Neutral Citation Number: [2019] EWHC 1073 (Ch)

Claim No.HC-2017-001634 and BL-2018-000273

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

In the matter of Kingsley Brothers, a firm
And in the matter of freehold lands at Cottered, near Buntingford, Hertfordshire

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Before:

DEPUTY HIGH COURT JUDGE LANCE ASHWORTH QC

(1) KARIM SOPHIE KINGSLEY
(2) AARON RICHARD PLAYLE
(as executors of the Estate of Roger John Kingsley, deceased)
(3) MARIA JACQUELINE WHEELER

Claimants

- and -

(1) SALLY MARGARET KINGLSEY
(2) COLIN DAVID BAYLES

Defendants

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Clifford Darton (instructed by **Edward Harte Solicitors**) for the **Claimants**
Catherine Taskis (instructed by **Pellys**) for the **Defendants**

Hearing dates: 11, 12, 13 and 15 February 2019
Judgment 1 May 2019

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JUDGMENT

Lance Ashworth QC:

Introduction

1. Because this case involves members of the same family, many of them share a surname. For the sake of clarity, I shall therefore, without intending any disrespect, refer to members of the Kingsley family by their given names.

2. These are 2 claims brought following the death on 27th June 2015 of Roger Kingsley ("**Roger**") which led to the automatic dissolution of the farming partnership ("**the Partnership**") that he had run with his sister, Sally Kingsley ("**Sally**"), under the title Kingsley Brothers on 181 acres of land at Lodge Farm, Cottered, Near Buntingford, Hertfordshire ("**Lodge Farm**") and other land of approximately 106 acres (together with Lodge Farm "**the Farm Land**").

3. By the first action, Claim No. HC-2017-001634 ("**the Partnership Action**"), Karim Kingsley ("**Karim**") and Aaron Playle, as executors ("**the Executors**") of Roger's estate ("**the Estate**") seek (i) the winding up of the Partnership and (ii) an order for the sale of the Farm Land under the Trusts of Land and Appointment of Trustees Act 1996 ("**TOLATA**"). As part of such relief the Executors also claim the usual orders for (iii) all necessary accounts and enquiries and (iv) an order for the production of the books and records of the Partnership under section 24(9) of the Partnership Act 1890 ("**PA 1890**"). Sally agrees that the Partnership must be wound up and that necessary accounts and enquiries have to be undertaken. She accepts that the Farm Land must be sold, but seeks an order that she should be entitled to buy it at a price determined by the Court.

4. By the second action, Claim No. BL-2018-000273 ("**the Possession Claim**") that was ordered to be tried with the Partnership Action, (1) the Executors and Karim's sister, Maria Wheeler, and (2) Karim and Maria respectively seek orders for possession of 2 parcels of land under title numbers HD249199 (amounting to some 32 acres "**Peascroft 1**") and HD530514 (amounting to 2.11 acres "**Peascroft 2**") known together as "Peascroft" and/or a declaration as to the terms on which Sally has occupied this land since the death of Roger. Sally defends this claim on the grounds that she enjoys agricultural tenancies over Peascroft within the meaning of section 2 of the Agricultural Holdings Act 1986 ("**AHA 1986**") and counterclaims for declaratory relief to that effect. Peascroft is not part of the Farm Land.

5. Mr Clifford Darton has appeared on behalf of the Claimants in each action and Ms Catherine Taskis on behalf of the Defendants in each action. I am grateful to Counsel for their assistance.

Background

6. Members of the Kingsley family have farmed Lodge Farm since at least the mid 19th century. It has, at all relevant times, been an arable farm. In 1950 Jessie Kingsley, who was Roger and Sally's grandmother conveyed Lodge Farm to her three sons, Percy, Richard and Thomas, for them to farm in partnership. These 181 acres of Lodge Farm were and still are unregistered land.

7. Richard died in 1975 and by his will left his estate to his brothers, Percy and Thomas, and after the death of the survivor of them to his nephew and niece, Roger and Sally.

8. Thomas died in 1976 and by his will left his estate to his nephew and niece, Roger and Sally.

9. Accordingly, as at 1976 Percy was the surviving brother, who held legal title to Lodge Farm and was the last of the brothers left farming the land. He entered into a new partnership with his children, Roger and Sally, to farm together.

10. There was a Deed of Family Arrangement drawn up in 1977, under which Percy, Roger and Sally as together absolutely entitled to the estate of Richard, declared that they now held this on trust for Roger and Sally in equal shares absolutely. The effect of the Deed of Family Arrangement would have been that Lodge Farm was therefore held on trust for Percy, Roger and Sally in equal shares. No executed copy of that Deed of Family Arrangement has been found and Sally, in her evidence before me, was not able to say that she remembered it being executed.

11. There was also an unsigned Deed of Partnership between Percy, Roger and Sally from 1981. Under this, it was recorded that Percy, Roger and Sally had been farming in partnership since October 1976 and they agreed to carry on the Partnership under the name Kingsley Brothers for the joint lives of the partners. The Deed recited that the legal estate to Lodge Farm had been held by Percy absolutely since the death of Thomas and that he agreed to grant the Partnership a tenancy from year to year over the said land. The shares in the Partnership were recorded as being held as to $2/6^{th}$ to Percy, $3/6^{th}$ to Roger and $1/6^{th}$ to Sally. Although no signed copy of the Deed of Partnership has been located, it is common ground that the 3 of them and then Roger and Sally had been carrying on the Partnership in accordance with the terms set out in that Deed.

12. It is agreed between the parties that Lodge Farm did not become property of the Partnership but remained held by the individuals and the Partnership was allowed to farm the land.

13. Thereafter, both before and after Percy's death in 1997, other parcels of land were acquired by Roger and/or Sally and were farmed by the Partnership. At no stage did the Partnership acquire any land. In addition the Partnership farmed other land which was rented from third parties.

14. On Percy's death in 1997, he left his estate to Roger and Sally in equal shares. Percy appointed Sally's husband, Colin Bayles, as sole executor. Mr Bayles is a chartered surveyor with many years of experience in agricultural matters. It is because of this and some confusion that has apparently arisen as to who has the legal title to the 181 acres that Mr Bayles has been joined as the Second Defendant to the Partnership Action, although as will become apparent in due course, I do not need to make any findings as to this.

15. Upon Percy's death, the Partnership continued, but the shares of the Partnership were then held as to $2/3^{rd}$ by Roger and $1/3^{rd}$ by Sally. It is common ground that

Lodge Farm was then held for Roger and Sally beneficially as tenants in common, each having a 50% share in the land. Whether this is because they already each held 1/3rd of the land beneficially (i.e. under the Deed of Family Arrangement) and each took 1/6th of the land from Percy's estate under his will or whether Percy held Lodge Farm (i.e. in accordance with the Deed of Partnership) and they each took a ½ share under his will, the outcome is the same in terms of beneficial interest.

16. On 12th November, 1997 Mr Bayles as Percy's executor produced for the benefit of Roger and Sally a "Provisional Statement of Assets and Liabilities" for Percy's estate. This identified various assets including the 181 acres of Lodge Farm, saying that Percy had a 1/3rd "*freehold interest*" in this and 3 areas of land described as "Charities Land", "Flint Land" and "Glebe Land" each of which was said to be held on a "*non-assignable 1986 Act tenancy*". The statement then included "Other Land" which was identified as "*60 acres – informal and short term tenancies and other arrangements – farmed by [Percy] in family partnership*".

17. From Percy's death in 1997 until Roger's death in June 2015, Roger and Sally continued the Partnership farming on the original Lodge Farm land, on the additional land that they purchased jointly over the years and also on various other parcels of land which were owned by one or other of them or their spouses or relatives or were rented as follows:

The Farm Land

Description	Unregistered/Title No.	Date acquired or registered	Beneficial Owner
Lodge Farm	Unregistered	Inherited	Roger & Sally
Potato Field	HD259241	6/4/1989	Roger & Sally
Church Field	HD259421	6/4/1989	Roger & Sally
Knackers	HD418098	24/4/2003	Roger & Sally
Kipple Elms	HD418098	24/4/2003	Roger & Sally
Bundle Scroat	HD516947	14/5/2012	Roger & Sally
New Grounds West	HD516947	14/5/2012	Roger & Sally
New Grounds East	HD516947	14/5/2012	Roger & Sally
Triggolds	HD394153	21/5/2012	Roger & Sally
Upwells	HD394153	21/5/2012	Roger & Sally
Land owned by family members but not within the Farm Land			
Peascroft 1	HD249199	28/3/1988	Roger (1998) Roger & Maria Wheeler (2007)

Peascroft 2	HD530514	4/12/2013	Karim & Maria Wheeler
River Field	HD418097	24/4/2003	Colin Bayles
Home Shot	HD418095	24/4/2003	Colin Bayles
Land rented from third parties			
Glebe Land		N/A	The Glebe
Townland		N/A	Cottered Ecclesiastical Charities

18. The Farm Land does not include any farm house or other residential dwelling as each of Karim and Sally live in their own properties which are not held under any relevant trust. Lodge Farm does have a farm yard, which has a number of agricultural buildings on it which are necessary for the ongoing operation of farming on the Farm Land.

19. As far as Roger and Sally's roles in the partnership were concerned, Roger was involved in the physical side of the farming, while Sally was responsible for the administrative and accounting side, although she did also from time to time get involved in the harvesting. The Partnership engaged the services of one other person, Derek, to do some of the manual work alongside Roger.

20. Roger has one daughter from a previous marriage. Karim is Roger's widow, having been married to Roger for about 20 years, and the mother of his youngest daughter, Tilly, now aged 17. Karim is the sole beneficiary of Roger's will.

21. Roger was diagnosed with cancer in 2011. Notwithstanding this, he continued to take his full role in the partnership, although from time to time he had spells of illness which restricted him. In the period leading up to his death, Roger raised the possibility of Karim and Mr Bayles joining the Partnership, so that it could continue after his death, with a view to the involvement of Tilly when she is old enough. I will return to this in greater detail below, but Sally did not agree to this, with the result that upon Roger's death in June 2015 the dissolution of the Partnership occurred automatically. The Partnership continued thereafter for the purpose of winding it up and, until an order is made by this Court, will continue in existence for that limited purpose.

