Brothers in arms

Daniel Burton considers a recent case involving trusts of land, family fallouts and a special purchaser

Daniel Burton is a barrister at Radcliffe Chambers. He acted for the claimant in Martin

'The land was held on an express trust for sale and there was a special purchaser who was prepared to pay well in excess of the market value for part of the land.'

Practitioners who regularly act in farming disputes will know that claims involving inherited farmland almost always involve an irretrievable breakdown in relationship between family members. In the recent case of *Martin v Martin* [2020], it was the Martin brothers who had fallen out and the dispute was over what to do with almost 63 acres of jointly owned agricultural land in Nottinghamshire.

Background and facts

John Martin and David Martin are brothers who jointly inherited family farmland by the village of Car Colston, near Bingham in Nottinghamshire. The Martin land comprised seven parcels of unregistered agricultural land in the vicinity of Car Colston and was a combination of arable, wood and grassland. There had always been a tension between John's wish to produce an income from the land and David's wish to use it as a wildlife haven.

Indeed, there were deep-rooted personal and ideological differences between the two brothers and, unfortunately, their relationship irretrievably broke down in or around 2005, with the result that it was impossible and unworkable for them to act as co-owners or neighbours of the land.

The Martin brothers inherited the family land from their father, Dennis James Martin, who in turn had inherited it from his father, Robert James Martin. It was common ground that the Martin family had owned land in the area for generations. The Martin family farm was a farmhouse, known as Field House Farm, and a larger tract of surrounding agricultural land in Car Colston. After Dennis Martin's death in 1990, the brothers (acting as his personal representatives) sold Field House Farm and several surrounding parcels of land to a wealthy local businessman, Nicholas Forman Hardy, in 1992. Mr Forman Hardy still owns the farmhouse and had actively sought to purchase the remaining Martin land which was not included in the conveyance from 1992.

By a declaration of trust and an assent both dated 19 April 1994 John and David declared that the seven parcels of land which had not been sold were assented to themselves and held on a new trust for sale as tenants in common in equal shares. This was the unequivocal basis of the co-ownership. Indeed, there was no express declaration or recital of any different intention or purpose for the trust of land other than a trust for sale.

By 2019, some parcels of the land were tenanted, while others lay fallow or were used by David for re-wilding. Back in 2015, after prolonged disagreement between the brothers over the ownership and management of the land, John had instructed solicitors and sought to agree with David a fair division of the land or a sale. Subsequently, however, five of the seven parcels were subject to a generous offer to purchase from the ever-patient Mr Forman Hardy. The brothers disagreed about the proposed sale, with John supporting it and David resisting it. There occurred other flashpoints and confrontations over the occupation of the land and the need for a solution – whether court-determined or negotiated – became acute.

The fundamental difference of opinion inexorably led to proceedings being issued by John seeking an order for sale under the Trusts of Land and Appointment of Trustees Act 1996 (the '1996 Act') and, in particular, the blessing of the sale of part of the land to the special purchaser and the

partition of the two remaining fields, one to each brother to hold absolutely.

The legal framework

The powers of the court under the 1996 Act are provided by s14 (entitled 'Applications for an 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.
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> (2) On an application for an order under this section the court may make any such order—
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> (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...

The factors to which the court must have regard are set out in s15 (entitled 'Matters relevant in determining applications'):

> (1) The matters to which the court is to have regard in determining an application for an order under section 14 include—
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> (a) the intentions of the person or persons (if any) who created the trust,
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> (b) the purposes for which the property subject to the trust is held,
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> (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
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> (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.
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> (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)...

In short, the powers under s14 include the power to order a sale – by private treaty or on the open market – and/or to partition (which is also available to the trustees under s7). Another recent example of the court ordering the sale of jointly owned farmland under s14 is found in the decision of Mr Nicholas Strauss QC in *Collins v Collins (No.1)* [2016].

The court's decision

The trial of John's Part 8 claim came before Master Shuman in October 2019. The main issue for the trial was what to do with the land, though John had also sought an inquiry and account in relation to historic use of the land by the brothers. In light of the one-day listing, the inquiry and account was effectively stood over.

John sought an order that the offer in respect of five of the parcels by the special purchaser be accepted and that the two remaining plots be partitioned, one to him and the other to David, with a balancing payment reflecting the small disparity in value. David contended for a partition of the land which he believed created a fair split between the brothers. However, there were four problems with David's suggested division. First, David wanted most of the land which was subject to the offer from the special purchaser. Secondly, division of the land as sought would have reduced its value to third parties (on the basis that John wished to realise a capital lump sum from his share of the property). Thirdly, one of the parcels which David sought adjoined land owned by John – indeed it was subject to an easement in John's favour – and had been a regular flashpoint between the two brothers. Finally, David's proposed split did not reflect an equal division of the value of the land (which was the subject of an expert report), but rather there was a significant disparity in David's favour. John did not believe that David was in a position to make good that disparity by way of any balancing payment.

The Master held that she was satisfied that the purpose of the trust of land was to hold the land free of the will trust in Dennis Martin's will and to hold as tenants in common in equal shares to sell the land.

