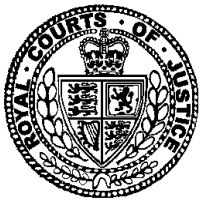

Neutral Citation Number: [2022] EWHC 365 (Ch)

Case No: E00YE350

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 25 February 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

AXNOLLER EVENTS LIMITED	**Claimant**
- and -	
(1) NIHAL MOHAMMED KAMAL BRAKE **(2) ANDREW YOUNG BRAKE**	**Defendants**

- -
- -

Edwin Johnson QC and Niraj Modha (instructed by **Stewarts Law LLP**) for the **Claimant**
The Defendants in person

Hearing dates: 7-24 September 2021

- -

Approved Judgment

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

.....

HHJ Paul Matthews :

INTRODUCTION

1. This is my judgment on the trial of a claim, made by claim form issued on 19 November 2018, for (i) possession of West Axnoller Farm ("the Farm"), near Beaminster in Dorset (this includes the main house, which I shall call "Axnoller House" or "the house", and associated equestrian facilities, as well as the remaining land of the original dairy farm), (ii) mesne profits and/or damages, and (iii) damages for wrongful interference with the claimant's goods. The claimant claims to be the legal owner of the fee simple estate in the Farm. The defendants do not challenge the claimant's title to the Farm, but resist the claim to possession, asserting various forms of licence or tenancy in doing so. They also deny the claims for damages.

2. At the request of the parties, I am giving judgment simultaneously in another action between (in effect) the same parties, called *Brake v Chedington Court Estate Ltd* (where the defendant wholly owns the claimant in this case, and the claimants are the present defendants). That case has been colloquially referred to as the "Eviction Proceedings", to distinguish it easily from this case, which is called the "Possession Proceedings". Rather than refer readers of this judgment to the other judgment for certain background and other information, I am going to set out certain material in effect twice, once in each judgment, so as to make each judgment self-contained. In any event, the two cases differ in certain details, and this approach means that each judgment can be tailored to the needs of the particular case.

3. Regrettably, this claim is only one part of much wider litigation between the parties. Until recently, the defendants were represented by solicitors and leading and junior counsel. However, in March this year both of the defendants' counsel withdrew from the litigation generally, and in particular withdrew from representation in the present claim. The defendants' solicitors continued on the record until June 2021, when they also withdrew. The trial of this claim had previously been listed for April to May last year, but after an application to adjourn was made to me I vacated that listing and relisted it for last September: see [2021] EWHC 982 (Ch). Because it was envisaged that the defendants would represent themselves, the first defendant Mrs Brake conducting the advocacy on behalf of both defendants, and she has a number of medical conditions, I agreed that the trial would be conducted in half days only. In fact, and either at her request or with her agreement, I sat into the afternoon on three days out of 15.

BACKGROUND

4. Although I shall have to return to some of the material in more detail later, I set the context for the present claim by providing some background, which refers to some of the other litigation between the parties. I have adapted this from similar statements in earlier judgments of mine.

West Axnoller Farm

5. In September 2004, the first defendant (then Mrs D'Arcy, but whom I shall call by her current name, Mrs Brake) acquired the Farm, near Beaminster in Dorset, from local landowners, the Vickery family (who continued to have substantial landholdings locally). This property included a substantial dwelling-house known subsequently as Axnoller House. Just outside the southern boundary of the Farm, on the other side of the private lane leading to the Farm, lies another, smaller residential property known as West Axnoller Cottage (the "cottage"). In July 2002 a Mr and Mrs White had purchased the cottage from the Vickery family and were living there when Mrs Brake bought the Farm.

6. In 2006 Mrs Brake began to operate a holiday letting business at the Farm, subsequently joined in partnership in 2008 by her husband, the second defendant ("Mr Brake"). Mrs Brake borrowed money from bankers Adam & Co in 2006, secured by a first legal charge on the Farm. The financial crisis of 2008 made it impossible to obtain further bank finance to expand the business being carried on at the Farm. The defendants therefore looked for an outside investor.

The "Stay in Style" Partnership

7. In February 2010 Mr and Mrs Brake ("the Brakes") entered into a partnership with a limited partnership called Patley Wood Farm LLP ("PWF"), whose principal was Mrs Lorraine Brehme ("Mrs Brehme"). The partnership (known as "Stay in Style") was to carry on the business of providing luxurious weekend and other breaks, and hosting events such as weddings. The Brakes contributed the Farm as partnership property, although still subject to the charge to Adam & Co to secure existing borrowings. With funds contributed by Mrs Brehme through PWF, on 8 April 2010 the partnership acquired the cottage, the legal title to which was transferred to the Brakes and Mrs Brehme jointly, who were registered as proprietors. At first the cottage was used as accommodation for a housekeeper and then for a personal assistant (Simon Windus) and his family. After they left in 2012 it was used (inter alia) for the Brakes and Mrs Brake's young son Tom D'Arcy to stay in when the main house was let.

8. Differences arose between the Brakes on the one hand and PWF on the other, as partners in Stay in Style. In accordance with the partnership agreement, these were referred to arbitration, which ended on 21 June 2013 with an award in favour of PWF, and the dissolution of the partnership. Following a failure to pay orders made against them for costs in the arbitration, the Brakes were adjudicated bankrupt on 12 May 2015. Mr Duncan Swift was appointed trustee in bankruptcy with another person, who later retired and was not replaced. The partnership itself subsequently went into administration (in 2016), and then into liquidation (in 2017).

The Sale of West Axnoller Farm

9. In October 2014 Adam & Co, the bank which had lent money to Mrs Brake against the security of the Farm, appointed receivers under the Law of Property Act 1925. After marketing the property, the LPA receivers sold it in

July 2015 to a newly incorporated company, Sarafina Properties Limited ("Sarafina", or "SPL"), said to be a corporate vehicle for the Hon Saffron Foster ("Mrs Foster"), a daughter of the third Lord Vestey, as well as a friend of Mrs Brake. Sarafina did not purchase the wedding and events business of the partnership. It was not the receivers' to sell. But Sarafina honoured existing bookings, and continued in the same line of business, albeit that, as explained below, for the first six months, Mrs Brake was restrained by injunction from working in it.

The involvement of Dr Guy

10. In February 2017 the company was sold to The Chedington Court Estate Ltd ("Chedington"), and on 18 July 2017 its name was changed to Axnoller Events Limited ("AEL"). It is the claimant in this claim. Chedington is a company owned by Dr Geoffrey Guy ("Dr Guy") and his wife Mrs Kate Guy. I refer to Dr Guy, Chedington and AEL collectively as "the Guy Parties". Mrs Brake was employed to continue to run the wedding and rental accommodation business as before.