22. Unfortunately, Sally and Karim do not get on. Despite correspondence which might be construed as showing the contrary, Karim claimed she did not want to take over the business, but that she wanted to work with Sally for the mutual benefit of both of them. Although Sally quite properly confirmed on 1st August 2015 to Karim that she was aware of her responsibility since the dissolution of the Partnership as a result of Roger's death to ensure that the Estate receives the full value of his interests in the Partnership and in the Farm Land, Karim feels that she has been

excluded and that Sally has been continuing the farming business without reference to Karim or the interests of the Estate.

23. This has led to a lot of ill feeling between Karim and Sally, which in turn has led Karim to cause these proceedings to be issued.

The Issues

24. There are essentially 3 main issues between the parties:
    (a) the terms on which the Farm Land should be sold, it being common ground that under TOLATA it should be sold. Sally seeks an order that she should be entitled to buy the Farm Land at a price and/or on terms fixed by the Court before it is put on the open market, whereas Karim seeks what has been described as the "usual order" namely that it should simply be put on the open market, albeit that both parties should be entitled to bid for some or all of the Farm Land;
    (b) the settling of the Cessation Accounts and subsequent trading accounts for 2016 and 2017 (those for 2018 not having been produced yet);
    (c) the terms on which Peascroft was occupied by the Partnership before Roger's death and therefore is occupied now.

The Witnesses

25. I heard evidence from a number of witnesses, although ultimately in light of the issues that I have to decide, by far the most important witnesses were Karim and Sally. They each gave evidence on a number of matters about which they feel strongly, but which were not relevant to the matters that I have to decide. I therefore make no attempt to resolve disputes between them as to such matters.

26. Karim came across as a forthright person, who holds strong views as to the actions of Sally and of her husband, Colin Bayles. She feels she has been treated badly by both of them. Those views coloured her evidence. She is understandably determined to get the best outcome she can for herself and her daughter, Tilly. However, I got the firm impression that she is also motivated in part by a desire to get her own back on Sally. She would not make what would have been appropriate concessions in cross-examination. Karim appeared to me to be convinced that Sally was seeking, by the order Sally invites the Court to make, to put one over on her. Karim was fixated on the concept of overage, notwithstanding the approach the experts have taken, which I deal with below. I therefore take a guarded approach to her evidence.

27. I also heard from Aaron Playle, Karim's co-executor and Maria Wheeler, Karim's sister and co-owner of Peascroft. Nothing turns on their evidence.

28. When Sally gave evidence, it was plain to see that she was a proud and stubborn person. She was not forthcoming in her cross-examination, especially on topics such as her intentions as regards development at Lodge Farm and how she would fund the purchase if she is allowed to buy the Farm Land. She clearly felt it was none of Karim's business, that she had been involved in the farming business for over 40 years and that she should be continued to allow to do so. She denied all

suggestions that she had acted improperly in any way or that she was trying to put one over on Karim. It is evident that she does not trust Karim any more than Karim trusts her.

29. I also heard from Mr Bayles. He gave his evidence well and with authority. In my judgment, he has not at any stage deliberately acted in a way adverse to the interests of Karim, but was keen to assist his wife, Sally. However, save to the extent addressed below, his evidence was of marginal relevance.

The Experts

30. Karim relied on the evidence of Mr Simon Gooderham of Cheffins and Sally on the evidence of Michael Alexander of Brown & Co. Mr Gooderham is a Member of the Royal Institution of Chartered Surveyors and a Fellow of the Central Association of Agricultural Valuers. Mr Alexander is a Fellow of the Royal Institution of Chartered Surveyors and a Fellow of the Central Association of Agricultural Valuers. Both experts are properly qualified to give evidence on the topics on which they were instructed, namely, to provide expert opinion on:
    (a) the market valuation of the Farm Land on the basis of a sale on the open market with vacant possession and by way of arm's length transaction as at 27th June 2015, 16th February 2018 and (by way of supplementary reports) 25th January 2019;
    (b) the rental valuation of the Farm Land as at 27th June 2015;
    (c) the market value of plant and machinery as at 27th June 2015.

31. There was a large measure of agreement between the experts by the time this trial started:
    (a) they agreed the market value of plant and machinery at £111,770;
    (b) they agreed the market rent of the Farm Land at £55,000 per annum;
    (c) they agreed the market value of the Farm Land (including the buildings and solar arrays on the Farm Land) other than New Grounds East and West at £2,750,000, excluding any hope value.

32. The only areas where they did not agree were as to:
    (a) the value of New Grounds East and West – they agreed that they had value as amenity land (pony paddocks) but Mr Gooderham said that they should be valued at £18,518 an acre giving a total value of £190,000 whereas Mr Alexander said that the right value was £11,208 an acre giving a total value of £115,000 – an overall difference of £75,000;
    (b) the hope value for the development potential and expectation of planning permission being granted for conversion of the farm buildings on Lodge Farm to an alternative use – Mr Gooderham said that the hope value was £513,250 whereas Mr Alexander said it was £253,000 - a difference of £260,250.

33. In relative terms as compared to the overall value of the Farm Land, these differences might seem to be relatively slight. However, the fact that there were differences at all was relied upon heavily by Mr Darton in support of Karim's position that the only proper thing for the Court to do was to order that the Farm Land be put on the open market. I shall therefore have to consider the reason for the differences in the views expressed by the experts in due course. It is to be noted,

however, that neither expert expressed the view in their written evidence that valuing the Farm Land on the basis of it having a hope value was inappropriate and that the correct way to value the Farm Land was on the basis of the application of overage to cover the development potential. Nor did they do so in their oral evidence, although it was suggested that it might be marketed on the basis of seeking overage.

34. In my judgment, both experts gave their evidence well and each presented their own genuinely held professional expert opinions. Each was prepared to concede where they had not investigated particular matters fully and each was prepared to state where they felt the other was likely to have the better knowledge.

35. An attack was made on Mr Alexander's independence by Mr Darton, albeit it was not made with great vigour. It was suggested that he had not disclosed his friendship with Mr Bayles in his report or the extent of his prior dealings on behalf of Sally. In particular, it was said that paragraph 1.2.1 of his first report was inadequate in respect of both matters. I reject these criticisms. As to his so called "friendship" with Mr Bayles, this is no more than the fact that the 2 of them are both chartered surveyors working in the same type of work, farming land, in the same geographical location and meet about once a year at an annual dinner. There was no evidence that the 2 of them socialised outside of this. As Mr Alexander pointed out, this was very similar to the relationship he had with Mr Gooderham, whom he would see at another annual dinner.

36. As to his prior work for Sally, this was disclosed in paragraph 1.2.1 of his first report. It was put to him that in connection with issues which arose in respect of the tenancy of the Glebe Land in 2015 that he had acted as Sally's advocate in writing a letter dated 14th December 2015 to the solicitors for the landlords. Mr Alexander explained that the letter was written on the basis of advice given by Counsel unconnected with this claim (Ms Caroline Hutton), setting out the arguments that she had advised could and should be made. While it is correct that Mr Alexander was advancing a claim that the Glebe Land was held on an AHA tenancy, this was in fact a claim that the Partnership held the land in that manner, rather than Sally personally. Had it been successful it would have been the Partnership which took the benefit of the tenancy, rather than Sally personally. As it happens, the landlords refused to accept the argument with the result that Sally was forced to accept that the best that she could get was a Farm Business Tenancy. I have no hesitation in rejecting the suggestion that in acting on behalf of the Partnership, albeit at the instruction of Sally, Mr Alexander's independence in terms of giving his evidence in this matter was compromised.

THE ISSUES: (1) THE SALE OF THE FARM LAND

37. The Farm Land was held by Roger and Sally on trust for themselves as tenants in common beneficially and was not an asset of the Partnership. The Executors and Sally are agreed that the provisions of TOLATA apply, in particular sections 14 and 15 thereof. Section 14 provides:

> *"(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."*

38. Section 15 provides:

> *"(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."*
>
> *"(3) ... 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 the case of a dispute) of the majority (according to the value of their combined interests)."*

39. It is accepted that the "usual" order in a TOLATA case is that the property be sold on the open market. However, it is established that the Court has a discretion to make other orders. Both parties referred me to *Bagum v Hafiz* [2015] EWCA Civ 801. In that case, following the death of her husband, the claimant became the sole registered proprietor of a residential property which had been acquired by the husband from the local authority under the right to buy legislation. The defendants were her two sons, each of whom had made financial contributions to the purchase. Each of them was married and their families lived together with the claimant in the property. The claimant and the defendants entered into a deed of declaration of trust under which the property was held on a trust of land for the three of them in equal shares absolutely.

40. Subsequently, the second defendant and his family moved out of the property, relations between his wife and that of the first defendant having broken down. The claimant sought an order from the court under section 14 of TOLATA that the second defendant sell and transfer his one third beneficial interest in the property to the first defendant. At first instance, the judge held that the court had no jurisdiction under section 14 to make an order that the second defendant sell his interest under the trust, but made an order that the property should be sold and that the first defendant should have the opportunity to purchase it, failing which the property was to be sold on the open market with liberty to all parties to bid. The decision was appealed to the Court of Appeal.

41. In the Court of Appeal, Briggs LJ (as he then was and with whom Lord Dyson MR and Bean LJ agreed) held that the judge below had been right to decide that the court had no jurisdiction under section 14 to make an order that the second defendant sell his interest under the trust. This was because (at [17]) it was

> *"no part of the functions of trustees of land to deal with or dispose of beneficial interests under the trust, whether by sale or otherwise…"*

42. However, he went on to say (at [23]) and [24]):

> *"[23] … the clear object and effect of sections 14 and 15 is to confer on the court a substantially wider discretion, exercised on the basis of wider considerations, than might be enjoyed by the trustees themselves, acting without either the consent of their beneficiaries or an order of the court. … section 15(1) may bring into play the intention of the person who created the trust that benefits might be conferred upon particular beneficiaries. All this departs from the general rule of equity which requires the trustees single-mindedly to advance the interests of the beneficiaries as a class, without preferring some of them over others."*
>
> *"[24] None of this means, of course, that the court will act unfairly, unjustly or capriciously as between beneficiaries in giving directions to trustees under section 14(2). It simply demonstrates that, in exercising its powers in circumstances where, necessarily, the beneficiaries will be in dispute with each other about what should be done with the trust property, the court is not rigidly constrained by those rules of equity which may, pursuant to section 6(6), constrain the trustees themselves."*

43. The second defendant in that case also argued that the order made was not a proper exercise of the judge's discretion. In particular, the judge's order was in conflict with the established equitable rules about obtaining the best price for all the beneficiaries, and avoiding the preferring of the interests of one beneficiary over another. In dealing with this submission, Briggs LJ said (at [29]) that:

> *"the judge's order is unchallengeable. I acknowledge at once that it is an unusual form of order, and that, in many similar cases, the court has ordered a sale of the trust property, with liberty to all beneficiaries to bid, thereby maximising the prospects of the achievement of best value."*

44. I had drawn to my attention the observation by Briggs LJ at paragraph [32] that the property in that case was one of a number of similar properties in a street in Islington that meant that the risk of an undervaluation by an expert was low, due to the large number of the available comparables. In concluding that the appeal should be dismissed Briggs LJ said (at [33]):

> *"All in all, I consider that the judge provided clear and cogent reasons, firmly grounded in the mainly uncontentious facts, for her conclusion that the order which she made was best calculated to serve the differing interests*

of all the beneficiaries. In particular, her order was calculated to minimise the risks that the interests of Mrs Bagum and Mr Hafiz and their families in continued occupation, and the interests of Mr Hai in obtaining a payment representing the proper value of his interest, might be materially compromised."

