Neutral Citation Number: [2020] EWHC 49 (Ch)

Case No: PT-2017-000216

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building, 7 Rolls Buildings
Fetter Lane, London. EC4A 1NL

Date: 20/01/2020

Before :

MASTER SHUMAN

- -

Between :

JOHN GRAHAM MARTIN	**Claimant**
- and -	
DAVID JAMES MARTIN	**Defendant**

- -
- -

Daniel Burton (instructed by **Browne Jacobson**) for the **Claimant**
Defendant in person

Hearing dates: 23 October 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER SHUMAN

MASTER SHUMAN :

1. John Martin and David Martin are brothers. They jointly own 7 parcels of unregistered land which comprise 11 fields historically known by their field name and Ordnance Survey number at Car Colston, Nottinghamshire ("the land"). They inherited the land in 1990 from their father, Dennis Martin. The land, which is unencumbered, includes arable land, pasture and woodland. It has been in the Martin family for generations together with other land in Car Colston that has eventually been sold off by the family. I will refer to the brothers and their parents by their first names for ease of reference.

2. The relationship between John and David broke down in or about 2005. They have irreconcilable and fundamentally divergent views on historical management of the land and what should now happen to the land.

3. John seeks an order that 5 parcels are sold to a special purchaser, parcels 3 to 7, and that the other 2 parcels are partitioned between the brothers, parcel 1 to David and parcel 2 to John. The claim is made under sections 7 and 14 of the Trusts of Land and Appointment of Trustees Act 1996 ("the 1996 Act"). In addition John seeks an account and enquiry in respect of rents received by David.

4. David's primary position was that the land should be retained by the Martin family and used to create in part a wildlife haven. He acknowledges that the brothers can no longer jointly own the land and proposes a different partition: David to retain parcels 2, 5 and 7, equating to about 50% of the jointly owned land, and the balance, parcels 1, 3, 4 and 6 to John. David has counterclaimed for an account and enquiry in respect of monies owed to him by John. Whilst David does not wish parcel 1 and 2 to be partitioned in the way sought by John he would reluctantly accept that rather than have the land sold to strangers. He wishes to retain some of the Martin land in the family.

5. The issue before me for trial is whether there should be an order for sale in respect of part of the land and partition of the rest or partition of all the land ("the trial issue"). The question of an account and enquiry will require directions for the filing of evidence and a further hearing.

6. The evidence and documents before me for the trial issue comprise:

   (a) The three trial bundles.

   (b) On behalf of John. Two witness statements from John: dated 23 July 2019 and 20 October 2019. John gave evidence and was cross-examined by David.

   (c) On behalf of David.

   (i) David has made no witness statement, although his defence and counterclaim dated 8 February 2018, settled when he had legal representation, contained a statement of truth signed by David. He did not give evidence.

(ii) A witness statement from Ann Frost, director of DW Frost (Wholesale Nurseries) Limited ("D W Frost"), dated 8 June 2018 in respect of the payment of rent to John and David and will be relevant to the account.

(iii) David lodged a lever arch bundle of documents shortly before the trial. The bundle contained some without prejudice documents. There was a short adjournment at the start of the trial to enable Mr Burton, counsel for John, and David to agree whether any documents from David's bundle should be removed. I was then provided with the agreed bundle. The bundle includes correspondence, a number of photographs, a letter from David's 11 year old granddaughter, Libby, and a letter from David.

(d) The joint single expert report of Andrew Houlden BSc (Hons) MRICS FAAV and RICS registered valuer dated 29 August 2019, valuing and appraising the land together with the offer made by the special purchaser ("the report"). The appendix to the report also attached a valuation report dated 6 July 2017 prepared by Rachel Ashworth MRICS FAAV on behalf of John. The expert's evidence was given by way of the report.

THE LAND AND HISTORY

7. David says that the Martin family have occupied land in Car Colston for over 600 years and that they are the oldest family in the area to work the land. John's evidence is that the family have owned land in Car Colston "upwards of 100 years before" World War 1.