11. However, relations between the parties unfortunately broke down, and on 8 November 2018 notice by letter was given to each of Mr and Mrs Brake of the termination of their employment. This also gave notice to them of the termination of any licence to stay overnight in Axnoller House and required them to move their possessions to the cottage by 30 November 2018. The Brakes did not do so, but continued to stay in Axnoller House. These various events led both to proceedings in the employment tribunal against Chedington and others by each of the Brakes ("the Employment Claims"), and proceedings in the County Court (later transferred to the High Court) by AEL against the Brakes and Tom D'Arcy to recover possession of the Farm ("the Possession Claim"). The latter is the claim the subject of this judgment. (Tom D'Arcy was later removed as a defendant to this claim.)

The cottage

12. Following this, in January 2019, Mr Swift as trustee in bankruptcy entered into a transaction with the liquidators of the partnership in relation to the cottage, to acquire the liquidators' rights in it. Chedington entered into back-to-back transactions with Mr Swift in order to acquire those rights. The Brakes allege that Chedington and Mr Swift acted collusively, implementing "unlawful arrangements to create the false appearance that Chedington had acquired title to the cottage". Chedington subsequently took possession of the cottage, the Brakes say unlawfully. They therefore commenced eviction proceedings against Chedington ("the Eviction Claim"). Those proceedings are the subject of the judgment being given simultaneously with this one. So, the position on the ground currently is that the Brakes are in occupation of the house, but seek possession of the cottage, whereas Chedington is in occupation of the cottage, and its subsidiary AEL seeks possession of the house.

Insolvency proceedings

13. In addition to all this, on 12 February 2019 the Brakes commenced insolvency proceedings (the "Liquidation Application" and the "Bankruptcy Application") against both the liquidators of the partnership and their trustee in bankruptcy. The first purpose of these insolvency proceedings was to unwind the disputed transactions. The second purpose was (as against the trustee) to establish that the Brakes' pre-existing interests in the cottage and the adjacent parcels had revested in them and Mrs Brake respectively on 12 May 2018 under the Insolvency Act 1986, section 283A, on the basis that they were the Brakes' sole or principal residence at the date of bankruptcy, and Mr Swift had taken no steps to realise them three years later. In April 2019, by consent, Chedington was joined as second respondent to the proceedings against Mr Swift, because it claimed to be a successor in title to him. In June 2019 Mr John Jarvis QC, sitting as a deputy judge, made two orders by consent, one removing Mr Swift from office, and another appointing his successors.

14. In January 2020 Chedington applied to strike out the proceedings against the liquidators and most of those against Mr Swift and itself, on the basis that the Brakes lacked standing to bring them. I heard those applications in early March 2020, and acceded to them. I struck out the whole of the Liquidation Application ([2020] EWHC 538 (Ch)), and most of the Bankruptcy Application ([2020] EWHC 537 (Ch)), for lack of standing. An appeal against my decision in the Liquidation Application was dismissed by the Court of Appeal. An appeal against my decision in the Bankruptcy Application was however allowed by the Court of Appeal, so that that application is yet to be tried (see [2020] EWCA Civ 149, [2021] Bus LR 577, for both appeals). However, as I understand the matter, the Supreme Court subsequently gave permission to Chedington to appeal against the decision of the Court of Appeal, on 6 December 2021, so that that appeal will have to be dealt with before it is known whether the decision of the Court of Appeal stands. I am told that that appeal has been fixed for 1 November 2022. But, as at March 2020, the only significant matter left from the Liquidation and Bankruptcy Applications to be tried in May of that year, against the former trustee and Chedington, was the revesting issue under section 283A.

15. It is relevant to note that, on 4 May 2020, the Brakes applied by notice in relation to that section 283A claim for me to recuse myself from trying that issue. I heard that application on 7 May and gave judgment on 11 May 2020, refusing the application: see [2020] EWHC 1156 (Ch), [2020] BPIR 1254. Permission to appeal against my decision was refused by the Court of Appeal. So the section 283A claim was tried by me (the "section 283A trial"), and I gave judgment in July 2020, in favour of Chedington ([2020] EWHC 1810 (Ch), [2020] 4 WLR 113). An application for permission to appeal against my order was refused by the Court of Appeal on 30 October 2020.

The "Documents Claim"

16. The next claim to be tried was the so-called "Documents Claim". The claim form in this claim was issued on 2 September 2019. The claim form sought a final injunction and damages based on causes of action in breach of confidence, misuse of private information, procuring a breach of contract, and

compensation under article 82 of the (EU) General Data Protection Regulation. This claim concerned the Guy Parties' access to and use of what were said to be private and confidential documents and information in an email account which prior to the Brakes' dismissal had been used, not only for the business purposes of the weddings and events business carried on at Axnoller, but also by Mrs Brake for her personal communications. At an early stage the Brakes were granted an interim injunction restraining the defendants until final determination of the claim or further order from disclosing or publishing certain documents within the particular email account.

17. After considering submissions from the parties, I decided to try the claim in stages. I heard argument on a preliminary issue of law and heard evidence and arguments on certain other issues. My decisions on these matters ([2021] EWHC 670 (Ch), [2021] 4 WLR 71, and [2021] EWHC 671 (Ch)), which were in favour of the Guy Parties, meant that the remaining issues did not need to be tried. No application for permission to appeal was made in relation to the judgment on the preliminary issue. On 3 September 2021 the Court of Appeal granted permission to appeal from the second judgment (the part trial). That appeal was heard on 2 and 3 February 2022. So far as I know, the decision of the Court of Appeal has not yet been handed down.

The Possession Proceedings and the Eviction Proceedings

18. The two next trials, in the Possession Proceedings and the Eviction Proceedings, were listed for trial in April and May 2021. A draft judgment in the Documents Claim had been circulated to the parties on 19 March 2021, and formally handed down (without attendance) on 25 March 2021. Unfortunately, and as I have already said, between those two dates junior counsel who had appeared for the Brakes at the trial of the Documents Claim (and indeed the section 283A trial and the insolvency proceedings) withdrew from that case, and *also* from the forthcoming trials in the Possession and Eviction Proceedings. On 29 March 2021 it was confirmed that the Brakes' leading counsel who had been retained in each of those two trials (two different people) had also withdrawn. This left the Brakes without any retained barrister to carry out the advocacy at the two trials. Their solicitors, however, remained on the record.