45. *Bagum v. Hafiz* (supra) has been followed and applied in a number of cases, including by Mr Edward Bartley-Jones QC in *Collins v. Collins (No. 2)* [2015] EWHC 2652 (Ch). That case involved land which had been purchased for the purposes of being farmed by a family partnership which partnership had come to an end due to various disputes. An order had been made under section 14 TOLATA that the land be sold, such sale to be overseen by a court appointed receiver, with liberty for any family member to bid. There were 2 rival bids for one particular piece of the land, a higher bid by a third party which was conditional on establishment of a right of way (which right of way the Court determined existed) and a lower bid by 3 of the 5 beneficiaries under the trust. Of the 2 non-bidding beneficiaries, one was implacably opposed to the bid by the 3 beneficiaries and the other was neutral. The third party bid would result in the non-bidding beneficiaries receiving £40,000 more than they would have done if the other bid were to be accepted. Edward Bartley-Jones QC (who went on to direct that the third party bid should be accepted) said at paragraph [87] having referred to the judgment of Briggs LJ in *Hafiz v. Begum* that:

"... the object and effect of ss.14 and 15 of TOLATA was to confer upon the court a substantially wider discretion, exercised upon the basis of wider considerations, that might be enjoyed by the trustees themselves. Thus the court is not rigidly constrained by those "rules" of equity which may, pursuant to s.6(6) of TOLATA, constrain the trustees themselves. I am not, therefore, necessarily mandated to obtain the best price for the beneficiaries as a whole. However, and conversely, I should bear clearly in mind in the exercise of my discretion the need to obtain the best price for the beneficiaries as a whole (which would be the overriding duty of a pure trustee). And, as this is the working out of an Order under s.14 , it seems to me that I must, in the exercise of my discretion, again bear in mind the matters which are referred to in s.15(1) and (3) of TOLATA."

46. Counsel in this case are agreed that the order which is sought by Sally, which is that she should have a limited period to purchase at a price which I am invited to fix, and only if she fails to complete the purchase at that price within that limited period should the Farm Land then be sold on the open market is one that it is within my discretion to make. They are not agreed as to how that discretion should be exercised.

47. Mr Darton seeks to place reliance on section 39 PA 1890 which provides that on the dissolution of a partnership, a partner is usually entitled to insist that all the partnership property is sold. He referred me to *Benge v. Benge* [2017] EWHC 2124 (Ch) which was concerned with the sale of partnership land following the dissolution of a partnership and the application of what is known as the *Syers* jurisdiction following the case of *Syers v. Syers* (1876) 1 App Cas 174, which allows

the Court to make an order permitting the majority partners to buy out the minority's share on the dissolution of a partnership. While in this case, the Farm Land is not an asset of the Partnership and therefore *Benge v. Benge* is not directly on point, it is argued that the *Syers* jurisdiction is analogous to the discretion under TOLATA and in particular that the factual situation in *Benge v. Benge* is not dissimilar to the situation before me. In that case one partner wanted to buy the partnership land from the other partners. Mr Murray Rosen QC sitting as a Deputy Judge of the Chancery Division reviewed various other authorities and said (at [54]):

> *"The cases do show that where one of the partners is running the business and would be the accounting party and wishes to continue to use the relevant assets, it may be just indeed to order that partner to pay for his purchase so long as the so-to-speak selling partner does not lose out financially. That of course requires the court to be very certain as regards what would be a fair value in those circumstances, and in my opinion the only way to do that is to judge the value of the asset against what would be achieved in the open market. Sometimes and for some assets that is an exercise which can be completed with a reasonable degree of confidence. Sometimes it is not."*

48. On the facts of that case, the Deputy Judge held that the property was a very unusual one with very significant development potential. Although the experts had agreed a range of £28 million to £35 million as the valuation of that land on the open market on an unconditional bid and the bid from the partner wishing to buy was £35.5 million, he held that the fact that one of the experts had expressed the view that it might be that a price of up to 30% more could be obtained by way of competitive bidding meant that the risk of injustice to the selling partners was too great for him to exercise the *Syers* jurisdiction. Accordingly, he directed a sale on the open market.

49. While I accept that the position in relation to partnership assets might be seen as analogous, it is only that, and is not directly on point. The wording of section 39 PA 1890 is in very different terms to TOLATA and on its face is mandatory. Nonetheless the decision in *Benge v. Benge* is illustrative of the difficulties which can be faced by a court in having to determine the value of an asset, whose real value can only actually be determined by what it sells for.

50. In my judgment, in deciding what order to make under section 14 TOLATA in this case, one of the key matters to take into account is the degree of certainty I can have as to the price I might set for the Farm Land to be bought by Sally being the "true" value of the land. That is to say I must consider how great the risk is that any price I set might turn out to be too low with the result that Karim will receive less than she would do on an open market sale. If I set the price too high, there is no risk to Karim: either Sally will purchase at that price and Karim will have received more than she would on an open market sale or Sally will decline to purchase and the open market sale price will be achieved. As I say this is a key matter, however, I accept the submission of Ms Taskis that it is not a threshold matter that is to say I do not have to be satisfied that there is no risk to Karim that she will not receive full value before I could make an order permitting Sally to purchase at a particular price. That would be to impose on myself an obligation to make an order to obtain the

best price for the beneficiaries as a whole, which is a constraint that I am not under in contrast to the position of the trustees.

51. One way to reduce the risk would be simply to adopt the higher of the 2 valuations for the Farm Land, being that given by Mr Gooderham on behalf of Karim, and provide that Sally could purchase at that price. However, in my judgment that is not appropriate. It is necessary to consider the reason for the differences in valuation between Mr Gooderham and Mr Alexander. If, as is the case in respect of some items, the experts each hold entirely justifiable but different views on certain elements of the valuation, in particular those items which are a matter of professional judgment but which are not clearly capable of mathematical or scientific support, in my judgment I should err on the side which results in higher figures for the value as that reduces the risks involved.

The Value of the Farm Land

52. I start by reminding myself that there are only very limited areas of dispute between the experts and that as a percentage of the overall valuation of the Farm Land, those disputes are within what might consider to be the permissible margin of error for valuers of 10% of the total value. Mr Gooderham's overall valuation for the Farm Land including the buildings, premises and solar panels, including the hope value and New Grounds East and West is £3,453,250. Mr Alexander's is £3,118,000.

New Grounds East and West

53. As to New Grounds East and West, Mr Gooderham values these at £18,518 per acre and Mr Alexander at £11,208 per acre. New Grounds East and West are currently one field, albeit they are treated as 2 separate paddocks. They are 4.668 and 5.582 acres in size respectively. They are on the outskirts of the village of Cottered outside of the development envelope. Both Mr Gooderham and Mr Alexander are of the opinion that these 2 pieces of land could be marketed as amenity land, i.e. pony paddocks and would therefore have a higher potential value than "normal" land.

54. New Grounds West lies close to the A507, although there appears to be small strip of land between it and the A507. Alongside New Ground East to its eastern boundary runs the track down to the sewerage works. I was told that there is quite a steep bank from the track up to New Grounds East. Access to New Grounds is currently from Childs Farm which lies to the south. That is owned by Sally and Mr Bayles. No evidence was adduced before me of how anyone other than someone who had access via Childs Farm would be able to get to either New Grounds West or New Grounds East.

55. The range of comparables relied upon by both experts is wide, the lowest price being in the region of £6,750 per acre and the highest as much as £24,000 an acre. Mr Gooderham put his valuation towards the mathematically higher end of this range, emphasising the land's proximity to the village and its ease of access. He said that this land was closer in its attributes to the comparables towards the higher end of the bracket. In my judgment, he had not fully appreciated the potential difficulties with access described above. When this was pointed out, he quite

sensibly accepted that the access issues would require time and money to be spent on them and that was likely to lead to a reduction in the price offered for the land.

56. Mr Gooderham was taken to details of a piece of pasture land in Fenstanton sold by his firm in March 2018 for the equivalent of £10,600 per acre. He accepted that this was a "pretty good comparable" before going on to explain, however, that while this was not on the particulars produced by his firm (but was in the auction legal pack) that piece of land was in flood zone 3. This is land having a 1 in 100 or greater annual probability of river flooding. In his opinion this would have a significant impact on value.

57. Mr Alexander based his valuation on the figure he and Mr Gooderham had agreed for Triggolds, one of the pieces of land comprising the Farm Land. Triggolds abuts the village envelope and is more centrally located. It is currently arable land, but would be very similar in value to the pasture land at New Grounds East and West. He did not rely on the land at Fenstanton other than to add it to others as one of a number of comparables. While he accepted that keeping a pony's feet dry was quite important, he did not believe that the market for pony paddocks would distinguish that in quite the way that Mr Gooderham had suggested.

58. Having heard both experts give evidence on this, in my judgment the evidence of Mr Alexander is to be preferred in this respect. His reliance on an agreed figure for a parcel of land in the same village seemed entirely proper. Mr Gooderham had not made proper allowance for the access issues with the land and did not provide me with a sensible explanation of why Triggolds was not the best comparable.

59. In my judgment, I accept the evidence of Mr Alexander that the correct value for New Grounds East and West is £115,000.