In her written judgment, the Master held that she was satisfied that the purpose of the trust of land was to hold the land free of the will trust in Dennis Martin's will and to hold as tenants in common in equal shares to sell the land. Upon a consideration of the gateways in s15(1)(a) and (b) of the 1996 Act, the Master was satisfied that it was appropriate to make an order for sale and, in light of the offer from the special purchaser, to sanction and direct the sale of the land subject to the offer accordingly.

Having directed that the majority of the land should be sold to the special purchaser, the Master was left with two remaining parcels of land. One of the parcels was the parcel adjacent to John's land, on which John lived. The other was tenanted. David nevertheless sought an order that he would receive the parcel adjacent to John's land. The Master sensibly rejected this proposal

on the basis that such a partition would lead to further conflict between the brothers. She took into account David's un-neighbourly conduct as part of the section 15 exercise (the subsections of which are of course non-exhaustive). On the basis that David had expressed a desire to retain some Martin family land, she therefore ordered the partition of the remaining two parcels and directed that the parcel adjacent to John's land be allocated to John, and the other – larger – parcel allocated to David. In addition, there would be a modest balancing payment to John to reflect the difference in value between the two parcels of land.

While attachments to family land can be sentimental as well as purely commercial, the court must look at the gateways in s15 of the 1996 Act in exercising the wide discretion to make an order under s14.

Concluding observations

The result is hardly surprising from a legal perspective; the land was held on an express trust for sale and there was a special purchaser who was prepared to pay well in excess of the market value for part of the land. Furthermore, it was plainly appropriate to partition the land in the manner contended for by John – to have done otherwise would have been to invite further flashpoints between the two brothers.

However, the positions adopted by the brothers attracted divided sympathies from members of the public, who took to the online comments sections of various press reports to voice support for their chosen side. While attachments to family land can be sentimental as well as purely commercial, the court must look at the gateways in s15 of the 1996 Act in exercising the wide discretion to make an order under s14.

In practical terms, the starting point will always be the instrument creating the trust of land and the purpose stated therein. In this case, the combination of the land being held on an express trust for sale and the existence of a special purchaser meant that it was inevitable that an order for sale would be made. While there is a gateway in s15(3) which requires the court to consider the wishes of the beneficiaries (and specifically the majority if the wishes are divided), where there is an even split the court will necessarily be forced to place further reliance on both the intentions of the person or persons who created the trust and the purposes for which the property subject to the trust is held. In this case, the answer was clear and obvious. While this is purely speculation, it is likely that an order for sale on the open market would have been made in the absence of the special purchaser (but with provision for David to purchase John's share of the land at market value). Where there are competing but differing offers from third parties and beneficiaries, the court's approach is to sanction the higher bid; see *Collins*.

The Master's decision on partition was also logical, as well as being very practical. While s7 of the 1996 Act permits trustees to partition land only if the beneficiaries are of age and consent, it has been acknowledged by the Court of Appeal that the court retains a power under s14 to give directions for a partition without the requirement imposed upon the trustees by s7(3) to obtain beneficiary consent; see *Bagum v Hafiz* [2016]. Nevertheless, judges are often reluctant to make orders for partition unless the proposed division has some support from the beneficiaries. In this case, while David did not wish the land to be sold or partitioned in the manner John contended for, he explained to the court that he would prefer partition to sale to a third party – though of course he primarily contended for partition of the two remaining parcels in a different way. The Master was accordingly satisfied that it was appropriate to order partition, but crucially, as contended for by John and not by David.

The lesson is that the court will not exercise its discretion under s14 of the 1996 Act to create a situation where there is likely to be further conflict between former beneficiaries. If future conflict is inevitable as a result of partition, then the likely order under s14 will be an order for sale. This is certainly the case where the beneficiaries disagree over the proposed partition – though the outcome could be different if the beneficiaries are in agreement.

More generally, if orders for sale and/or partition are made on a claim under s14 of the 1996 Act, practitioners should ensure that all the necessary relief is sought and obtained as part of the final order. This includes a workable mechanism for any sale (including express directions for the conduct of the sale and deduction of conveyancing expenses), suitable vesting orders for the land and ancillary orders relating to land registration. Where the land is unregistered, a disposition will trigger first registration. In addition, where there is any equitable accounting or other debits/credits from the beneficiaries' shares, provision should be made for these to be applied prior to the proceeds of sale being distributed. If a costs order is made in your client's favour, then provision can be made for the deduction of costs (or at least an interim payment on account of costs) from the proceeds of sale. Where such matters are adjourned to a later date, it is possible to include a retention from the proceeds of sale to discharge any indebtedness.

While *Martin* is a somewhat rare beast (insofar as the case related to non-residential land), it is a perfectly orthodox and logical example of the court's approach to relief under s14 of the 1996 Act. On a human level, one hopes that the Martin brothers can put their historic disputes behind them and take advantage of the clean break the court has given them. ■

Bagum v Hafiz
[2015] WTLR 1303
Collins v Collins (No.1)
[2016] 2 P&CR 5
Martin v Martin
[2020] EWHC 49 (Ch)
(to be reported in the online version of *Wills and Trusts Law Reports*)