19. The Brakes thereafter made two applications. First, they applied for an order that I recuse myself from hearing the two trials. I refused that application for the reasons given in a written judgment: [2021] EWHC 949 (Ch). Secondly, the Brakes applied for an adjournment of the two forthcoming trials. After hearing argument, I acceded to this latter application, and vacated the trials, relisting them for September and October 2021, when Mrs Brake would act in person for herself and her husband. Both cases would be tried in half-days only, so as to meet Mrs Brake's medical needs, according to the advice of her consultant physician: see [2021] EWHC 982 (Ch).

20. In May 2021 Mr Brake entered a mental health crisis moratorium under the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020. This placed restrictions on the ability of the Guy Parties to enforce orders made against him, and also

against any person who was a joint debtor with him (*ie* Mrs Brake). On 11 June 2021 the Brakes' solicitors came off the record. The Brakes have been acting in person ever since, except in relation to the appeal in the Documents Claim, and now also in relation to the forthcoming Supreme Court appeal in the Bankruptcy Application. On 25 June the Guy Parties applied for an order cancelling the mental health crisis moratorium of Mr Brake, or alternatively for certain unless orders. This was argued remotely by videoconferencing on 12 August 2021. I announced my decision (to refuse the cancellation order but to make certain unless orders) on 13 August, and handed down written reasons for my decision on 17 August 2021: [2021] EWHC 2308 (Ch), [2021] 1 WLR 6218.

21. On 31 August 2021 the defendants issued a further application for specific disclosure against the claimant and for third party disclosure against Mrs Lorraine Brehme. I dealt with this on paper on 6 September 2021 (which was my first day back from annual leave). I made no order on the first part of the application, as it appeared that the documents sought had already been supplied, and so it was academic, and I refused the second part of the order, for the reasons given. The trial of this claim and counterclaim began the next day.

PROCEDURE

Statements of case

22. As I have said, the claim form was issued on 19 November 2018, with particulars of claim dated 17 December 2018. The original defence and counterclaim was served on 8 January 2019, but amended and re-served on 14 February 2019. The particulars of claim were amended on 24 January 2019 and re-amended on 20 January 2020. A re-amended defence and counterclaim was served in March 2020, in substitution for the earlier defence and counterclaim. Finally, an amended reply to the re-amended defence and amended defence to the amended counterclaim was served in September 2020, in substitution for the existing reply and defence to counterclaim dated 21 February 2019.

Listing

23. The trial of this claim and counterclaim has been previously adjourned a number of times. The first trial was due to take place on 17 January 2019, in the usual summary form appropriate against trespassers. However, it was adjourned to April 2019, because it became apparent that one day would not be sufficient to try the issues between the parties. It was then further adjourned to February 2020. That listing in turn was vacated (in December 2019). In September 2020, at a case management conference, I ordered a split trial of the claim and counterclaim, leaving the claimant's claims for mesne profits and damages over to a second trial, whilst allowing the first trial to deal with everything else. That first trial was then listed for hearing by me, for seven days beginning on 26 April 2021. However, and as I have already explained, the Brakes applied (on 14 April) for the trial to be adjourned, and on 21 April I acceded to that application, and relisted for three weeks (in half day sittings)

from 6 September 2021. This is therefore the fifth listing of the trial of this claim. On 31 March 2021, Marcus Smith J gave some directions for the conduct of both forthcoming trials. These included the provision of a joint trial bundle for both trials. I held a pre-trial review on 5 August 2021, in both this claim and the Eviction Claim.

Trial

24. During the trial of this claim, an issue arose about an apparently draft witness statement, dated 26 November 2018, unsigned but in the name of Mrs Brake. This was in the trial bundle, and the claimant wished to cross-examine Mrs Brake upon it. I was obliged to hear evidence from those who were present at a hearing at the County Court at Yeovil on 27 November 2018. These included both counsel then present and Mr Brake, the second defendant. One counsel provided her evidence in the form of emails. The other went into the witness box. After hearing the evidence and considering the submissions, I ruled that, if the document had once been privileged, that privilege had been waived, and the claimant was entitled to cross-examine upon it: see *Axnoller Events Ltd v Brake* [2021] EWHC 2539 (Ch).

25. Because the Brakes' counsel had withdrawn earlier in the year, and later the Brakes' solicitors too (as set out above), the roles of both solicitor and advocate at this trial devolved upon Mrs Brake, supported by her husband. Usually, at a court hearing, litigants in person do not know what they are doing, and allow their lack of knowledge and their emotions to interfere with their organisation and presentation of their case. Mrs Brake has proved a notable exception to this generalisation. First of all, she is extremely clever, with a prodigious memory and recall for events, details and documents. Secondly, she is very fluent (as the hearing transcribers will agree, sometimes rather too fluent) in expressing her ideas. Thirdly, she is an extraordinarily rapid learner. Having sat behind counsel on earlier occasions, she was able to adapt to the ways of the courtroom with impressive speed.

26. However, there were problems. It is clear that she is used to getting her own way, to wear down opposition by constant attrition, and always to have the last word on everything. I had to intervene frequently in her questioning of witnesses. For example, she would make a series of lengthy, tendentious statements to a witness, and then finally ask the witness to agree with the whole of them. On occasions, she also allowed her emotions to get in the way. Her mastery of the rule about not leading her own witnesses did leave something to be desired.

27. But it is clear that, despite her various serious medical conditions, and the strictures of her doctors, a great deal of work had gone into her presentation. I should also say that the quality of her written submissions was very high. I do not know if she had any legal assistance in this respect (as she did in relation to Eviction), but, whether or not she did, I am satisfied that the defendants' case was properly put forward, and that the claimant's case was properly tested.

Changes in the focus of the defence

28. I should record that the focus of the Brakes' defence has changed considerably during the course of the pre-trial phases. At the time of the original defence and counterclaim and then the amended defence and counterclaim (January and February 2019), the Brakes resisted the claim to possession by claiming:

(1) a service tenancy of the house, apparently protected by the Housing Act 1988;

(2) an equity arising by way of proprietary estoppel;

(3) a business tenancy of the Farm or some parts of it, protected by the Landlord and Tenant Act 1954, Part II;

(4) an assured agricultural occupancy of the house, though it was not clear whether it applied to both Mr and Mrs Brake or to Mr Brake alone.