Hope Value

60. There are 2 potential development opportunities in respect of the farm buildings on Lodge Farm. Currently there are 10 buildings in the farm yard. Of these, there are 3 or 4 which might be capable of some redevelopment. One of these is a grade 2 listed barn currently being used as a grain drying barn. The others are barns which might be allowed to be developed as "Class Q Buildings". If these were to be developed, it would be possible to have 3 or perhaps 4 residential dwellings. They would be in the middle of what would still be a working arable farm close to very sizeable other non-developed buildings.

61. The experts are agreed that there is some development potential, but not as to the degree of that potential. Each advanced valuations based on hope value. It was common ground between them (although not accepted by Karim) that hope value was the price that would be paid on top of the base value of the land in order to compensate the vendor for the potential uplift in value in the event of planning permission being obtained by the purchaser for development of the land. Neither expert said that such an approach was inappropriate. Neither said that the only way to sell the Farm Land was to sell at the base value and then to add a clause in about overage. Mr Alexander said he would raise it with the client and let the client decide

but he did express the view that including an overage provision in a sale of land such as this could (not necessarily would) make a sale more difficult.

62. In my judgment, in light of the evidence that I have heard, it is an entirely appropriate approach to take to value this land on the basis of it having hope value. The alternative approach that overage should be sought would not be inappropriate, but that was not advanced by either expert as the correct or only way forward.

63. The differences between Mr Gooderham and Mr Alexander on the question of hope value were helpfully set out on in tabular form at page F/325A of the trial bundle. By the time of trial, the issues were:
    (a) the price per square foot for the potential Class Q Buildings with planning permission: Mr Gooderham said it was £135 per square foot and Mr Alexander £125 per square foot;
    (b) the deduction for planning uncertainty for the potential Class Q Buildings to reflect the fact that planning permission had not been obtained: Mr Gooderham said it was 25% and Mr Alexander said it was 35%;
    (c) the allowances to be made for infrastructure costs: the experts were agreed that there should be a £50,000 deduction to deal with the footpath which runs alongside the grade 2 listed barn, but Mr Gooderham said that only a £20,000 allowance should be made for water and no allowance for a new access road and upgrades to the electricity supply, whereas Mr Alexander said that a £75,000 allowance should be made for the water supply and £30,000 for each of the access road and the electricity supply;
    (d) the price per square foot for the grade 2 listed barn with planning permission: Mr Gooderham said it should be £108 per square foot and Mr Alexander said £60 per square foot;
    (e) the deduction for planning uncertainty for the grade 2 listed building to reflect the fact that planning permission had not been obtained: Mr Gooderham said it was 40% and Mr Alexander said it was 50%.

    I will deal with each in turn.

64. As to the price per square foot for the potential Class Q Buildings with planning permission, each expert relied on comparables. By the time of the trial, the difference between them was relatively small being £10 per square foot. Mr Gooderham relied on a number of comparables each of which had planning permission. These included a barn at Olmstead Green which sold at the equivalent of £96 per square foot, but had no services i.e. no water, no electricity and no drainage, and Starrs Farm Barn which sold at the equivalent of £112 per square foot. He also referred to properties at Cardinals' Green, Horseheath (at £222 per square foot), at Brocking Farm, Clavering (at £138 per square foot) and at Ford Street Farm, Braughing (at £176 per square foot), each of which had planning permission. He justified his figure of £135 per square foot on the basis of all of these properties. When pushed as to why the barn at Olmstead Green and Starrs Farm Barn did not provide the best comparables and lead to a lower figure than the £135 per square foot, he explained that those properties were not in as good areas as Lodge Farm and therefore prices per square foot would be less.

65. When Mr Alexander gave evidence, he concentrated on Olmstead Green and Starrs Farm Barn. It was suggested to him that he had deliberately included in his list of

comparables the Tithe Barn at Pirton in order to depress the average prices achieved, notwithstanding that this was a grade 2* listed barn which had been included by Mr Gooderham for the purposes of valuing the grade 2 barn at Lodge Farm, i.e. not the Class Q buildings. In my judgment, while it is right that he did include it in the table of properties in the discussion of the Class Q buildings, he was merely including it because it had been included in Mr Gooderham's list of comparables without differentiation. Mr Alexander did not seek to place any reliance on it in his evidence before me. Importantly, and as an indication of an expert being prepared to make appropriate concessions, Mr Alexander volunteered that as regards knowledge of whether Olmstead Green and Starrs Farm Barn were in less good areas than Lodge Farm or not, Mr Gooderham's judgment of those areas was probably better than his.

66. In light of the evidence presented to me and Mr Alexander's concession as to Mr Gooderham's better knowledge of the areas, in my judgment the correct figure to take as the price per square foot for the class Q buildings with planning permission is that advanced by Mr Gooderham of £135 per square foot. It is a figure which is justified by the comparables that he has relied upon.

67. As to the deduction for planning uncertainty, neither expert was able to point to anything by way of comparables (or even reverse engineered mathematics) which supported their respective deductions of 25% and 35%, but both accepted that there should be a deduction. It appeared to be suggested to Mr Alexander in cross-examination that obtaining planning permission for class Q buildings was effectively a tick box exercise and that it was a right if one could tick the necessary boxes. As these buildings ticked all the boxes, planning permission (it was suggested) was a certainty. This cannot have been the view of Mr Gooderham as even he had a 25% deduction. Mr Alexander justified his deduction on the historic approach of East Hertfordshire District Council, the local planning authority, which initially had rejected a large number of applications for class Q developments. However, its attitude appears to have changed in more recent times and many more applications are being permitted.

68. This is one of those areas on which, in my judgment, both experts held perfectly legitimate and justifiable opinions. As set out above, where I am seeking to minimise the risk to Karim if I am to allow a sale at a particular price to Sally, I should err on the side which results in the higher figures as that reduces the risks involved. Accordingly, for the purpose of determining a value, in my judgment I should apply and do apply only the 25% deduction proposed by Mr Gooderham.

69. As to infrastructure costs, where they disagree, I prefer the evidence of Mr Alexander to that of Mr Gooderham. As to both the access road and electricity upgrade, Mr Gooderham made no allowance on the basis that his £135 per square foot figure as the price for the properties with planning permission made allowance for the fact that services needed to be provided. However, he accepted that he had not analysed the comparables in the detail necessary to say that those sites had comparable access issues to this site. Similarly, he had not done any exercise to compare the electricity supplies at his comparable sites to the situation at Lodge Farm. He said he would need to look at the detail a bit more and accepted (again

an indication of a good expert trying to assist the court) he could have looked at the question of electricity upgrade but had not.

70. By contrast Mr Alexander was clear that one would have to relocate the access from the A507 away from its current position and that anyone buying Lodge Farm was going to factor in putting in an improved access. As he explained, it would be a very different situation once any development had taken place to merely having farm buildings there. As to the electricity supply, once the utility company was told that there were going to be 3 or 4 new properties up there, so that there would be 4 or 5 users (including the farm), it was inevitable that there would have to be an upgrade. He had allowed £10,000 per plot for 3 plots, which he said was pretty modest for an electrical supply. I accept his reasoning, which was logical and well thought through. Accordingly, in my judgment deductions from the price of £30,000 for the access road and £30,000 for the electricity supply are the correct deductions to make.

71. As to the water supply, Mr Gooderham's figure for deduction was £20,000 and Mr Alexander's £75,000. In oral evidence (although not on the written reports) it became clear that the difference is down to whether one allows for water being provided via a borehole (or 2) or whether allowance for mains water should be made. The experts were agreed that the mains water currently stops at the edge of the village which is about 600 metres away from the farm buildings. Mr Gooderham said that he had not looked at the costs of getting that extended up to the farm buildings, but accepted that any developer purchaser would look at both options of a borehole or mains water. He accepted that a developer would not pay more than it had to for a property, but if it thought it could make do with a borehole it would go with that. In his re-examination Mr Gooderham said that if the borehole was properly constructed, there would be no distinction between a borehole and mains water, save that the ongoing costs of providing water tends to be lower via a borehole. After the last occasion on which the experts had discussed matters, Mr Gooderham had received an oral estimate of £23,000 for 2 boreholes, which he said would be better than one.

72. In contrast, Mr Alexander was firmly of the opinion that any developer looking to have 3 or 4 properties on the site would want to allow for the cost of bringing mains water to the site. He did not agree that boreholes was a sensible way forward and the only way to be sure of having a proper supply was to have a mains water supply. If a number of properties were being supplied by boreholes, there would also have to be a management agreement as to who had to contribute what to the maintenance of the boreholes. He said that while he thought that the costs of getting a mains water supply might exceed £75,000 that was the amount he had allowed on a prudent basis.

73. I prefer the evidence of Mr Alexander. In my judgment, a hypothetical purchaser who was going to seek to develop the farm buildings would proceed on the basis that it was going to be necessary to have a mains water supply connected. It would make the properties so developed much easier to sell, would ensure continuity of supply and avoid the need for any management agreement as between the developed properties. There was no challenge to the figure of £75,000 as a prudent sum for

doing this work. Accordingly, the sum of £75,000 should be deducted from the headline figures.

74. As to the price per square foot for the grade 2 listed barn once it has planning permission, there were fewer comparables advanced. This is not surprising given the nature of a grade 2 listed barn. In the end there were just 3. Mr Gooderham relied on Hall Farms Barn, Great Chishill which sold for the equivalent of £116 per square foot. In oral evidence (but not in his report) he explained that these were grade 2 listed. He also referred to The Tithe Barn at Pirton which was a grade 2* listed barn which equated to £53.75 a square foot. He explained that the Tithe Barn at Pirton is a very substantial building. Planning permission had only been granted for a part of the barn, but the rest of the barn needed significant expenditure, which would have to be undertaken as part of the development. That had depressed the price per square foot and he therefore did not think it was a direct comparable. At the trial he produced a further comparable being Stock Barn, which was sold without planning permission at a price equivalent to £114 per square foot. However, he accepted that the latter had room to put in a second floor, but expected that the planning authority would require some void spaces so that the effective developable foot print would be 1½ times greater than the advertised space, so would bring down the comparable figure to approximately £80 per square foot.

