Farm signatures, legal agreements with formal understanding and approval

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As we adjust to more lockdown, there is no doubt that Covid-19 has increased the reliance by the farming industry on digitalisation. Electronic signatures can now be used to execute documents, including where there is a statutory requirement for a signature, and can also be used to enter into contracts and also witness Wills. This means that, in most cases, electronic signatures are a viable alternative to handwritten ones, although many farmers still prefer the reassurance of the “wet signature”.

For land agreements, however, many transactions have to be by deed, where signatures need to be witnessed. Effective from 27 July 2020, HM Land Registry updated its procedures to accept “witnessed electronic signatures”. This means that while electronic signatures can be used by an individual to sign a deed, they will still require a witness to be physically present at the time to also sign the deed electronically. With continued lockdown there are practical problems. Whilst these changes should help those working from home to comply with the legal formalities, it is considered that the ability to witness electronic signatures by the use of video technology, with appropriate safeguards, will be a further welcome development.

So many uncertainties

With so much uncertainty in farming, e.g. the Agriculture Act, the detail around the new subsidies, tenancy reform consultation together with the findings of the APPG (All Party Parliamentary Group) that suggest taking away Agricultural Property Relief (APR) and Business Property Relief (BPR) for inheritance tax (IHT), there is much need to sort all farm legal documents and former succession planning.

As a point of consideration, when a farmer is married or enters into a civil partnership, their Will is automatically revoked and unless they re-write their Will (or sign a codicil to ‘republish’ their earlier Will), they will be intestate. On the other hand, divorce does not cause automatic revocation – instead, the divorced spouse will simply be treated as having pre-deceased the testator. The practical point is to check farm Wills following marriage or divorce or proposed significant change, particularly with so much change and Covid digital relaxation.

A part of the accountant and tax advisers work is key to point out where Wills do not exist, or are clearly out of date, and to explain the problems associated with

intestacy etc. This should all be part of current succession planning. There will also be sales and purchases of farms and farmland which will require the Wills to be revisited.

Physical witnesses

Many farmers and their advisers would argue that they prefer the protection of physical live witnesses as the farm values are so high and the disputes are so prolific. Covid-19 has led to increased pressure on costs, challenging access to face-to-face legal advice and practical obstacles in formalising agreements. However, it is important to note that it will not constitute an excuse for non-compliance with the required legal formalities. To achieve certainty in all legal transactions it is important to take extra protection and compliance in Covid-19 times.

As agricultural and rural businesses have expanded and diversified in recent years, so too has the array of legal formalities that farm owners need to consider in order to protect themselves and their businesses. With the large number of farm dispute cases going through the courts through 2019 and 2020 the importance has been highlighted in a significant way. In this time of Covid-19 it is ever more important, yet even more challenging, to ensure that legal arrangements are properly dealt with and there is greater need for farmers to formally understand ownership and occupation of all farm property, as well as the supporting legal agreements.

Recent cases demonstrate the practical concerns over the use of email and verbal approval that farm advisers must be aware of. The case, *Neocleous & Anor v Rees* [2019] EWHC 2462 (Ch), shows how a contract can inadvertently be concluded by email without the proper protection. Another example is a case from earlier this year – *Solomon v McCarthy* [2020] 1 WLUK 130 (21 January 2020) – where the parties tried to comply with the legal formalities in dealing with a land agreement, but failed.

Verbal declaration

The case of *Solomon v McCarthy* illustrates that varying legal formalities can produce an entirely different outcome. While in the *Neocleous* case the contract could be concluded by means of a simple signature, in the *Solomon v McCarthy* case a deed was required which had to be signed and witnessed to be effective. The parties involved intended to transfer land which was then to be held on trust for a third party. However, the declaration of trust was only made verbally, and it did not satisfy the legal formalities for a deed set out by the Law of Property Act 1925. The court held the trust could not be enforced, meaning that the third party was deprived of the benefit of the land, i.e. the land was not transferred. A warning to farmers.

The risk of email approval – authenticating intent

The Neocleous case concerned a dispute over a right of way, something that the farming community is very aware of. The parties reached a compromise in which Mr Rees agreed to transfer land to Mr Neocleous for £175,000. Mr Rees then wanted to not go through with the deal, but Mr Neocleous stated that this was too late to do so

because a binding agreement had already been made. The binding agreement had been created because Mr Neocleous' solicitor had sent an email to Mr Rees' solicitor which set out all the terms of the compromise for the sale of the land, with Mr Rees' solicitor confirming the agreement by email. Hence emphasising the need for caution for farmers in these difficult times.

As in this case no formal agreement was physically signed, Mr Rees contended that "signed" meant a handwritten name, so there was no binding contract, i.e. the email was insufficient. The court disagreed with Mr Rees, stating that the email signature was sufficient to conclude the agreement. The test was whether the name at the footer of the email was applied with "authenticating intent". The *Neocleous* case serves as a timely reminder that care is needed to ensure that the legal formalities are not inadvertently met, and contracts concluded, unless and until they are intended to be. It is understood that heading up emails with 'Without Prejudice' and 'Subject to Contract' will not necessarily avoid the problem. It is essential to beware of Covid-19 carelessness and always important to consider the tax consequences of all farm transactions.