29. However, in the re-amended defence and counterclaim of 16 March 2020 (which operated as a complete replacement of the earlier statement of case), the position had considerably changed:

(1) the claim to a service tenancy disappeared;

(2) the claim to a business tenancy disappeared;

(3) a new claim was made to a tenancy for 90 years arising under the Law of Property Act 1925, section 149(6);

(4) other new claims were made to various kinds of licence to occupy parts of the Farm;

(5) the claim to an assured agricultural occupancy of the house was maintained, although confined to Mr Brake alone.

30. In addition, the express claim to an equity arising by way of proprietary estoppel disappeared, which led AEL to think that the claim to that equity was being abandoned. There was an argument before me at trial as to whether it had in fact been abandoned. Mrs Brake pointed to paragraphs in the re-amended defence and counterclaim which she said showed that the claim to a proprietary estoppel equity continued to be made. On the other hand, the claim to a tenancy for 90 years arising under the Law of Property Act 1925, section 149(6) *was* expressly abandoned by Mrs Brake at the pre-trial review.

The issues at trial

31. The issues for trial in the Possession Proceedings, as stipulated by Appendix 3 of the order of Mr Justice Marcus Smith dated 31 March 2021 (but following the subsequent abandonment by the Brakes of the section 149(6) claim), are as follows:

1. Do the Brakes have an irrevocable licence to occupy Axnoller House and the Arena (the indoor covered arena with temporary stables which is part of

the Land), and to make use of other parts of the Land identified as the Grazing Land and the Access Ways?

2. Do the Brakes have a licence to occupy Axnoller House and the Arena, and to make use of the Grazing Land and the Access Ways, which is not revocable before 17th February 2022?

3. …

4. Do the Brakes have a licence to occupy Axnoller House and the Arena, and to make use of the Grazing Land and the Access Ways, which has not yet been terminated?

5. Does Mr Brake have an assured agricultural occupancy of Axnoller House?

32. This means that I shall have to consider, amongst other factual matters arising on the pleadings:

1. What the relationship was between Mrs Foster and the Brakes at the time of the acquisition of West Axnoller Farm in 2015?

2. What if any assurances were given by Mrs Foster to the Brakes at that time about the occupation by the Brakes of Axnoller House?

3. If such assurances were given, did the Brakes rely on them?

4. What did Dr Guy know of the Brakes' occupation of Axnoller House in 2016-17?

5. What if any assurances were given by him to the Brakes at that time?

6. If Dr Guy gave any such assurances, did the Brakes rely on them?

EVIDENCE

Trial bundle

33. Again in accordance with the order of Mr Justice Marcus Smith, a common trial bundle was used for both trials. I record that, although the trial bundle was prepared by AEL's solicitors, Mrs Brake in particular required the addition of a considerable number of lever-arch files of supplemental documents. I further record that the proportion of documents in the bundle that were actually looked at during the trial was strikingly small. My unscientific estimate is no more than 15%. In passing, I do wonder whether the enormous waste of photocopying that occurs in every trial which I (and for that matter other judges) undertake has something to do with the fact that counsel no longer routinely advise on evidence (whether formally or otherwise) and solicitors who have any doubt simply put everything they can into the bundle "just in case".

34. I should also mention that at several points during the trial I sat in private. This was because documents in the trial bundle were being referred to which were

subject to special undertakings of nondisclosure as a result of their provenance, having come into the hands of AEL in the ways (unsuccessfully) complained of by the Brakes in the Documents Claim. The special undertakings were given pending the appeal of my decision in that case to the Court of Appeal.

Witnesses

35. The following witnesses were tendered on behalf of the claimant: Dr Geoffrey Guy (director, and director and shareholder of its parent company, Chedington), Russell Bowyer (director, and director of Chedington), Marcus Beresford (acquaintance of Dr Guy), Michael Butler (Dr Guy's former external accountant), Mrs Brehme, Sherryl Dagnoni (housekeeper at Axnoller), Tracey Symons (former events planner), Colin Maddock (estate manager) and James Vickery (land manager at Chedington). Mrs Brake cross-examined all of them. The following witnesses were tendered on behalf of the defendants: Nihal ("Alo") Brake, Andrew Brake, and Paul Maple. One potential witness who was not called was the Hon Saffron Foster. I shall consider this omission shortly. (The Brakes also complained about the omission of the claimant to call another witness. I come back to that later.)

36. I give here my views of the witnesses who were called. In doing so, I emphasise that I do it on the basis of the evidence given in person in front of me *on this occasion*. Some of these witnesses have previously given evidence to me in earlier proceedings between the same parties, but by videolink. In reaching my views, I disregard all that, and focus on what I heard and saw at this trial, which was in person.

Dr Guy

37. Dr Guy was an impressive witness. He was precise, to the point, and clear. He did not attempt to go outside what he knew, but within that he had an entirely convincing recall of detail and events. He was also a very fair witness, immediately correcting himself (even without prompting) if he considered that he had made an error. He also gave credit where due to Mr and Mrs Brake where he thought they had done a good job. I am satisfied that he was trying to help the court, and was telling me the truth throughout. He was cross-examined for four half-days in total. Although he was not cross examined on significant parts of his witness statement evidence, the cross-examination that there was on the remainder made no impression on him.

Russell Bowyer

38. Russell Bowyer was a careful, professional and slow-speaking witness. He did not have the same immediate recall or grasp of detail as Dr Guy, but it is clear that he was trying to assist the court, and telling the truth as he understood it. Again, he was not challenged on much of his evidence. Where he was challenged, little impression was made on him.

Marcus Beresford

39. Marcus Beresford was a helpful, very precise but nevertheless slightly wary witness. His evidence was marginal to the matters which I have to decide, but I accept it nevertheless.

Michael Butler

40. Michael Butler was a slow-speaking, careful but clear-thinking and transparently honest witness. He showed a marked lack of appetite for risk-taking, and declined to commit himself outside precisely what he knew himself. I accept his evidence as truthful, if limited.

Lorraine Brehme

41. Mrs Brehme was a calm and businesslike witness. She gave her evidence clearly and (despite the fact that she said she had lost a lot of money in her dealings with Mrs Brake) fairly dispassionately. She was trying to assist the court and I accept her evidence as truthful.

Sherryl Dagnoni

42. Sherryl Dagnoni was a clear and straightforward, indeed transparently honest, witness who was not afraid to speak her mind. But she was also very fair, and gave credit to Mrs Brake (and Mr Brake) where she thought it was due. I accept her evidence as truthful.

Tracey Symons

43. Tracey Symons was a quiet, thoughtful and non-confrontational witness, who was trying to assist the court. She was obviously speaking the truth, and I accept her evidence.