8. The land had been part of the Martin family farm, Field House Farm.

9. Dennis died on 17 April 1990. Under his will dated 26 November 1982 he appointed John and David as his executors, possibly together with the National Westminster Bank plc, and the residue of his estate was to be held equally by John and David. Mr Burton submits that the residue was held on a trust for sale: I have not seen a copy of the will but I accept Mr Burton's submission.

10. Dennis' widow and the brothers' mother, Vera, brought a claim against Dennis' estate under the Inheritance (Provision for Family and Dependants) Act 1975. John believes that Vera had only been left a life interest under the will. John's evidence, which I accept, is that Vera wanted a capital settlement, the family farm was no longer economically viable and there was a significant bank debt. The estate capital and life tenant accounts record that there was a debt due to the National Westminster Bank plc together with interest of £106,423.92.

11. John and David therefore agreed in or about February 1992 to sell the farmhouse and approximately 32 acres of land to Nicholas Forman Hardy ("NFH") for the price of £300,000, purchased through Forman Hardy Holdings Limited. The brothers also sold approximately 11.67 acres to D W Frost who run a nursery business in the area.

12. The estate final cash accounts dated October 1994 record that 3 sums were paid to Vera totalling £108,500.

13. By an assent dated 19 April 1994 John and David vested the land in themselves ("the assent"),

> "UPON TRUST to sell the same and TO HOLD the net proceeds of sale and the net rents and profits upon sale UPON TRUST for ourselves the said DAVID JAMES MARTIN and JOHN GRAHAM MARTIN in equal shares as tenants in common".

14. On 19 April 1994 John and David also executed a declaration of trust in respect of the land ("the express trust"). Clause 2 provides,

> "THAT as from the date hereof the Declarants will hold the property UPON TRUST to sell the same and to hold the net proceeds of sale and the net income until sale in trust for themselves as tenants in common in equal shares."

15. The parcels of land and current values are as follows:

Parcel	**Name**	**Occupation/access**	**Type of use**	**Area**	**Value £**
1	Fosse Field	Farm business tenancy – D W Frost 1.6.92 term of 5 years then rolling over to date	Nursery stock	3.42 acres	35,000
2	Mork Hill Field	Access through 2 to John's land	Pasture	1.89 acres	20,000
3	Hill Field		Pasture	7.06 acres	40,000
4	Hill Field		Pasture	1.6 acres	10,000
5	Carrs	Farm business tenancy – D W Frost 1.6.92 term of 5 years then rolling over to 2015	Woodland	8.83 acres	35,000

Parcel	Name	Occupation/access	Type of use	Area	Value £
6	Carrs	Farm business tenancy – D W Frost 1.6.92 term of 5 years then rolling over to date	Woodland	17.71 acres	80,000
7	Carrs	Farm business tenancy – Richard Daubrah 1994 to 2014 or 2015	Arable	22.31 acres	165,000
				Total:	385,000

THE LAW

16. Section 7 of the 1996 Act provides that,

> "7.— Partition by trustees.
>
> (1) The trustees of land may, where beneficiaries of full age are absolutely entitled in undivided shares to land subject to the trust, partition the land, or any part of it, and provide (by way of mortgage or otherwise) for the payment of any equality money.
>
> (2) The trustees shall give effect to any such partition by conveying the partitioned land in severalty (whether or not subject to any legal mortgage created for raising equality money), either absolutely or in trust, in accordance with the rights of those beneficiaries.
>
> (3) Before exercising their powers under subsection (2) the trustees shall obtain the consent of each of those beneficiaries.
>
> (4) Where a share in the land is affected by an incumbrance, the trustees may either give effect to it or provide for its discharge from the property allotted to that share as they think fit…."

17. Section 14 of the 1996 Act provides that,

> "14.— Applications for order.
>
> (1) Any person who is a trustee of land or has an interest in property subject to a trust of land may make an application to the court for an order under this section
>
> (2) On an application for an order under this section the court may make any such order—
>
> (a) relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or
>
> (b) declaring the nature or extent of a person's interest in property subject to the trust,
>
> as the court thinks fit.
>
> (3) The court may not under this section make any order as to the appointment or removal of trustees."

