs White's share of the total assets would be increased to about two-fifths.

24. Thorpe LJ regarded the farming partnership as the dominant feature in the case. Mrs White was entitled to use her share as she thought fit. Only insofar as she sought additional capital from Mr White was the judge entitled to evaluate critically the use to which such additional capital was proposed to be put. There was no fairness in an outcome which involved a transfer of property order in favour of Mr White. The court did not have the material to assess how much Mrs White would have been entitled to receive on dissolution of the partnership. But, having regard to the parties' contributions and the goal of overall fairness, the provision for Mrs White should be increased by a further £700,000. Mantell LJ agreed. Butler-Sloss LJ considered that Mrs White was entitled to more than her partnership share, to recognise the contribution she made to the family as wife and mother over and above her partnership role in the farming business. Mr White would still be able to continue to farm, even if on a reduced scale.

25. Mr White appealed seeking the restoration of Holman J's order. Mrs White cross-appealed seeking an order giving her an equal share in all the assets.

<u>What were the Key Issues</u>?

26. <u>Recognition of equal contributions by the homemaker:</u> the court recognised equality of contribution made by Mr and Mrs White over their 33 years of married life. The judge found that each party contributed a great deal of effort to the marriage and the welfare of the family. Within the home it was the wife who primarily brought up the children,

and she also worked hard in all sorts of ways on the farm. Mr White was a hardworking and active farmer. Holman J said:

> "In truth this was a marital and also a business partnership in which, by their efforts and commitment, each contributed to the full for 33 years, and any attempt to weigh the respective contributions of their effort is idle and unreal."

27. This was approved by the House of Lords who went on to say:

> "In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party"

28. This may not now seem so radical, but it was at the time. This also led to the famous rarely spotted yardstick of equality as the House of Lords urged any first instance judge considering an unequal division of assets to "check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination."

29. <u>The end of "reasonable requirements"</u>: the term had been come to be seen as synonymous with "needs" and used as a significantly limiting factor on the award made to (usually) wives by the courts. The House of Lords deprecated this approach and

steered us back towards the statutory language of "needs" and that these are only one of the factors which should be considered.

30. How to treat inheritance: the assets of Mr and Mrs White did not derive wholly from their own efforts. Without the initial loan of £14,000 from Mr White's father, the young couple would not have been able to acquire their own farm when they did. The advantageous terms on which Mr White acquired Rexton Farm stemmed from his father's purchase of the Willett estate. The approach of the House of Lords arguably set the tone for the way in which inherited assets are now treated:

> "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."

31. The House of Lords upheld the Court of Appeal's division of assets 43% to Mrs White and 57% to Mr White.

Whatever happened to equality?

32. It was not long after White v White itself that reasons to depart from application of the yardstick of equality were found. In N v N (FINANCIAL PROVISION: SALE OF COMPANY) - [2001] 2 FLR 69 Coleridge J took the view that the theory of equality was all well and good, but impractical:

> "As is glaringly apparent from this case, the theory behind White is one thing. But the actual practicalities involved in valuing, dividing up, and/or realising certain species of assets make the attaining of the White objective sometimes either

impossible or only achievable at a cost which may not overall be in the family's best interests. In this regard of one thing I am convinced. I am sure the House of Lords 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."

33. In that case W received more like 40% of the matrimonial assets over time on the basis that H's business needed to continue with as little disruption as possible to ensure it retained its value and viability.

34. In S v S (FINANCIAL PROVISION: DEPARTING FROM EQUALITY) [2001] 2 FLR 246 the grounds for departing from equality were H's second wife and family. The court held that the award of £400,000 to W, required to achieve equality, would discriminate against H. On the facts, such an award would mean that W lived in luxury, while for H with a new family to support, things would be much tighter. The judge took the view that if an agreement was harder on one party than the other, then there was good reason to depart from equality. The court should aim to provide both parties with a comfortable house and sufficient money to discharge their needs and obligations. On that basis there would be an order for the husband to transfer to the wife his half-share of the matrimonial home and of the joint investments, and to pay to her a lump sum of £300,000.

35. Cowan v Cowan (2001) EWCA Civ 679 - [2001] 2 FLR 192 was the key case in which the court explicitly emphasised fairness over equality and Thorpe LJ defined the yardstick of equality as a cross-check and not a rule:

> "The decision in White clearly does not introduce a rule of equality. The yardstick of equality is a cross-check against discrimination. Fairness is the rule and in its pursuit the reasons for departure from equality will inevitably prove to be too legion and too varied to permit of listing or classification."

36. This led to the familiar arguments over contributions, inherited wealth and illiquidity of assets being used to prevent equal division even in big money cases. Judges in higher courts did remain critical of first instances judges who did not justify a departure from equality in appropriate cases: E v E (Shared Residence: Financial Relief: Yardstick of Equality) [2006] 2 FLR 1228 [2006] EWCA Civ 843

37. The next sea change came fairly shortly after with Miller v Miller; McFarlane v McFarlane [2006] 1 FLR 1186 [2006] UKHL 24 and the familiar criteria of needs, compensation and sharing. It is widely accepted that the concept of sharing has come to replace the yardstick of equality, but sharing is not the same as equality.

38. Cases in which equal division has been ordered remain relatively rare:
    i. H-J v H-J (FINANCIAL PROVISION: EQUALITY) - [2002] 1 FLR 415 is one in which the availability of liquid capital in excess of the parties' needs and equality being fairness persuaded the judge over overturn a 45% / 55% split in favour of equality.
    ii. G v G (FINANCIAL PROVISION: EQUAL DIVISION) - [2002] 2 FLR 1143 is another in which (almost) equality was ordered.
    iii. Lambert v Lambert [2003] 1 FLR 139 is another long marriage "big money" case which resulted in a 50% / 50% split.

iv. Norris v Norris - [2003] 1 FLR 1142 - A case better known for its guidance on add backs was a 50% / 50% case (including the add back).

v. M v M (FINANCIAL RELIEF: SUBSTANTIAL EARNING CAPACITY) [2004] 2 FLR 236 [2004] EWHC 688 (Fam) was another 50% / 50% case including post-separation assets as substantially linked to matrimonial assets.

vi. P v P (FINANCIAL RELIEF: ILLIQUID ASSETS) - [2005] 1 FLR 548 in which H's claims of illiquidity were not considered sufficient to prevent equal division.

vii. H v H - [2007] 2 FLR 548 in which W was awarded 50% of assets on separation but not H's subsequent bonuses.

viii. S v S (Ancillary Relief: Importance of FDR) - [2008] 1 FLR 944 in which W's inheritance was included as a matrimonial asset on the basis of needs.

ix. Christoforou v Christoforou [2018] 1 FLR 1090 [2016] EWHC 2988 (Fam)

x. Martin v Martin [2019] 2 FLR 291 [2018] EWCA Civ 2866

39. None of the cases above relate to farms or farming and I am not aware of any other farming case since White in which equal division has been ordered. The reason for this may well lie in the nature of farm assets. It may also lie in the change of emphasis brought about by Miller & McFarlane and the straightjacket of "needs" which some might say has become a polite euphemism for "reasonable requirements".

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