Colin Maddock

44. Colin Maddock was a straightforward witness who was clearly trying to assist the court. He was perhaps a little overawed by the courtroom setting and being the focus of questions, and plainly he is not used to public speaking. As a result he sometimes allowed his evidence to be mis-summarised in questioning. Nevertheless, I accept his evidence as honest, albeit unsympathetic to Mr and Mrs Brake.

James Vickery

45. James Vickery was a slow-speaking and careful witness. He did not seek to go outside his experience, and accepted correction where due. He was fair-minded and honest in his evidence, and I accept it as truthful.

Mrs Nihal Brake

46. Mrs Nihal ("Alo") Brake was a polite, charming, complex and engaging, but (from my point of view) an unsatisfactory, witness. She is both highly intelligent, and very quick, both in thought and in speech. She worked in the City first as a bond salesman and then later in raising capital for fledgling

companies, and it showed. She had an instant recall of events, people, dates and places, an impressive and detailed command of numbers and prices, and gave every answer in the way designed to show her and her own activities in the best light possible. She also picked up the court procedure very quickly. And, when she made any mistakes, whether of fact or procedure, she always apologised.

47. She had however a need to control the whole process. Indeed, she herself said in evidence that she was a "control freak" (day 9, page 44). She constantly interrupted counsel (and sometimes me too, for that matter) before the question was asked, answered different questions from the ones asked, and sometimes made speeches instead of answering questions at all. When she did answer the question she usually broke off sentences part way through, as her train of thought changed, so that the answer came out as a series of somewhat disjointed thoughts. Her answers were frequently only intelligible to me at the time because of her accompanying body language. In addition, she often spoke so fast that the transcriber was obliged to interrupt and ask her to speak more slowly, as she could not get everything down correctly. Indeed, Mrs Brake during the trial pointed out that the transcript contained, in my view entirely understandably, many errors (transcript, 13 September 2021, internal pages 137-139). For these reasons, as I have noticed during my preparation of this judgment, it is often very difficult to follow her evidence from merely reading the transcript. It is often necessary also to recall *how* she said things, and what her accompanying body gestures were.

48. She invariably interpreted any possible ambiguity or uncertainty in documents in her own favour. I am left in no doubt that she believes passionately in the rightness of her cause. And I take into account the fact that she conducted the entire trial herself, which must have been exhausting for her. But, in the light of the other evidence before me, I think she has persuaded herself that some things happened, or happened in a particular way, which would support her case, but which did not in fact happen, or not in that way. I refer later to examples of documents which did not say what she said they did. Moreover, in some respects, indeed, I regret to say that I think she told me some things which she knew were not true, but (no doubt because she believes she is in the right) which she thinks that she is justified in telling me were true, because that would mean that "right" (as she sees it) triumphs. Accordingly, I am afraid that I disbelieve some important parts of her evidence, and am not prepared to accept the remainder except where independently corroborated. In particular, where there is a conflict between her evidence and that of Dr Guy, I prefer that of Dr Guy.

Andrew Brake

49. Andrew Brake was a slow, careful and precise witness. He answered questions firmly and without hesitation when the answers were in his favour, but often prevaricated, or evaded questions, when they were not. On the other hand, I think that he would not lightly tell what he *knew* to be an untruth. (That does not exclude the possibility of his being mistaken, of course.) But it was clear from his evidence that Mr Brake is not one for business matters, figures, reading and writing, instead preferring to be outdoors with the land and the

animals. He was at pains to make clear that he did not understand legal and business matters, and he generally left the negotiating and drafting of agreements in the hands of Mrs Brake, whom he relied on to tell him what to do. (However, he was responsible for certain grazing agreements, to which I shall return.) Two things flow from this. First, he was not much involved in some important events with which I am concerned in this claim. Second, he did not necessarily understand some of the documents put to him. I treat his evidence with a certain amount of caution.

Paul Maple

50. Paul Maple was a lively and positive witness, answering questions without any reluctance, but often without much thought. I bear in mind that his partner is Mr Brake's sister, but on the whole, with some caveats, I accept his evidence as what he thought was true (whether in fact it was or not). However, this had limited relevance to the issues.

Factfinding

General

51. The parties will already know this, but here I make clear that, in civil litigation in England, it is for the parties to call witnesses, and not for the court. A failure to call a relevant witness without adequate explanation may have consequences, as I shall explain shortly. Secondly, judges do not find facts on the basis of what is *scientifically certain*, nor even of what is *beyond reasonable doubt*. Instead, they find facts on the basis of what is *more likely than not* to have happened, the so-called "balance of probabilities". And it is the judge, and no-one else, who makes that (objective) evaluative decision. Self-evidently, the parties may have a quite different, subjective, appreciation of what the evidence shows. Thirdly, it is also well known that memories are fallible, especially going back a number of years, and in cases where there are contemporaneous documents available these accordingly acquire a greater significance.

The use of contemporaneous documents

52. In relation to that last point, I repeat here what I said in my judgment in the earlier section 283A trial ([2020] 4 WLR 113):

> "31. … in commercial cases where there are many documents available, and witnesses give evidence as to what happened based on their memories, which may be faulty, civil judges nowadays often prefer to rely on the documents in the case, as being more objective: see *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [22]. Oral evidence and cross-examination are however still important. They enable proper scrutiny of the documents, and they also permit the judge to gauge the personality and motivations of witnesses.
>
> 32. The relevant facts in this case go back about fifteen years. The present case is at least partly a commercial case, and there are sufficient written

> records, letters, emails and so on as to make the *Gestmin* approach relevant to this case. I will therefore give appropriate weight to both the documentary evidence and the oral evidence, bearing in mind both the fallibility of memory and the relative objectivity of the written evidence available."

Failure to call witnesses

53. As I have already said, one person who might have been called as a witness, but was not, was the Hon Saffron Foster. (I should add that Mrs Brake referred in the same way to at least one other potential witness on the other side, Richard Morris, a gardener.) I will need to consider what effect, if any, this omission has upon the fact-finding exercise that I will undertake. At this stage I simply set out the relevant law. In *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, CA, Brooke LJ (with whom Roch and Aldous LJJ agreed), in what is now a well-known passage, said:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

54. This was qualified by Sir Ernest Ryder SPT (with whom Sales LJ agreed) in *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882:

> "30. … *Wisniewski* is not authority for the proposition that there is an obligation to draw an adverse inference where the four principles are engaged. As the first principle adequately makes plain, there is a discretion *ie* 'the court is *entitled* to draw adverse inferences'." [Emphasis added]

55. More recently, in *Royal Mail Group Ltd v Efobi* [2021 UKSC 33, [2021] 1 WLR 3893, SC, Lord Leggatt (with whom all the other members of the court agreed) said:

> "41. The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

56. In the light of that (unanimous) statement from the Supreme Court, I do not think it is necessary to cite from any of the other recent judicial pronouncements on the subject.