75. Mr Alexander relied almost exclusively on The Tithe Barn at Pirton as the appropriate comparable. He said that this was a much bigger barn and somehow they had managed to get 3 floors into 3 or 4 bays, then there were other bays which were to be used for gardens and the like. But when pushed further on this, he said he did not know enough about the Tithe Barn, his information having only come from Mr Gooderham.

76. If I had to make a choice between Mr Gooderham's evidence on this and Mr Alexander's I would choose Mr Gooderham's as it is based on a slightly increased pool of comparables, whereas Mr Alexander is, in my judgment, over-reliant on one about which he does not have chapter and verse. However, given the relative lack of comparables for a grade 2 listed barn, in my judgment in circumstances where I do not have any proper reason to reject Mr Gooderham's evidence on this, in any event the only prudent course where I am seeking to minimise the risk to Karim if I am to allow a sale at a particular price to Sally is to err on the side which results in the higher figures as that reduces the risks involved. Accordingly, I accept Mr Gooderham's figure of £108 per square foot.

77. As to the deduction for planning uncertainty, both experts are agreed that a greater discount needs to be applied. Mr Gooderham says 40% and Mr Alexander says 50%. However, as with the planning deduction for the Class Q buildings, this is one of those areas on which, in my judgment, both experts held perfectly legitimate and justifiable opinions. As set out above, where I am seeking to minimise the risk to Karim if I am to allow a sale at a particular price to Sally, I should err on the side which results in the higher figures as that reduces the risks involved. Accordingly, for the purpose of determining a value, in my judgment I should apply and do apply only the 40% deduction proposed by Mr Gooderham.

78. The net effect of my conclusions set out above on the issue of hope value is that in my judgment the correct figure is £380,000 calculated as set out in the table (adapted from page F/325A) below:

	Conclusions
1. Potential Class Q Buildings	
5000 sq ft @ £135	**£675,000**
Deduction for planning uncertainty	
At 25%	**- £168,750**
Net	**£506,250**
Less infrastructure costs:	
Footpath (agreed)	**-£50,000**
Access Road	**-£30,000**
Electricity Supply	**-£30,000**
Water supply	**-£75,000**
Net	**£321,250**
2. Listed Barn	
2663 sq ft **@£108**	**£287,604**
Deduction for planning uncertainty	
At 40%	**£115,042**
Net	**£172,562**
3. Summary	
Potential Class Q	**£321,250**
Listed Barn	**£172,562**
Total	**£493,812**
Less deduction for existing buildings	
Agreed	**£112,750**
Total	**£381,062** **Say £380,000**

Conclusions on the Value of the Farm Land

79. In my judgment, if I am otherwise minded to exercise my discretion to allow Sally the opportunity to purchase the Farm Land first without it being placed on the open

market, the price at which a sale to Sally would have to take place is £3,245,000 (being the agreed sum of £2,750,000 plus £115,000 for New Grounds East and West plus £380,000 for the hope value).

Further discretionary factors

80. I have had urged on me a number of other matters that it is said I should take into account when exercising my discretion.

81. The first of these is the purpose of the trust. There can be no doubt that the Farm Land was held in trust in order to allow it to be farmed by the Partnership, while not becoming a partnership asset. On behalf of Karim, it is argued that the purpose of the trust was not to allow Sally to continue to farm the Farm Land after Roger's death and therefore the end of the Partnership. On behalf of Sally, it is argued that Roger would want the Farm Land to continue to be farmed by members of the Kingsley family, that is to say by Sally.

82. There was a fair amount of evidence given as to what Roger thought about this in the period running up to his death. In my judgment, what Roger may have thought about things as he neared his death is not what section 15(1) of TOLATA is directed towards, rather it is looking at the intention of the parties who created the trust at the time that the trust was created.

83. Nonetheless, it is clear from the contemporaneous notes and correspondence from 2015 that Roger was interested first in trying to have Mr Bayles and Karim join the Partnership so that it would continue and then (he hoped in due course when she was old enough) that his daughter, Tilly, might join the Partnership. It is evident from this that he envisaged the Farm Land continuing to be farmed by members of the Kingsley family after his death.

84. In particular, in an exchange of letters dated 15th June 2015 (some 12 days before he died) Sally asked a number of questions of Roger, including whether he wanted Kingsley Brothers to continue as a successful farming business and for Tilly to have an opportunity to be involved in the business at the right time. Roger's reply was that Tilly would inherit his share of the farm in due course (in fact this was left to Karim, not Tilly, but in the expectation that Karim will pass it on to Tilly). He said:

> *"The decision I have asked you to make and the one I have been asking on numerous occasions over many months is if you are prepared to work with Karim and for her to be admitted to the partnership? This will enable the farm to continue for the foreseeable future and until Tilly is ready/able to inherit. We are still awaiting this answer.*
> *If your answer is no then I see no alternative than for the farm to be sold …"*

85. There was no written answer to this, but it is apparent that Sally was not prepared to work with Karim or for her to be admitted to the partnership. When Karim was asked in cross-examination about Roger's wishes and this letter, she said that the family business was important to Roger and that he saw the sale of the Farm Land as a last resort. His concern was that Karim and Tilly should be properly catered

for. Karim said that Roger did not believe that Sally would be in a position to purchase out his interest in the Farm Land.

86. Ms Taskis on behalf of Sally submits that a sale to Sally at the correct price would meet the 2 concerns that Roger had namely (1) the continuation of the family farming business and (2) financial security for his wife and child. In my judgment, it certainly would achieve the latter. As to the former, that would also be achieved at least in the first instance.

87. By contrast Ms Taskis submitted, a sale of the Farm Land other than to Sally would mean not only the loss of the family inheritance but also the loss of Sally's livelihood. Given that the farming business is said to have been loss making since Roger's death (although for reasons set out below this appears not to be the case), one might have thought that Sally would be more interested in receiving a lump sum on the sale of the Farm Land on which she could live rather than continuing to work hard for little reward in the farming business. However, life is not all about earning money for not doing much. Having been involved in the farming business for over 40 years, being forced to give it up would, in my judgment, result in the loss of Sally's livelihood.

88. In rebuttal Mr Darton on behalf of Karim submits that Sally is now aged 67, she has no children of her own, the only remaining Kingsley family members are Roger's 2 daughters, Tilly and her older sister, and therefore the end of the Kingsley family farming this land is in any event imminent. I accept that unless Sally were to decide to leave her interest in the Farm Land to Tilly or her older sister, which Sally says she has not decided upon, farming of this land by the Kingsley family will cease when Sally stops farming it. However, at 67, there is no indication that Sally does not have many more years to live. Given that the physical work on the farm will be done by others, there is no reason why Sally should not be able to continue farming for many years to come.

89. A further matter that it was said on behalf of Karim that I should take into account was the conduct of Sally since Roger's death. This divides into different times. It is said that, although Sally said in her correspondence of 1st August 2015 to Karim that she was aware of her responsibility since the dissolution of the Partnership as a result of Roger's death to ensure that the Estate receives the full value of his interests in the Partnership and in the Farm Land, she has never sought to do this, rather she has sought to obtain for herself the Farm Land as cheaply as possible and has had to be forced as a result of applications to court to provide any funding of substance to Karim.

90. Particular reliance was placed on Sally's first open offer to purchase the Farm Land made on 19th October 2016. The net offer was to pay a sum of £845,000 after deductions for the outstanding mortgage, which equated to the Farm Land having a value of in the region of £1.5 to £1.8 million. It is said that this was so far below what the true value was that it shows a lack of bona fides on Sally's part and was an attempt to get rid of Karim's interest very cheaply. In my judgment it is not helpful or instructive to look at that offer and the reasons for it when considering matters some 28 months later. It was an offer based on an early valuation at a time when Karim had no valuation.

91. Of more significance is the open offer of 10th September, 2018 in which Sally offered to purchase the Farm Land on the basis of Mr Alexander's then expert valuation plus 50% of the difference between Mr Alexander's valuation and Mr Gooderham's then valuation. The valuation that came out at was £3,283,350 which is slightly more than the figure I have concluded is the right price for any sale to Sally, if I am to permit one. In my judgment, this demonstrates a practical and sensible approach being adopted by Sally.

92. Continuing with Sally's conduct, Mr Darton on behalf of Karim says that the Court can have no confidence whatsoever in Sally's future intentions, in particular the Court can have no faith that she will not simply purchase the land and then redevelop it. In my judgment, Sally's evidence on this topic was far from convincing. She claimed that she had no intention of developing the land or any part of it, then she appeared to change her position to saying that she would not undertake "much" development and when pressed on that, she then sought to explain this away by saying she meant that she might look to make more use of the existing farm buildings for other purposes that is to say to get other tenants in to use those buildings.

93. It is then said that Sally has not explained how she would fund the purchase of the Farm Land. The offer of 10th September 2018 referred to above was supported by proof of funding from Barclays Bank in a letter of even date. In her evidence before me, Sally was not able clearly to explain how this funding from Barclays Bank (which seemed to be for the whole £1.5 million that she would have to lay out) would be repaid. Sally suggested on more than one occasion that the funding was only by way of a short term advance until things got completed. She appeared to me to be saying that she thought the funding from Barclays was necessary at this stage but upon completion, presumably of the purchase, it would be repaid out of other funds that she has. This made little sense as the time when the funding would be needed would be on completion, not at this stage, and she failed to give details of what funding of her own she had, indeed saying it was none of anyone else's business.

94. Against this background, Mr Darton submits that the conclusion that the Court should draw is that Sally does not in fact intend to farm the Farm Land as it currently is, but does indeed intend to develop it or sell it on for development. He says that if she did not so intend, Sally would be offering to purchase the Farm Land without any hope value but with overage instead and it is said that she has not done this.

95. I agree that there is at least some doubt raised as to whether Sally really intends to carry on farming the Farm Land as it currently is. As to the question of overage, this seems to have arisen as an issue relatively late in the day, although it did get a brief mention in correspondence in August 2016 before disappearing again and then reappearing in September, 2018.

96. From her evidence before me, it was clear that Karim believes that Sally has some deal up her sleeve where she is going to benefit from the development of this land to the exclusion of Karim and therefore ultimately Tilly. She therefore says that any offer without overage should be disregarded and that the only offers that should

be considered are ones with overage clauses, even if it is say 30% payable at any time over the next 30 to 40 years as she says that will benefit Tilly. It is to be noted that as against this, at no stage has Karim ever made an open offer to accept a price based on the value of the Farm Land without any hope value, but with an overage clause. There is no evidence as to whether funding for Sally to purchase would be made available if the sale was to be on this basis.