18. The relevant matters for the court include those set out in section 15,

> "15(1) The matters to which the court is to have regard in determining an application for an order under section 14 include—
>
> (a) the intentions of the person or persons (if any) who created the trust,
>
> (b) the purposes for which the property subject to the trust is held,
>
> (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
>
> (d) the interests of any secured creditor of any beneficiary.
>
> (2) In the case of an application relating to the exercise in relation to any land of the powers conferred on the trustees by section 13 the matters to which the court is to have regard also include the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under section 12.
>
> (3) In the case of any other application, other than one relating to the exercise of the power mentioned in section 6(2), the

> matters to which the court is to have regard also include the circumstances and wishes of any beneficiaries of full age and entitled to an interest in possession in property subject to the trust or (in case of dispute) of the majority (according to the value of their combined interests)."

19. Section 15(c) and (d) are not relevant to this case.

THE TRIAL ISSUE

20. John in his witness statements and during his cross-examination gave evidence in a consistent and frank manner. The cross-examination was limited, David either sought to question historic events which did not bear on the trial issue or to make submissions during cross-examination questions. For example, John was questioned as to why he had permitted Mr Daubrah to cut down trees on parcel 7. John's response was that hedges and tree had become overgrown and that the farmland had not been maintained. Pervasive weeds have been allowed to grow unchecked, thereby impacting on adjoining farmland owned by third parties. John was questioned as to why he was seeking to evict David from parcel 7. His response, which I accept, was that parcel 7 forms the block of land that NFH has made an offer to buy, "it was all or nothing".

21. I have not heard evidence in respect of the account.

22. Where John sets out in his evidence the family history, the historical use of the land and the rationale behind the brothers selling family land and entering into the express trust and the assent I accept his evidence. I also accept that the offer by NFH is to purchase parcels 3 to 7 as a whole and that there is no evidence before me that it would be acceptable to NFH to buy some but not all of this land.

23. John does not describe a close historical fraternal relationship with David but what is palpably clear is that what relationship they had has utterly broken down. That has been the position for some time now and I accept John's evidence that by 2006 the brothers were no longer able to speak to each other about any aspect of their co-ownership of the land. Whilst I make no findings as to an incident that took place on 5 June 2016 involving the brothers, the cutting down of trees and a chainsaw both parties accept that an incident gave rise to the police being called I am satisfied that there is ample evidence that the brothers can no longer co-own the land. I will go on to deal with specific elements of John's evidence below.

24. David elected not to file any witness statements himself in these proceedings and did not give oral evidence.

25. John is aged 59 years. John purchased land adjacent to the western boundary of parcel 2, Mork Hill Field, in 2010 ("John's land"). He lives on that land, stores machinery on it and has now applied for a certificate of lawful residency from Rushcliffe Borough Council. The only vehicular access to John's land is across parcel 2; that has been the position since Dennis purchased parcel 2 in 1961. Until June 2019 John used parcel 2 for grazing cattle. Following a directions hearing in May 2019 David moved or

caused to be moved onto parcel 2 a caravan, a wooden structure and farm machinery. David has now introduced varieties of fowl and appears to have tried to divide up parcel 2. Mr Burton refers to parcel 2 as a flashpoint between the brothers, that is an accurate description.

26. In 2017 John took early retirement from his job as a postman for health reasons. John suffers from osteoarthritis. He continues to raise some cattle and carries out occasional gardening or agricultural contracting work. John has 3 daughters with his ex-partner, they are aged 13, 11 and 7. He pays maintenance and provides further financial help for holidays and school uniform when he can. He currently derives no income from the land.

27. John wishes to sell parcels 3 to 7 to NFH which would provide him with a capital sum to provide for his retirement and for his family.