Judge's reasons

57. Lastly, and as I have said on previous occasions, judges are not obliged to deal in their judgments with every single point that is argued, or every piece of evidence tendered. What they do is to take the evidence and arguments into account, and set out their reasons for their decisions. I say this now, because the written closing submissions of the parties have dealt with a great many points that (having read them all) I do not think it is necessary to deal with specifically. It should also be borne in mind that specific findings of fact by a judge that are made are inherently an incomplete statement of the impression which was made upon that judge by the primary evidence.

FACTS FOUND

58. On the basis of the evidence before me, therefore, I find the following facts. Before the partnership with PWF in February 2010, the Brakes occupied the Axnoller estate in right of Mrs Brake's beneficial ownership of it, subject to the charge in favour of Adam & Company. There was some suggestion in the evidence that Mrs Brake had granted a licence for life to Mr Brake in relation to the estate when they began living together there, before they were married in 2006. But I am satisfied that any such licence that she may have granted had no effect either as against the bank's prior charge (by virtue of which it was sold in 2015) or as against third parties who in the interim acquired property rights in relation to the estate. So SPL/AEL's ownership was never burdened by any such licence that there may have been in that respect.

59. After entering the partnership, when the estate was contributed as partnership property, the Brakes continued to occupy it under the terms of the partnership agreement. This provided that:

> "1.1. The definitions and rules of interpretation in this clause apply in this agreement.
>
> […]
>
> Partnership Property: the Premises and all other assets (all rights in them) which are used by the Partnership for the purposes of the Business and listed in Part I of Schedule 5 except for those assets listed in Part II.
>
> Premises: the freehold or leasehold premises to be occupied by the Partnership, 0 [sic], and such other premises as the Partners may decide in accordance with clause 15.6(i).
>
> […]
>
> 8.1. On the last day of each month, or the next Business Day where that date is not a Business Day, the Founding Partners shall be paid the aggregate sum of £8,333. … In addition, at the option of the Founding Partners, this amount may be paid in whole or part by payment in kind. …
>
> 8.2. If any Partner withdraws funds in excess of his entitlement to profit share under clause 6.1 for an Accounting Period, that Partner shall repay the excess drawings to the Partnership immediately on the approval of the Accounts for that Accounting Period in accordance with clause 9. …
>
> 8.3. Subject to the requirements of clause 8.1, no sum may be drawn under this clause unless there is money and/or facilities to cover the drawings to which all of the Partners are entitled at date, in excess of sums which the Partners unanimously agree are required for the current expenses of the Partnership.
>
> 8.4. The Partners hereby agree that the Founding Partners are entitled to reside in the Premises as Licensees rent-free.
>
> 8.5. West Axnoller Cottage forms part of the Premises. The Partners agree that as and when the Founding Partners so decide at any time after the second anniversary of the Admission Date, West Axnoller Cottage will be valued by an independent valuer and an aggregate amount equal to 25% of the value will be credited in that Accounting Period to the Current Accounts of the Founding Partners …
>
> […]
>
> Schedule 4 Premises
>
> West Axnoller Farm
>
> Schedule 5

> Part I Partnership Property
>
> West Axnoller Farm
>
> […]".

60. The receivers appointed by the chargees Adam & Company sold the estate, as agent for Mrs Brake and in her name, to SPL in 2015. The contract of sale, dated 23 July 2015, relevantly provided:

> "6.3. The Seller and the Receivers do not give any warranty as to vacant possession and the Property is sold subject to the occupation of the Seller and any third parties whether or not they occupy pursuant to any Occupational Agreements as may exist at the date of Completion without obligation on the part of the Seller to identify or define the same and the Buyer having had the opportunity to inspect the property and carry out its own enquiries should be deemed to purchase with full knowledge thereof and shall not raise any objections or requisition in respect thereof.
>
> 6.4. For the avoidance of doubt the Buyer shall not be entitled to delay completion or to refuse to complete due to the existence of the Seller or any third party or any chattels belonging to them on the Completion Date.
>
> 6.5. The Buyer shall accept the Title of the Seller to the Property which has been deduced in full to the Buyer and shall not raise any requisition or objection in respect of the Title to the Property except in respect of matters arising in the period between the date of this Agreement and Completion.
>
> 6.6. Unless expressly stated nothing in this contract will confer any rights on any person pursuant to the Contracts (Rights of Third Parties) Act 1999.
>
> […]
>
> 6.8. The Seller shall sell with no title guarantee.
>
> 6.9. The Seller is selling the Property acting by the Receivers under the provisions of the Charge …
>
> […]
>
> 6.14. The Buyer acknowledges that the Property has been used for the purpose of running a business which has taken deposits, reservation fees or similar payments in respect of advance bookings. The Buyer acknowledges that it is not purchasing any part of such business and neither the Seller nor the Receivers shall not be liable to pay, refund, make an apportionment for, indemnify or in any other manner reimburse the Buyer in respect of any such deposits whether at Completion or any time thereafter."

The "Seller" was defined in the agreement as Mrs Brake, and the "Buyer" was defined as SPL.

61. The transfer of the land, in Form TR2, also dated 23 July 2015, defined the "Transferor" as Adam & Company, and the "Transferee" as SPL. It recorded that the Transferor had received from the Transferee £2,460,000, and that the transfer was made with no title guarantee. It also provided by clause 12.3 that "The Transferor and the Transferee agree that the Property is sold on an 'as is, where is' basis".

62. Mrs Brehme had bid unsuccessfully for the property. She was very suspicious of the successful bid by SPL, and considered that it might represent an attempt by Mrs Brake to resurrect the old partnership business, but this time in a commercial vehicle excluding her. Accordingly, she applied for an injunction against the Brakes. On 1 July 2015, Sir William Blackburne, sitting as a High Court judge, granted an order restraining the Brakes for six months from the date of the sale of the Farm from providing any services to Mrs Foster or any company with which she was connected in respect of the Farm or any business operated from it which was conducted by the former partnership without PWF's consent. This injunction becomes relevant later on in the story.