97. Ultimately there is no evidence that Sally actually has a deal in mind for the Farm Land or that there is a deal which will result in her benefitting at the expense of the other beneficiary, effectively Karim.

98. Finally, it is said by Mr Darton that this is a situation which is a long way away from that in *Bagum v. Hafiz* (supra) and it is only a sale on the open market that will provide the definitive test as to what the Farm Land is actually worth. This is, of course, correct. However, the courts are used in many different contexts to making judgments based on assessment of expert evidence as to what something is worth without a sale actually taking place. Provided the risks identified above are properly addressed, as I believe they have been, the concerns as to only the market being able to determine the true price can be catered for.

99. In the course of the hearing, I raised the question of the tax implications in the event of a sale on the open market as it occurred to me that there might well be tax disadvantages to Sally if she was a forced seller rather than being able to buy out Karim's share. However, neither party sought to adduce any evidence on the tax implications of any order I might make, nor to address me on that issue. Accordingly, I leave all such issues out of account.

<u>Conclusion on Order for Sale</u>

100. In exercising my discretion as to what order should be made, I therefore take into account the following:
   (a) I am being asked to make an "unusual" order;
   (b) only a sale on the open market will provide the definitive test as to what the Farm Land is actually worth;
   (c) however, in my judgment, the correct price for the Farm Land to be purchased by Sally if she is to have the opportunity to purchase first before the Farm Land is put on the open market can be determined with sufficient accuracy to reduce the risks of Karim not receiving proper value for her interest in the Farm Land;
   (d) that price is £3,245,000;
   (e) neither expert expressed the opinion that selling the Farm Land on the basis of a hope value rather than on the basis of no hope value but overage would be an incorrect way to go about the sale, indeed both were instructed to value without it being suggested that they should go down the hope value route. Mr Gooderham elected to do so and Mr Alexander followed;
   (f) the purpose of the trust was so that the Farm Land could be farmed by members of the Kingsley family;
   (g) a sale to Sally will allow the Farm Land to continue to be farmed by a member of the Kingsley family and will allow her to preserve her livelihood;
   (h) Karim's interest is now purely financial;

(i) Roger's 2 apparent concerns as to the continuation of the farming business by members of the family and financial security for his wife and daughter would be met by a sale to Sally;
(j) I do not think that Sally's alleged bad conduct in the early days following Roger's death is a factor which I ought to take into account, even if (which I have not) I had determined that she had been guilty of the same;
(k) I do take into account that Sally made an offer very close to the "right" price in September 2018 which was backed by proof of funding from Barclays;
(l) I cannot be certain that if Sally purchased the Farm Land she would definitely farm it as it is and would not seek to develop it or sell part of it for development, but there is no evidence of her having any actual deal in mind for the Farm Land or that there is a deal which will result in her benefitting at the expense of the other beneficiary, effectively Karim;
(m) I am left uncertain about how the funding of Sally's proposed purchase is actually going to work and cannot be certain that she will not have to enter into some arrangement (if she has not already) with some third party to complete the purchase which arrangement might include a sub-sale of some part of the Farm Land or some deal to develop some part of it.

101. I appreciate that it is quite possible that other tribunals hearing the same evidence, taking into account the matters set out above, might quite reasonably come to a different conclusion. However, in the exercise of my discretion, I am prepared to make an order permitting Sally a period of 2 months to complete the purchase of the Farm Land based on the price of £3,245,000. I limit it to this period on the basis that this will allow sufficient time for such a purchase to complete given that, in order to raise the funding which will be necessary, Sally is going to have to undertake the usual searches even though she personally knows all about the Farm Land.

102. If at the end of that 2-month period, the sale has not completed, the Farm Land will have to be put up for sale on the open market. Both Sally and Karim will be entitled to bid for the Farm Land or any part of it, as it appears that it might well be appropriate to sell it in lots if it is going to be sold on the open market. Given the level of distrust that there is between Karim and Sally, it would seem appropriate that the sale on the open market should be conducted under the supervision of a court appointed receiver, but I will hear further submissions on this before making any direction to that effect.

103. I should make it clear that having made the order permitting Sally to purchase on the above basis, there is nothing to stop Sally and Karim instead agreeing to a purchase by Sally on the basis of a price without hope value, namely £2,865,000 but with an overage clause. But that is a matter for them.

Legal ownership of Lodge Farm

104. Mr Bayles was joined into the Partnership Action on the basis that it was asserted he still held the legal ownership to the whole of Lodge Farm (the 181 acres). It has been made clear from the outset that while he says he does not hold the legal ownership, he will join into any conveyance of the Lodge Farm land as part of the sale of the Farm Land in order to ensure that any purchaser obtains good title. To

the extent that the same is necessary, the order drawn up as a result of this judgment must include provision for that.

THE ISSUES: (2) THE ACCOUNTS

105. As originally pleaded, issues were raised with the accounts both before and after Roger's death. These were driven by Karim's belief that Sally was hiding things from her. By the time this matter reached trial, there were concerns only with accounts which had been produced after Roger's death.

106. Draft Cessation Accounts for the period to 27th June 2015 have been drawn up along with accounts for the periods to 30th September, 2016 and 30th September, 2017. No accounts for the period ending 30th September 2018 were available at trial. A single joint expert, Ms Hotson Moore, was instructed to review these accounts, as a result of which she identified certain errors which have been accepted by Sally. These, and errors as to professional fees which were also accepted by Sally, were helpfully set out by Sally's solicitors in an email following the conclusion of the hearing as follows:

(a) As to the Cessation Accounts:
    (i) sale proceeds for Karim's car adjusted to agreed sum of £1,500;
    (ii) sale proceeds of plant and equipment increased to £111,770;
(b) As to the accounts for the period to 30th September, 2016:
    (i) professional fees of £5,373 removed;
    (ii) bean sales increased by £4,628;
    (iii)rent paid increased by £34,375;
(c) As to the accounts for the period to 30th September, 2017:
    (i) professional fees of £25,909 removed;
    (ii) seeds (included in the figure for purchases) reduced by £22,682;
    (iii)rent paid increased by £27,500;
    (iv)rent transposition error adjusted – rent increased by £270.

When the revised accounts are drawn up, all of these matters will have to be taken into account along with the matters outstanding on which I have to rule.

Cessation Accounts

107. As to the Cessation Accounts, the one issue which appeared to remain outstanding was the "freehold property" shown in the accounts under fixed assets with a value of £33,624.

108. In her closing note, Ms Taskis for Sally identified in addition to the above the question of the solar arrays, saying that they fell to be treated in the same way as "freehold property". This is not something which had been raised previously.

109. There has been an entry for "freehold property" in previous sets of accounts while Roger was alive. As I have set out above, the partnership did not actually own any freehold property. Rather the property was deliberately owned by the individuals and used by the partnership. It appears (although this was not explored to any degree in evidence) that some of the buildings erected in the farmyard at Lodge Farm were paid for out of partnership income. What this figure of £33,624 is said

by Mr Darton on behalf of the Estate to represent is the depreciated sum in respect of the costs expended on those buildings.

110. The buildings are fixtures to the land. It is trite law that such fixtures become part of the land. Accordingly, any buildings paid for out of partnership income now belong to the owners of Lodge Farm, namely the Estate and Sally. Their value is included in the valuations of the land set out above. It follows that on a sale of the land either to Sally as I have directed may happen at the price set out above or on the open market, the Estate and Sally will receive the full value of the increase in value due to the buildings on the land, albeit on a 50/50 split.

111. Notwithstanding that the buildings do not belong to the Partnership and cannot be partnership assets as such, Mr Darton submits (in reliance on *Lindley & Banks* 20th ed at 18.40) that where a partnership expends money on property belonging to one or more of the parties the court can direct that the improved value of the property be treated as a partnership asset. I accept that the court can so direct if justice requires that this should be done. In turn that will depend on what the partners agreed should happen as a result of the outlay of partnership money.

112. There was no evidence adduced by Karim as to there having been any particular agreement reached. Mr Darton submits that the fact that this figure for "freehold property" has been included in the partnership accounts evidences an agreement between the partners that the improved value of the property should be treated as a partnership asset. In my judgment the inclusion of this item as "freehold property" does not evidence an agreement of the nature suggested by Mr Darton. The figure included in the accounts is not the improved value of the property, but rather the depreciated outlay. It seems much more likely to me that this sum had been included in the partnership accounts to allow the costs of the erection of the buildings to be claimed as an expense of the partnership for the purposes of reducing the profits of the partnership by way of charging depreciation to the profit and loss accounts. There is a line for depreciation of the buildings in the accounts. This is simply an accounting concept.

113. Further, in this case, the partners became the owners of the buildings in accordance with their rights as owners of the Farm Land. While the shares in which they are entitled to the value of the land is 50/50 and their interest in the partnership is 2/3rd to 1/3rd, this is not sufficient in my judgment for me to infer that there was an agreement that the improved value of the property should be included as a partnership asset as opposed to the improved value accruing to them in their capacities as owners of the Farm Land. The burden of proof on this lies fairly on the Estate and it has not discharged that burden.

114. Accordingly, there is no freehold property which is an asset of the partnership. When producing the Cessation Accounts, that figure for "freehold property" should be removed as there is no asset which the Partnership could realise. The value of these buildings is included in the value of the land.

115. It must follow that the line "improvements to property", if that refers to improvements to the buildings, also has to be removed from the Cessation Accounts as that is not a realisable asset either.

116. As to the solar arrays, these do not appear in the balance sheet in the Cessation Accounts as a separate item. They do appear 3 pages later in a document entitled "*Fixed Assets – Disposal @ Cessation*" under the column "*Vehicles & Implements*" against an entry for disposal proceeds of £21,530, being an item some or all of which Sally is proposing to buy from Karim, albeit under the page "*Adjustments*", they are split between the Estate and Sally. They have also been included in the value of the land (within the agreed figure of £325,000 before hope value) and therefore the Estate will receive 50% of their value and Sally 50% of their value. By contrast to the buildings, it may well be that they would not be treated as fixtures, depending on their degree of permanency. In light of the lack of information as to these solar arrays, I am not able to make any determinative finding, save that it is clear that the Estate is not entitled to be paid for these twice over. I will hear further submissions as to the solar arrays if the parties cannot agree on the treatment of these items in light of my findings above.