28. David is a naturalist and is aged 70 years. Whilst I am told that none of the parcels of land have been designated as sites of special scientific interest that does not mean that the wildlife habitats and biodiversity found there are not important. David has rewilded some of the land. In David's trial bundle there is a letter from him to John's ex-partner, undated, which says, "The land is not for us to destroy but for future generations to enjoy". I accept John's evidence that in or about 1993 David asked him to stop taking a hay crop from Hill Field and to leave the field ungrazed and unmown (parcels 3 and 4) to try and encourage barn owls to hunt and nest there. In a letter from the Wildlife Trusts to David dated 31 May 2016 they record what could be done to keep a wildlife record and the criteria for a site gaining local wildlife status. There is nothing further about this in David's bundle, other than some photographs, I presume taken by David.

29. This is however a claim about land subject to an express trust. David has not referred me to any documents where Dennis or even his grandfather described a desire by the Martin family to preserve the land for future generations and specifically for conservation. All that I have before me is a bare assertion in the defence that "the land, being historic family land, is not just for the Claimant and the Defendant, but for future generations of their family"[1]. I accept John's evidence that Field House Farm and other family land was sold to discharge debts owed by Dennis' estate and to fund a capital sum to Vera.

30. John's evidence, which is not contradicted, is that in 1992 the brothers decided not to sell any more land at that time as they had no need to and there was a severe recession so that land prices were very low. Neither of the brothers actively farmed the land and by the 1990s David was living in Newark. He effectively left John and Vera to clear and clean up the family farm.

31. The brothers did agree that they would find tenants for the land to provide them with an income. On or about June 1992 the brothers as executors of Dennis's estate granted a tenancy of 31.03 acres in Car Colston Nottinghamshire to DW Frost for a term of five years from 1 June 1992 at a yearly rent of £3,880. This was a tenancy of agricultural land and the tenant has continued in occupation albeit that the land they now occupy is only approximately 18.9 acres. There are issues about the surrender of

[1] Paragraph 5.8 of the defence.

some of the land and what payments of rent have been paid and to whom but these are issues for the account. In about 1995 the brothers granted Mr Daubrah a tenancy of parcel 7 for a term of 3 years from 1 November 1995 at an annual rent of £2,000. This was also a tenancy of agricultural land and continued until in or around November 2014. There appears to be a factual issue between the brothers as to when Mr Daubrey vacated the land. John's evidence is that Mr Daubrey confirmed in 2014 that he would not be renewing his tenancy and that it has remained empty since then. In a schedule attached to the defence and counterclaim David alleges that the last rent paid by Mr Daubrey was on 1 April 2015 in the sum of £1,404.50 and this was paid to John. Again these are issues for the account.

32. In 1995 NFH approached the brothers about renting a field from them and paying £1,000 per annum. John says that David refused to rent it because he believed that NFH would use the land to rear birds for shooting and it would disrupt wild birds. There is no evidence before me as to what NFH intended to use the land for in 1995.

33. I am satisfied that the Martin family and more specifically John and David did not intend to retain the land in the Martin family and preserve it as a wildlife haven. Not only did they sell the Martin family land when they needed to they entered into leases to generate income from the land and the tenants used the land in connection with a nursery business and for agriculture.

34. As to the purposes on which the land is held on trust, the express trust records that Dennis gave all the residue of his real and personal estate to the brothers to be held upon trust to sell the same. The fifth recital states that the brothers,

> "are desirous of enjoying the said property as land and of declaring that the said property is vested in them free from the trusts for sale contained in the will but on trust for themselves as tenants in common in equal shares."

I asked Mr Burton if this wording had any significance given that the express trust was entered into before the commencement of the 1996 Act. Mr Burton submitted that this simply needs to be read in the context of the express declaration set out in clause 2. There is no further guidance to be found in the express trust and I therefore do not place any significance on the wording of the fifth recital. Had had there been a secondary or collateral object underlying the express trust, for example to preserve the land for conservation which is not something that could simply be read into the express trust, I would have expected it to say so: it does not.

35. I am satisfied that the purpose of the express trust was for the brothers to hold the land free of the will trusts but subject to the trust set out in clause 2. Therefore the brothers hold the land on trust for themselves as tenants in common in equal shares to sell the land.