Farming gifts and loans

With the Coronavirus pandemic resulting in an enthusiasm of intergenerational gifts and loans, questions must be asked over the correct recording and approval of such transactions together with the appropriate tax treatment. There can be confusion as to whether a 'gift was a loan' and such misunderstandings can have different IHT treatment with serious tax impact if deemed to be a loan as opposed to a gift made seven years previously. The different understandings between family members as to loans and gifts for the ultimate share of the estate can result in quite bitter dispute. This is particularly important in farming situations where the family members are known to enter into disputes as shown by *Guest v Guest* [2020] EWCA Civ 387 and the plethora of cases going through the courts and mediation process. There are considerations around whether the donor will survive seven years since the date of the gift. If the donor survives less than seven years, then there is a failed potentially exempt transfer (PET), subject to tapering.

The debts can arise where the deceased lent money or indeed with the current Covid-19 and farming profitability problems where they borrow money. Securities for the borrowings must be understood. The basic rule for what constitutes the death estate is found at s5(1), IHTA 1984 which confirms: "For the purposes of this act a person's estate is the aggregate of all the property to which he is beneficially entitled…" And, at s5(3), IHTA 1984: "In determining the value of a person's estate at any time his liabilities at that time shall be taken into account…" Extra pressure is placed on the farm accountant when producing farm accounts to understand the exact position and ideally obtain evidence.

The farm tax adviser and accountant must consider the legal points arising from the difference of farm loans v gifts in the context of tax and succession planning. All tax advice associated with such transactions must be in writing and the interaction with

the need for legal formalities and agreements correctly reflecting the tax advice must be considered.

Farm intestacy problems

Even if a Will exists, if gifts within the Will fail and there is not clarity as to how the failed gift is treated, that part of the estate will be intestate. The intestacy rules do not cater for farmers choosing to leave legacies, either pecuniary or 'specific' (e.g. a particular item), to friends or family, nor do they allow gifts to be made to charity. Where a farmer dies owning a farm, it is not only his family who are likely to be affected by the intestacy, but also his employees, and it is quite common to see these people remembered in a farmer's Will, often with the provision that the gift is only to take place if the individual is still in the deceased's employment at the date of his death. Gifts can be made either 'free of tax', in which case the tax (if any) will be borne by the residuary estate, or 'subject to tax', in which case the recipient of the gift will have to pay tax on it at the rate of 40% (current rates) to the extent that the value of this and other gifts exceeds the nil-rate band. Whilst farmers and their advisers are considering Covid approval complications, focus must also be made to the Will itself and indeed full succession planning within the farming community.

The intestacy rules are something that trouble the farming industry and they were amended by the Inheritance and Trustees' Powers Act 2014 and these rules apply for all deaths on or after 1 October 2014. Where a farmer dies intestate with a surviving spouse and children, the intestacy rules now allow the surviving spouse to receive a 'statutory legacy' of £270,000 (assuming the estate is worth more than this amount) which in farming cases it is often worth considerably more than this and any personal chattels outright, with a half share of the remaining assets outright. The children will inherit the remaining half share of the assets on statutory trusts (i.e. dividing the assets equally between them and giving them a right to inherit at 18). Where there are no lineal descendants and the death occurs on or after 1 October 2014, the surviving spouse will inherit the entire estate outright. In the context of a family farm which is co-owned between siblings as tenants in common, intestacy could give rise to an unintended result for the future of the farm with children owning part of the share of the farm not in the way it was intended. Continued lockdown is a fine opportunity to remind farming clients of the need to consider Wills as part of full tax planning but safe approval is difficult.

Fairness in farm succession

Apart from tax planning, arguably one of the more complicated areas of farming is trying to achieve parity between the various farming children or other family members as well as "testamentary freedom". "Fairness" is known to be complicated within the farming community, where the farm advisers must take into account who is to remain in the business and who isn't, along with their different tax requirements, besides carrying out the complex exercise of ensuring "equal values" are achieved. At the time of writing the very subject of achieving reliable values can be difficult in itself. The detail of the succession will need careful working through with the family and their other advisers and may often be more challenging than the tax itself.

Farm tax advisers and accountants are very aware of the propensity for farming families to dispute and they must make sure everything is protected at every step of tax planning and by legal documents. The signing of such agreements has been the focus of the article. It is essential to work with other advisers and it is often the tax work of succession planning that highlights the need to sort the challenges of parity etc., and now the logistics of signatures and the problems of face-to-face meetings has to be considered by all farm advisers.

It can be seen why the witnesses to Wills etc. are so important; as fairness is often extremely complex and undue influence is prevalent. It is so much easier for farmers to keep working literally with their "heads in the sand" or "minds in the tractor cab" together with watching the livestock and the crops and leaving everything to fate. Farm tax planning, especially succession planning, is a very useful opportunity of the need to sort the legal understandings of the farm but all advisers must be careful how all the documents are approved moving forward for protection.

The truth is that in reality "fate" normally means the farm sibling who is the most "pushing" can be the one who obtains the "greatest fairness". NOW is an ideal time for independent reminders to farming clients of the need to review succession planning and provided the signatures, approval and witnessing problems can be overcome, it seems the farming industry has time to contemplate succession and is wanting to contribute…we hope!

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