Post dissolution accounts

117. In respect of post dissolution accounts, the following items were in issue before me, at least initially:
(a) depreciation on the plant and machinery;
(b) legal expenses; and
(c) occupation rent.

118. As to depreciation, what is said on behalf of the Estate is that the figures in the post dissolution accounts (which are only trading accounts and do not include a balance sheet) are exceptionally high given the value of the assets concerned. The figures for depreciation are £30,188 for the period 28th June 2015 to 30th September, 2016 and £19,120 for the year to 30th September, 2017. No alternative figures have been advanced on behalf of the Estate.

119. There is a slight oddity in this as the value of the plant and machinery as at Roger's death has been agreed and it is agreed that Sally will pay the agreed sum for the plant and machinery. Accordingly, from 28th June 2015 onwards, the plant and machinery was notionally not owned by the Partnership but was Sally's. Accordingly, the Partnership was not suffering any depreciation on it, rather Sally would have been. However, the Partnership has continued to trade and is continuing to do so for the purposes of the winding up. In order to do so, it needs to have plant and machinery. It could have rented the plant and machinery from a third party and then charged that to the profit and loss account, but it makes much more sense to continue to use the same plant and machinery and to charge the use of that plant and machinery to the profit and loss account. While it seems to me that it would probably have been more accurate to include this as an item of rent for plant and machinery, the single joint expert, Ms Hotson Moore, did not suggest that the treatment in the post dissolution accounts was inappropriate. Nor did she suggest that any adjustment needed to be made.

120. There is no explanation of how the depreciation figure has been calculated, but on an agreed value of the plant and machinery as at 25th June 2015 of £111,770 the depreciation figure of £30,188 over a 15 month period equates to approximately

22% per annum. The deprecation figure of £19,120 over the following 12 month period on a starting figure of £81,582 (namely £111,770 less £30,188) equates to approximately 23%. While these are necessarily rough and ready figures as they assume that there were no additions or disposals to the plant and machinery in these periods, they are not, in my judgment, so out of the norm that I could conclude that they were exceptionally high.

121. In my judgment, therefore, there is no evidential basis on which I could conclude that any alternative figure should be included in the accounts in place of the figures currently included. No adjustment is necessary to the post dissolution accounts in this respect.

122. As to legal expenses, it was properly conceded on Sally's behalf that these should be excluded as they related to the partnership dispute. They were included in the email from Sally's solicitors following the conclusion of the hearing under the heading of "professional fees" as being items for which the accounts had to be adjusted.

123. As to the question of "*occupation rent*", this is far from straightforward. The Estate sought interim relief in these proceedings, namely a payment for the use and occupation of the land by Sally from the date of Roger's death and continuing. After agreement had been reached on the appropriate rental for the Farm Land, Sally tendered the sum of £65,717.98 in respect of (among other things) occupation until September, 2018, which was accepted. By order dated 11th October 2018, Deputy Master Kaye (as she then was) ordered that Sally should pay interest in respect of the capital sum which was expressed as being occupation rent until 30th September, 2018 namely the sum of £58,297.79 and in addition a sum of £1,495 per month "*by way of an interim occupation rent for [Sally's] use and occupation*" of the Farm Land. The figures of £58,297.79 and of £1,495 per month were, as I understand matters, 50% of the monthly rental less the mortgage payments. The mortgage payments were met by the co-owners of the land as they always had been prior to Roger's death. They were never recharged to the Partnership.

124. It was submitted in closing on behalf of Sally that in fact, because this was occupation by the Partnership continuing for the purposes of the winding up, occupation rent was properly payable by the Partnership and should be included in the post dissolution partnership accounts as a cost to be charged against income. Further, it was said that Sally as a co-owner was equally entitled to receive an occupation rent and accordingly, the cost should be doubled. No authorities were cited by Ms Taskis at the time of the oral closings.

125. In his oral submissions, Mr Darton submitted that occupation rent is paid for exclusion from land and is effectively damages for trespass, on the basis that the occupation is adverse to the co-owner. He said that the difficulty for Sally in seeking to claim an occupation rent is that the Partnership's occupation was not adverse. There was no notional rent and none was actually charged. He appeared to accept that the Partnership might be able to claim for the sums paid to the Estate but that it did not have to pay any monies to Sally.

126. Because these arguments arose relatively late in the day, I asked for and was provided with short further submissions by email.

127. In her further submissions, Miss Taskis relied upon the decision of David Richards J (as he then was) in *Lie v. Mohile* [2014] EWHC 3709 (Ch) and in particular at paragraph [9] for the proposition that the implied licence granted to the partnership by the partners who owned the property continued until the partnership is wound up (unless a receiver is appointed by the court on the application of either of the partners).

128. Ms Taskis further submitted that this is not a case of Sally as a co-owner having kept the Estate out of occupation, but of the Partnership continuing to exercise its rights under the implied licence (albeit for reasons set out below in connection with Peascroft, it is not a formal licence). Therefore, so the argument runs, Sally is equally entitled to receive an occupation rent from the partnership. The effect of this is that the post dissolution Partnership accounts should show twice the lump sum paid to the Estate and an ongoing rent from October 2018 payable by the Partnership at the rate of £2,990 per month.

129. In his further submissions, Mr Darton, on behalf of the Estate submitted that co-owners are not entitled to claim an occupation rent unless they have been expressly or implicitly excluded from jointly owned property, relying on the judgment of Millett J (as he then was) in *Re Pavlou* [1993] 1 WLR 1046 at 1049-105. He submits that Sally was at liberty to occupy Lodge Farm as a consequence of her co-ownership of the property and as a consequence of her decision to carry on the partnership business, she has not been excluded from jointly owned property.

130. In my judgment, Mr Darton is wrong to view this as a case of an occupation rent being ordered to be paid by one co-owner in possession of a property to the other co-owner on the basis of Sally having excluded the Estate from occupation of the Farm Land. Rather, in accordance with the principle set out in *Lie v. Mohile* (supra), the occupation was by the Partnership for the purposes of the Partnership and it was a right to occupy as against both of the co-owners of the Farm Land.

131. In my judgment, the difficulty that arises in this case stems from the order of Deputy Master Kaye. I have not seen any judgment setting out the basis on which she made this order. I make no criticism of the Deputy Master as it appears that matters were presented to her by both sides on the basis that the Estate was entitled to an occupation rent. She does not appear to have had the decision in *Lie v. Mohile* (supra) drawn to her attention. Had she done so, it seems likely to me that she would have concluded that until a receiver was appointed or the Partnership was finally wound up, the Partnership was entitled to continue to occupy the Farm Land on the terms of the previous implied licence. Those terms did not include the payment of any rent or licence fee (the rent figure appearing in the accounts relating to land which was not owned by the partners). She would therefore have been likely to have declined to make an order requiring payment of an "*interim occupation rent*" by Sally.

132. However, there has been no appeal against Deputy Master Kaye's order, rather its terms have been complied with. In my judgment on the true interpretation of

that order, construed against the background facts, the order being made for Sally to pay the interim occupation for her "*use and occupation of the Properties*" was for her occupation as carrying on the Partnership. It was not for her personal occupation as one co-owner as against another co-owner. The Deputy Master was, in effect, setting a rent that ought to be paid by the Partnership, one half of which was to be physically paid across to the Estate. The rent that she was setting was £2,990 per month.

133. It follows that in the post dissolution partnership accounts, the rent paid to the Estate (both the lump sum of £58,297.79 and the ongoing monthly sums) should be included as a cost to the Partnership. In my judgment, contrary to the submission of Mr Darton, it does not matter that no such figure has to date been included in the draft partnership accounts as the relief sought in the Particulars of Claim is for all necessary and usual partnership accounts and the order of Deputy Master Kaye at paragraph 6 listed a number of accounts which were to be taken including at sub-paragraph (vi) an inquiry as to what sums have been paid since Roger's death by Sally to the executors of the Estate in respect of the business as well as wider accounts and inquiries at sub-paragraphs (vii) and (viii) of the order.

134. The next issue which arises is whether there should also be included in the post dissolution accounts sums which have not actually been paid to Sally, but which represent the other 50% of the "*interim occupation rent*" as a partnership liability. In my judgment, there could be no equitable basis on which Sally as a 50% co-owner of the Farm Land would not be entitled to the same rent from the Partnership as the Estate is. It cannot have been the intention of Deputy Master Kaye to say that the Partnership only had to pay one of the 2 co-owners of the Farm Land if a rent was payable for the Partnership's occupation of that land. Therefore, in my judgment the equivalent sums should be included in the post dissolution accounts.

135. When ultimately calculating what sums are due and to whom, account will have to be taken of the fact that sums have actually been paid to the Estate for "*occupation rent*", whereas no such sums have been paid to Sally.

136. An alternative interpretation of Deputy Master Kaye's order is that when ordering that an "*interim occupation rent*" should be payable "*until the trial of the action or further order*", the Deputy Master was merely saying that the sums were payable for the time being, but the issue of whether any occupation rent was actually payable at any time was a matter for the trial judge. If that is the correct interpretation of her order (and I have received no submissions on this), it must be implied that if the trial judge subsequently found that there was no occupation rent payable, any payment made pursuant to her order would be repayable by the Estate. One of the issues in the Claimants' skeleton argument served in advance of the trial was "*the occupation rent payable by Sally in respect of her use of the Farm since 27 June 2015*", implying that the issue included the question of whether any such rent was payable at all.

137. If this interpretation of Deputy Master Kaye's order was open to me (and I make no finding on this in light of the lack of any submissions), given the decision of David Richards J in *Lie v. Mohile* (supra), I would have found that the Partnership was under no liability for rent for the Farm Land, as the terms of the implied licence

would continue until the winding up of the Partnership and those terms did not include the payment of any rent or licence fee for occupation of the Farm Land. The net effect of this would be that there would be no adjustment to the post dissolution accounts in respect of rent, but that the Estate would be required to give credit for the sums received (both the lump sum and the ongoing monthly sums) under the terms of Deputy Master Kaye's order.

Conclusion on the Accounts

138. As a result of my findings set out above, it will be necessary for the Cessation Accounts and the post-dissolution accounts to be re-drawn. I would hope that the parties will be able to agree the final form of those accounts, but in the event of disagreement they will have to bring this matter back before me to rule on such disagreements.