The "2015 Assurances"

63. After the sale and transfer to SPL in July 2015, the Brakes continued to occupy the estate, but now by arrangements made with SPL. (The Brakes do not claim that they had rights in relation to the estate from the time of the partnership which were subsequently binding on SPL.) The Brakes' case is that Mrs Foster, as the then beneficial owner of SPL, made various promises to them on which they relied ("the 2015 Assurances"). The case of AEL (formerly SPL) is that Mrs Foster was a mere nominee, put no money of her own into it, and that the beneficial owners of the company were the Brakes themselves. Accordingly it is said that Mrs Foster made no such promises, consistent with its case that the Brakes had their own beneficial rights in relation to it. It is common ground that there is no document between Mrs Foster and the Brakes setting out the basis upon which the Brakes occupied the Axnoller estate after the purchase.

64. A preliminary point taken by the Brakes in their closing submissions is whether the 2015 Assurances are the subject of an issue estoppel from the section 283A trial. They refer in particular to paragraphs [77], [81], [233] and [239] and following of my judgment, at [2020] EWHC 1810 (Ch), [2020] 4 WLR 113. It is said that the Guy Parties relied on Mrs Foster's assurances to establish that the *house*, and not the cottage, was the Brakes' sole or principal residence in 2015. But now (it is said) they seek to deny that such assurances were given. The paragraphs referred to do not however bear this out. None of them includes a finding that the 2015 Assurances were given. The most they go to is that the Brakes were *permitted* to stay in the house. There is nothing in this point.

65. The 2015 Assurances do not appear in either the original Defence and Counterclaim of 8 January 2019 or the Amended Defence and Counterclaim

of 14 February 2019. They are pleaded for the first time in the Re-Amended Defence and Counterclaim (dated 16 March 2020), as follows:

> "17. During 2015 and 2016, Mrs Foster on behalf of the Claimant assured the Defendants that:
>
> (i) for as long as the Claimant owned the Land, the Defendants would have exclusive possession of Axnoller House and the Arena for the Horses; and
>
> (ii) they were entitled as of right to use all Access Ways and some grazing land ("the Grazing Land") in common with the Claimant."

66. Mrs Brake was cross-examined as to why the earlier pleadings did not mention the 2015 Assurances. She said that the later pleading of 2020 was just making "a lot fuller" what had been in the earlier, and "the opportunity was taken to flesh out exactly what the assurances were". I do not accept this. There is no trace of the 2015 Assurances in the earlier pleadings. They are new allegations. I should add that there is no trace either of these assurances in a number of witness statements made earlier in these proceedings, including that of her solicitor Ms Burcher dated 4 December 2018, that of Mrs Brake herself of 8 January 2019, and that of Mr Brake of the same date. Nor are they mentioned in the draft (unsigned) witness statement of Mrs Brake dated 26 November 2018 taken to Yeovil County Court the following day. Nor are they mentioned in other contemporaneous documents, such as correspondence between Mrs Brake and Mr Chedzoy in late 2016 and early 2017 about how best to structure the sale of SPL to Chedington. Yet if they had been made they must surely have been relevant to Mr Chedzoy's advice. I find that they were new in 2020.

Mrs Brake's evidence

67. In support of their case that Mrs Foster gave the 2015 Assurances to them, the Brakes rely on a number of matters. These include their own evidence to the court in these proceedings. Mr and Mrs Brake each made a witness statement for trial which stood as their evidence in chief under CPR rule 32.5(2). Mrs Brake's witness statement, dated 16 March 2021, relevantly said:

> "46. In early 2015 I called Saffron Foster, a friend of mine. I knew she had been looking at nearby properties and I wondered if she would be interested in purchasing the Farm. I told her that we would be unable to purchase it. She said she was interested.
>
> 47. The Farm was put on the open market in early April by Strutt & Parker LLP and on 7 May 2015 final bids were invited for the farm for 15 May 2015. On or around 5 June 2015 we were informed by Opus LLP that Saffron Foster, or more accurately Sarafina Propertied Ltd (SPL) which was incorporated on 2 June 2015, was the winning bidder. Saffron bid approximately £300,000 more than Lorraine Brehme. In addition, SPL agreed to honour the wedding bookings.

48. Between 2 June 2015 and 17 February 2017, Saffron Foster was the sole shareholder of SPL

49. SPL purchased the Farm without vacant possession and on 23 July 2015 the sale completed. We were not required to move out of Axnoller house nor to vacate the stables.

50. On behalf of SPL Saffron did not require us to move any of our possessions or furniture held in trust for our son from Axnoller House and the horses that were in our care remained in at the indoor arena at Axnoller. She did not tell us at the time, but has said since, that she bought the Farm with the main purpose of ensuring that we would not lose our home.

51. During the run up to the purchase of the Farm by SPL, Mrs Brehme did all that she could to prevent Saffron from purchasing the Farm. In January 2016 an order was made, prohibiting us from communicating with any prospective purchasers and seeking employment with any prospective purchaser without the permission of the Arbitrator or PWF. On top of that, all Parties were obliged to copy each other in to all communications with the Bank, the LPA receiver or its lawyers or agents. …

52. The communications between May 2015 and July 2015 were under the microscope in what has become known in as the S283A trial. It was our case that because of all of the uncertainty caused by Mrs Brehme's actions we did not know until after completion that we would be secure in our home at Axnoller House. The Judge rejected our evidence and preferred the evidence promulgated by the other side that we always knew that we could remain at Axnoller House. Whichever way, once she had completed on the sale Safffron [sic] did make us the promises that both she and we say that she did.

53. In this way once we knew for sure that SPL was the successful bidder, we knew that we would not have to vacate our home and could continue to occupy Axnoller House in the same manner as we had done: ie as owner- occupiers. Saffron did not ask us to allow guests to use Axnoller House but I knew that having the option of doing that, if there was a demand and at times that it did not inconvenience us would increase the revenue from the business. Therefore, Andy and I did carry on as we had since 2012 and if and when we wanted to allow guests to use Axnoller House as overflow accommodation for bridal parties, we would lock up our private quarters and go to the Cottage.

54. On behalf of SPL, Saffron did not use the exact legal words contained in paragraph 17 of the re re amended Defence, but she told us that we could remain at Axnoller House, that the horses could remain with us and that we could continue to run the farm and business in the same way as before and so we did. We trusted Saffron and she trusted us and she was worthy of our trust.

