

DOWN ON THE FARM

When marriages break down in a farm setting, things can get complicated. The courts seek to balance the viability of the farm with the need for 'proper provision' for both spouses.

Ann Fitzgerald explains the role of the agricultural consultant

This article first appeared in the May 2009 issue of the 'Law Society Gazette' and is reproduced with the permission of its editor.

Marriage breakdown in a farm setting is keenly felt where, in a rural community, family ties remain close-knit and farmland is passed from one generation to the next – as it has been over many decades. Since its introduction in 1997, the numbers of couples filing for divorce has grown significantly – although the associated financial aspects of divorce settlements continue to cause ripples.

The courts desire to see farming enterprises remain viable, while also seeking to ensure that 'proper provision' in financial terms is made for both spouses. This is the challenge for the judiciary and family lawyers alike. The same considerations that apply in the urban setting apply to farming families: firstly, the fact that two households now require to be supported, leaving less money to go around; and secondly, the likelihood that there will be less opportunity to offset household necessities against the farm accounts, where one spouse is no longer connected to that business.

Agricultural consultants

In family law cases, how does the expert agricultural consultant assist in seeking to conclude a separation/ divorce case involving a farming business? Their role should be to:

- ❖ Summarise in simple terms a complex financial situation and provide a report to the solicitor,
- ❖ Review the value given on the financial assets, such as shares in private companies,
- ❖ Advise on how a settlement may be financed, having regard to liquidity issues and taxation consequences,
- ❖ Assist in the preparation of a complex affidavit of means,

- ❖ Assist in drafting a list of documents required to ensure that voluntary discovery is in place,
- ❖ Advise on valuations issues arising,
- ❖ Conduct investigations and asset tracing,
- ❖ Prepare adverse inference reports – are there contra indicators on the accounts? In other words, a summary will not suffice – the agricultural consultant should point to where the problems lie and where the accounts do not add up,
- ❖ Prepare affidavits to support interim maintenance or a freezing-order application,

MAIN POINTS

- ✱ Marriage breakdown in a farm setting
- ✱ Farm viability and proper provision
- ✱ Role of the agricultural consultant

- ❖ Analyse income and potential future income, budgets and liquidity,
- ❖ Consider the taxation issues on maintenance and financing of the settlement,
- ❖ Conduct a 'reasonableness review' – stand back and look at the overall picture: does it add up and make sense? Is there anything obviously missing, like the proverbial 'elephant in the room'? For example, look at income, if it is shown to be much less than expenditure. Is there a corresponding overdraft or borrowing? The truth has intrinsic and internal logic. Common sense rules!

What is required?

The report of the agricultural consultant should be short, accurate, easily intelligible and with a 'onepage' balance sheet attached, being the matrimonial balance sheet showing the assets and liabilities of both spouses, net of any inherent capital gains tax liability (see *BD v JD*).

The report should include a comment on tax issues arising on maintenance and the anticipated net position of the parties – net to husband and net to wife on maintenance of €X. The

report should identify the literature or other material that the expert has relied on in compiling the report and give a summary of the conclusions reached. The report may need to be qualified and should indicate the basis for any opinion given. The right expert will be impartial, independent, credible and have the appropriate expertise.

The purpose of the agricultural consultant's report is to provide the following guidance:

- ❖ Assess the farm business net worth,
- ❖ Comment on the farm business net profit,
- ❖ Assess options for a potential division of assets, and
- ❖ Identify other issues of relevance.

The report is based on information collated from discussions with the client, a farm visit, and copies of pleadings and affidavits of means, together with the financial documentation referred to earlier. The report will detail the farm resources, including land, livestock, labour, buildings and machinery.

GETTING DOWN AND DIRTY

The farm business may consist, for example, of a dairy/ beef/ tillage or other enterprise. In the case of a farming business, the following information will usually be required, where appropriate:

- * Farm accounts for the last three years,
- * Income tax returns and notices of assessment for the previous three years,
- * Copy of the single payments scheme application form for the current year,
- * Digitised maps of land declared on single farm payment form,
- * Map of holdings,
- * Copy folios and file plans of all owned lands,
- * A list of the animals submitted for the animal-herd tests for the two previous years from the veterinary surgeon,
- * A list of all vehicles and agricultural machinery, stating the age, value and balance of outstanding finance agreements,
- * Statement and breakdown of categories and number of animals currently on the holding,
- * Confirmation of the annual milk quota,
- * Copies of all land lease/rental agreements (if any),
- * Certified balances of all bank accounts, certified balances of all equities and business, and a
- * Certified balance of all pension plans.