139. Additionally, final accounts will need to be drawn up to cover the period from the 30th September, 2017 until the date of the making of the order consequent on this judgment. Those will have to be drawn up applying the principles set out herein.

THE ISSUES: (3) PEASCROFT

140. As set out above, Peascroft is not part of the Farm Land and is the subject of the separate Possession Claim. The owners of Peascroft 1 and Peascroft 2 respectively seek possession alternatively a declaration as to the terms on which Sally has occupied this land since the death of Roger.

141. The pleaded defence to the Possession Claim (at paragraph 9) is that in respect of Peascroft 1, there was an agreement when Roger acquired this in September, 1988, between Roger and his partners, who at that time were Percy and Sally, that the land would be farmed by the Partnership as Roger's tenants. Sally says that the rent for Peascroft 1 was originally £1,120 and this was recorded in the cash books of the Partnership. It seems to be common ground that such payments as were made were irregular.

142. As to Peascroft 2, it is pleaded by Sally that the previous owner, Mr Sanders, wanted to retain ownership but was willing to let it to the Partnership on the terms that an annual turnover rent was paid for it. The Claimants' case is that there was an oral agreement between Mr Sanders and Roger only for Roger to farm this land, evidenced by a letter of February 1989. Sally accepts that no rent was paid by the Partnership in respect from Peascroft 2 since at least December 2013 when Karim and her sister Maria purchased this parcel.

143. Although separate parcels, Peascroft 1 and Peascroft 2 were farmed as a single enclosure of arable land without differentiation between the 2 parcels.

144. At paragraph 12 of the defence it is pleaded:

> "*It is the Defendant's case that the alleged "informal agreement" with Roger … amounted to a new agricultural tenancy within the meaning of section 2 of the [AHA] 1986 granted by Roger to himself, Percy and [Sally]*

as joint tenants, they having agreed that they would have exclusive possession of the land at an agreed yearly rent. It is further [Sally's] case that the alleged informal agreement made with Mr Sanders for the … Partnership's exclusive use and occupation of [Peascroft 2] also amounted to a new agricultural tenancy within the meaning of section 2 of the [AHA] 1986. Percy, Roger and [Sally] were thereby granted legal possession in aggregate of the whole of Peascroft as joint tenants under two agricultural tenancies both with statutory security of tenure."

145. Sally counterclaimed for declaratory relief that she lawfully uses and occupies Peascroft as the yearly tenant thereof under 2 agricultural tenancies within the meaning of section 2 AHA 1986. This provides that:

"*(1) An agreement to which this section applies shall take effect, with the necessary modifications, as if it were an agreement for the letting of land for a tenancy from year to year unless the agreement was approved by the Minister before it was entered into.*
(2) Subject to subsection (3) below, this section applies to an agreement under which—
(a) any land is let to a person for use as agricultural land for an interest less than a tenancy from year to year, or
(b) a person is granted a licence to occupy land for use as agricultural land,
if the circumstances are such that if his interest were a tenancy from year to year he would in respect of that land be the tenant of an agricultural holding."

146. In light of that pleaded case, Mr Darton for the Claimants advanced in his Skeleton Argument the position that if the Partnership (as opposed to Roger personally) ever occupied either title, then it did so as a consequence of Roger's ownership of Peascroft 1 and his contractual rights in respect of Peascroft 2. On that basis, he said that the Partnership could not acquire an agricultural tenancy over land which is already owned by one of the partners, as the partner could not grant himself a licence over land that he already owns even if that licence is also granted to the other partners, relying on *Harrison-Broadly v. Smith* [1964] 1 WLR 456 at 464-465 per Harman LJ, at 468-469 per Pearson LJ and at 470 per Davies LJ. Accordingly the "statutory magic" (as Ms Taskis termed it) of section 2 AHA 1986 would not operate to give rise to an agricultural tenancy.

147. Faced with this argument, in her written closing submissions Ms Taskis agreed that the "statutory magic" under section 2 AHA 1986 did not operate because of the effect of *Harrison-Broadly v. Smith*. She said that Sally "*does not however claim under s. 2. [Sally] claims to have been granted a tenancy of the land, which would fall under s. 1 of the 1986 Act*". In her oral closing submissions, she went even further and said that Sally had never relied on section 2.

148. Given the terms of Sally's pleaded defence to the Possession Claim as set out above and the relief she expressly sought, it is clear that she had indeed relied on section 2 and its "statutory magic". Further, and importantly, Sally has never

pleaded a case based on section 1 of the AHA 1986. No permission to amend was sought at any stage during the trial to add a claim under section 1, even when the lack of any pleaded case under section 1 was pointed out.

149. Accordingly, in my judgment, it is not open to Sally to advance a case based on section 1 AHA 1986 by way of a defence to the Possession Claim. Given that she has disavowed her pleaded defence based on section 2 AHA 1986, her defence must fail. On this basis alone, I would grant judgment to the Claimants in the Possession Claim and dismiss Sally's counterclaim.

150. Further, on the basis of the evidence I heard I would not have been satisfied that Sally had discharged the burden that there were in fact tenancies of Peascroft 1 and/or Peascroft 2 within section 1 AHA 1986, which would have had to have been in place before 1st September, 1995. It is to be noted that there is nothing in any of Sally's 3 witness statements filed in these proceedings which addresses the grant of any tenancy in respect of Peascroft 1 or Peascroft 2. Accordingly, it is particularly important to look at what (little) documentary evidence from the time that there is.

151. As to Peascroft 2, Mr Darton drew to my attention the letter dated 8th February 1989 from Roger to Mr Sanders in which he said he was writing to "*confirm that I am cultivating, as your contractor*" Peascroft 2 and that he would "*let you have a cheque after harvest for the net profit after calculating the cost of cultivations, seed and fertilisers*". While this was, of course, only a statement of what the position was at that time, it is inconsistent with Roger having had a tenancy of Peascroft 2, let alone a section 1 AHA 1986 tenancy. There was no evidence adduced before me to show that this position changed so that a tenancy of the land was granted to Roger, let alone to the Partnership. Sally's written evidence did not touch on this and in her oral evidence she was unable to offer any assistance, beyond saying that Peascroft was farmed in the same way as the rest of the land farmed by the Partnership.

152. On 12th November, 1997 which was within a couple of months of Percy's death (and after the date by which an AHA tenancy had to be established to qualify for the protection under that Act), Mr Bayles as his executor produced a document entitled "*Provisional statement of assets and liabilities*" setting out assets attracting 100% agricultural property relief. In that he identified Lodge Farm, Charities Land, Flint Land, Glebe Land and Other Land. Percy was said to have a 1/3rd interest in Lodge Farm. The Charities Land, Flint Land and Glebe Land were all described as "non-assignable 1986 Act" tenancies farmed by Percy in the family partnership. By contrast in respect of Other Land this was described as: "*60 acres – informal and short term tenancies and other arrangements – farmed by PCK in family partnership*".

153. While it is not expressly mentioned by name, both Peascroft 1 and Peascroft 2 would have fallen within this description of Other Land. Mr Bayles, who was a chartered surveyor working in farming land, did not state on this document that these were the subject of AHA tenancies. In giving his oral evidence Mr Bayles accepted that the wording does not allow the reader to see if there was a 1986 AHA tenancy in respect of any of the Other Land. However, he asserted that he did think that there was a 1986 Act tenancy (although he did not expressly limit this to

Peascroft), pointing out that the audience for this statement of assets and liabilities was Roger and Sally as the beneficiaries under Percy's will and therefore the way that he had categorised the land was perfectly appropriate for the purposes of the document.

154. Having seen Mr Bayles give evidence and having regard to the care which he took in compiling this document, I reject his evidence given over 20 years later as to his belief of the situation as regards Peascroft 1 and Peascroft 2 being subject to AHA 1986 tenancies. Had he believed this at the time, I have no doubt that he would have identified these as being subject to AHA 1986 tenancies in favour of the Partnership in this document, just as he did the other parcels which were subject to AHA 1986 tenancies. It was not an informal document but was setting out his understanding at the time. In giving this oral evidence (it was not in his witness statement), Mr Bayles was understandably but misguidedly trying to assist his wife, Sally.

155. Further in a document written by Roger on 15th February, 2015 a few months before his death when he was trying to get his affairs in order, he said that in relation to Peascroft 1, this would "*have to be subject to a formal agreement written up and signed. This will need to be on a rolling one year agreement*". Had he believed that the Partnership had the benefit of an AHA 1986 tenancy, there would have been no need to refer to a "rolling one year agreement".

156. When Sally was cross-examined about the agreement pleaded at paragraph 9 of her defence to the Possession Claim, she understandably was unable to recall a word for word conversation about Peascroft 1, but asserted that they (that is Roger, Percy and she) would have discussed it. She could not remember when they would have done so and was unable to remember any discussion about the "rent" of £1,120 saying that this came from the books.

157. On the basis of the evidence before me, I am not satisfied on the balance of probabilities that there was any grant of a tenancy in respect of Peascroft 1 or Peascroft 2 in favour of the Partnership, to which Sally has succeeded following dissolution of the Partnership. To the contrary, the documentary evidence, while not conclusive, points the other way.

158. Given my conclusions as to what is open to Sally in light of her pleaded case and my conclusions on the facts, it is not necessary for me to lengthen this already lengthy judgment, by considering the authorities on the question of whether one partner as owner of a property can grant a tenancy to the partnership. A number were cited to me which appear to conflict on the issue. It is better that I do not add to the authorities on this topic.

<u>Conclusion on Peascroft</u>

159. The Estate and Maria Wheeler are entitled to possession of Peascroft 1. Karim and Maria are entitled to possession of Peascroft 2. The Partnership did not have the benefit of any AHA 1986 tenancy in respect of either property.

160. The Partnership is liable for mesne profits for its occupation of these properties since Roger's death, but I have heard no evidence on which to arrive at any figure for mesne profits.

161. It may be that if Sally completes the purchase of the Farm Land, the respective owners will wish to seek to enter into agreements with Sally for her to occupy Peascroft 1 and/or Peascroft 2, but that is a matter which is down to them.

CONCLUSION

162. I will list this matter for a consequentials hearing, at which Counsel can address me as to the form of the order which should follow if the parties are unable to agree this. At that hearing the parties may make further submissions as to any other matters arising out of the accounts for the Partnership as a consequence of this judgment and such other matters (if any) as cannot be agreed.

1st May 2019