36. I have set out John's circumstances and wishes above. There is no evidence before me about David's circumstances. His wishes are clear. He does not want to sell the land to NFH but does now accept that the brothers can no longer co-own the land. However he does not set out any cogent argument for not selling parcels 3 to 7 to NFH. The report records that the market value of parcels 3 to 7 is £330,000. This is also consistent with Ms Ashworth's report for John which valued these parcels on 15

May 2017 at £313,000. NFH has offered to purchase the parcels for a price of £845,000. NFH owns the land on which Field House Farm stood and has erected an estate house there. Mr Houlden at paragraph 6 of the report conjectures that,

> "It is therefore clear to me why this landowner has offered to buy this block of land, as he is trying to "fill in" his ownership of the land surrounding this house, so as to have control over it and to greatly assist him in the enjoyment and use of his own land around it."

I have no evidence about the intended use of this land but I note it surrounds NFH's house and the conjecture by Mr Houlden seems entirely plausible and moreover is consistent with NFH being a special purchaser. He clearly has a special interest in purchasing the land surrounding his own land and house and is willing to pay more than the market value for it.

37. Having considered the factors set out in section 15(1)(a) (b) and (2) of the 1996 Act and the offer made by NFH I order that parcels 3 to 7 are sold to NFH for the price of £845,000. John's solicitors should have conduct of the conveyancing transaction on behalf of John and David including serving any necessary notices on D W Frost in so far as they remain in occupation of any part of parcel 5.

38. As to the issue of partition, David has failed to set out any argument to support his position that parcel 2 should be vested in him and parcel 1 vested in John. Partitioning the land in this way would only serve to increase tensions between the brothers: they need in effect a 'clean break'.

39. The factors set out in section 15 of the 1996 Act are not an exhaustive list. I consider that a further factor in this case is the conduct of David towards John during these proceedings. There is no obvious explanation for the actions taken by David after the directions hearing in May 2019. John lives on John's land and the only vehicular access is through parcel 2. He has no option but to travel across parcel 2 and to do so regularly. The actions by David could not be described as altruistic or designed to further his conservationist principles. All they have served to do is to make parcel 2 a flashpoint between the brothers. I accept John's evidence, which was not challenged by David, that David's son, James, at the end of September 2019 threatened that if parcels 3 to 7 were sold to NFH he and David would move 20 pigs onto parcel 2 as well as more belongings. This is a case where to accede to David's submissions would lead to further conflict.

40. Given that David wishes to retain some of the Martin land in the family and John wishes to partition the land I consider that it is appropriate to partition parcels 1 and 2 rather than simply order them to be sold on the open market. The only feasible option is to vest parcel 1 in David and parcel 2 in John. That means that the brothers do not share a boundary. It will be a matter for David whether he continues to permit D W Frost to rent parcel 1 or to rewild it. There should be a compensating payment by David to be deducted from David's share of the net proceeds of sale to NFH. Parcel 1 has a value of £35,000 and parcel 2 has a value of £20,000. Therefore David needs to make a balancing payment of £7,500.

41. The parties should now submit an order setting out their proposed consequential directions to give effect to my judgment on the trial issue. In addition it will be necessary for directions to be given for the taking of the account and enquiry. This is a sad family case but nevertheless one that should be capable of resolution between the brothers without recourse to further hearings before the court and the inevitable costs consequences.

Post script

42. John's solicitors have instructed surveyors to negotiate with D W Frost about the termination of their tenancy. As a result further information has come to light. It now transpires that in 1997 the brothers renewed D W Frost's tenancy in respect of certain land near to Field Farm House but as a farm business tenancy for a term of 5 years. D W Frost continue in occupation as periodic tenants. What I do not know is which parcel or parcels are affected, presumably either parcel 5 or 6. Whilst it does not affect the judgment that I have given it may impact on the manner and timing of implementation. John's solicitors will need to identify the land affected by reference to parcel number or numbers and the date on which vacant possession can be obtained. I will then invite the parties to make written submissions before I approve the order consequential upon my judgment.