Assessing the net profit

An assessment of the net profit of the farming enterprise will point to the ability to borrow and ability to pay maintenance. In some instances, planning potential for sites, zoning or compulsory purchase will take centre stage. The availability of a site nearby, either on the lands or adjacent to the farm, may assist in offering possible solutions. Accordingly, check for road frontage and the division of each of the holdings to ascertain whether a natural division of the lands is possible, or sale of sites, and whether compulsory purchase for road widening is coming down the tracks.

Check whether the lands are adjacent to each other or whether some of the lands are in 'outside farms' some miles away. Check the location of the family home and whether it is in a separate 'take' or parcel of land. If the farm is to be subdivided between the spouses, the practical wisdom of such division must be examined to ensure that such a plan works on the ground as well as on paper. Maps of the farmlands should be examined and carefully checked. Whether any single farm payment or forestry grant can be divided should be considered.

If compulsory purchase is relevant, the land will be located on one of the preferred routes, for example, the N8 road from Cork to Dublin, and this will have the potential to produce liquid cash to fund a possible settlement. At present, the NRA offers up to €80,000 to €100,000 per acre.

In some cases, there will be a unique element for the farm in question, such as whether the early retirement scheme from farming pension (ERS) may be available for both parties when they reach 55 years of age – although this relief has been suspended in the 2009 budget. This ERS is not to be confused with retirement relief from capital gains tax (see *SN v FN*, where much of the evidence centred on the development potential of the farmlands).

Figures on a farm business net profit will include interest and depreciation and, hence, in order to arrive at the farmer's net income, these items should first be deducted. In many cases, the farm accounts include overheads for personal outgoings, such as running costs of a car, phone, ESB – and this is legitimate. However, these should be checked for in the fourth schedule of the affidavit of means, as double accounting is not acceptable. It is usual to allow one-third of these outgoings as referable to ordinary domestic usage.

The farm consultant will look at the current farming programme and farm profitability, as to room for improvement, whether the profit has been suppressed or whether the farmer is not running an efficient enterprise.



Settlement options

As to settlement options, in some instances the property can be easily subdivided and this may form the basis for settlement where both spouses continue to run the subdivided farm, or one employs a manager or sublets the land. However, a cash settlement for the non-farming spouse is frequently the preferred outcome in reaching settlement. The farming business (if being run reasonably well as a going concern) may be left largely untouched in a family law settlement where the farm profit provides the income for the family – which might be seriously undermined otherwise, in the event of a sale of part or more of the lands.

Currently, there is effectively a ‘Mexican standoff’ between sellers and buyers, so that land is now difficult to sell. Until the markets stabilise, sales are unlikely to be concluded and total stagnation is the order of the day. This has resulted in a change in the structure of settlements – from cash deals to the division of land assets. In fact, some cash settlements agreed in 2007 and early 2008 are now being revisited, as land has not sold to raise the cash, and penalty interest is accruing. ‘Land equivalence reports’ are now in vogue with agricultural consultants prepared to aid reaching a settlement in the current depressed economic climate. The value of different lots of land is assessed and valued so that an appropriate allocation of land might be made in an individual case, while ensuring ongoing viability of the farming enterprise.

The farm consultant may also be in a position to give taxation advice – if not, then taxation advice is essential in addressing settlement options. Special care should be taken on the disposal of certain assets from one

spouse to another spouse, which could give rise to a clawback of agricultural relief/business relief and dwellinghouse relief, or a possible clawback of the young trained farmers’ stamp-duty exemption. Specific advice is required on capital gains, capital acquisitions tax and stamp duty in all these instances, and taxation issues are not addressed here in any detail. ■

Ann FitzGerald is a partner in FitzGerald Solicitors, Cork. This is an edited version of a lecture delivered on 6 December 2008 at the Thompson Round Hall Annual Family Law Conference. With thanks to Mike Brady (agricultural consultant, the Brady Group, Cork) and Pat Lane (tax director FDC Group, Cork).

LOOK IT UP CASES:

- * *BD v JD* (unreported, Supreme Court, 8 December 2004)
- * *C v C* (2005 IEHC 276, Mr Justice O’Higgins)
- * *F v F* (Mr Justice O’Sullivan, unreported, June 2002)
- * *MK v JPK* (Mr Justice McCracken, Supreme Court, 9 February 2006)
- * *SN v FN* (Mr Justice Abbott, unreported, 8 December 2003)
- * *T v T* (Supreme Court, 2002 3IR 334 at 383, Mrs Justice Susan Denham)