> 55. The Claimant has alleged that from 4 August until November 2018 that we have always lived at the Cottage and that it allowed us to stay at Axnoller House on an informal basis while some works were being done to it. This is untrue. … Since 2012 we have occupied both Axnoller House and the Cottage. At the Section 283A trial in May 2020, the Judge found that prior to 2012 that our only residence was Axnoller House; from 2012 that we used the Cottage when Axnoller House was let but despite a prolonged period of occupation in 2015, our principal residence was Axnoller House. This he attributed at least in part to the promises made and carried out by Mrs Foster."

68. I may say at once that, even if accepted in full, this statement would not justify the pleading in paragraph 17 of the Re-Amended Defence and Counterclaim. It simply does not go far enough. In any event, Mrs Brake was cross-examined in some detail on this statement. I can give here only a bare summary. She first said that the reference to the 2015 Assurances "refers to a conversation that was had" and that Mrs Foster "gave [them] the assurances when she became the successful purchaser", in "July 2015". Then in response to a question as to whether she was talking about a single occasion, she said "It probably wasn't, no." She was then asked how many conversations there were. She said "between April 2015 and finally 23 July 2015 when the deal completed and during that time there will have been conversations between us in respect of if I am successful, but I -- at the outset she was going to actually move there, that's what I thought, but then her sale fell through on her house …"

69. She was next asked whether, by saying "there will have been" she was speculating about the conversations. She replied:

> "No, no, I am not speculating. Obviously we had -- the -- I can't tell you at this point in time, no matter how good my memory is, what date Mrs Foster specifically said: you can remain at Axnoller House as long as SPL owns the property. I can't tell you the exact date. But I can –
>
> Q. You can't?
>
> A. But I can tell you that by 23 July she had most certainly made those assurances…"

She was further asked whether the conversations were face to face, to which she replied "Telephone mostly." She also insisted that Mr Brake had not been involved in these conversations with Mrs Foster, but then immediately qualified this by saying that Mrs Foster did speak to her husband in spring 2015 about work she wanted him to do with the horses.

70. The things that struck me most about the whole of this evidence are (i) its vagueness and imprecision when compared to (a) her usual speedy and accurate recollection of exact dates, times and words that matter to her, and (b) the tightly drafted, essentially *legal*, terminology of the pleading itself, (ii) Mrs Brake's complete failure to obtain a written confirmation from Mrs Foster, or even herself to make a written note, either of the assurances themselves, or even the date or occasion on which they were given, compared with her

careful habit (displayed throughout this litigation) of noting all important conversations between herself and others, (iii) her failure to mention these assurances to Dr Guy during their relationship, in particular once that relationship soured in November 2018, (iv) her failure to instruct her lawyers on the assurances when the litigation began, so that they were introduced into the case only by way of re-amendment in March 2020, and (v) the absence of the assurances from many of the earlier witness statements made in these proceedings from November 2018 onwards. I observed Mrs Brake closely during this cross-examination, and I regret to say that I formed the clear view that she was making this evidence up as she went along. This may possibly be an example of a witness making up evidence to support a case that she passionately believes to be right, but I reject it all the same.

Mr Brake's evidence

71. As for Mr Brake, in his witness statement of 16 March 2021 he says this:

> "31. Before completion there was no formal agreement between Saffron and us to continue to occupy the farm. No one knew what would happen with the bidding.
>
> 32. … What I can say with certainty is that when the purchase was complete Saffron, told Alo and Alo told me that she had assured her that we could remain at Axnoller House and could continue to keep the horses in our care in the indoor arena. She was good to her word.
>
> 33. The quid pro quo was that we were to run a business from the Farm in order to service the loans which she would be taking on in order to finance the purchase and that I was to farm the 92 acres of land, and as and, [sic] when required, train Saffron's horses and her children's ponies.
>
> […]"
>
> 39. … Since all of this has happened, Saffron has told us that her main aim was to protect us and allow us to continue living as we always had done at the Farm. I regard her as one of the most honourable people that I have met.
>
> […]
>
> 62. I have never previously considered what the legal basis of our ongoing occupation of Axnoller House and the Arena. I hadn't had any cause to. All that I knew was that when SPL purchased the Farm we had been assured that nothing would change and that we were to continue to reside at the Farm on the same basis is that we always had done. That was to be the case for as long as the Company owned the Farm. Saffron had assured us of that in 2015. Dr Guy came along and continued those promises in the way that I have outlined above.
>
> 63. Both Alo and I understood from Saffron that we had a home for life. Alo told me at the time that during discussions she had with Saffron

> regarding how the loans were to be serviced and what would happen if sufficient revenue couldn't be generated, Saffron was clear that Axnoller House was our home and that nothing would change that."

72. Mr Brake was cross-examined on this statement, and gave a number of unsatisfactory answers, in particular about what was and what was not aired before Sir William Blackburne at an earlier court hearing. I intervened to ask for clarification:

> "JUDGE MATTHEWS: What I am not clear about is what his answer is to [the] original question, which is: did Mr Brake have any conversation with Mrs Foster at the time in 2015 in which the assurances were given?
>
> MR JOHNSON: Yes.
>
> JUDGE MATTHEWS: Not did he have a conversation subsequently.
>
> MR JOHNSON: Anticipating my submissions I will say that what we got was effectively the answer no to that, my Lord, but if it's unclear --
>
> JUDGE MATTHEWS: I think it's unclear and I want to be clear about this. Mr Brake, are you saying that you did or you did not have any conversation with Mrs Foster in 2015 in which she gave you these assurances?
>
> A. She -- at some time shortly after completion she came to Axnoller with a horse and I had a conversation with her then and --
>
> JUDGE MATTHEWS: At some time after completion?
>
> A. Yes.
>
> JUDGE MATTHEWS: You had a conversation with Mrs Foster at Axnoller?
>
> A. Yes, and she said -- I would have said something like thank you so much and she said: well, you're safe now, you're not going to be out on the street.
>
> JUDGE MATTHEWS: But that's it?
>
> A. Well, that's as much as I can remember."

73. The language used ("I would have said something like…") is not that of an actual recollection. Moreover, this conversation with Mrs Foster is not mentioned in Mr Brake's witness statement. Given Mr Brake's important interest in the outcome and his obvious belief in the rightness of his case, in the absence of corroboration from Mrs Foster I am not prepared to find that any such statement by Mrs Foster was actually made. But in any event, even if Mrs Foster *had* made the statement suggested, it is perfectly consistent with an ordinary licence to occupy terminable on notice. It would not support, indeed would go nowhere near as far as, the pleaded case.

Witness statements by Mrs Saffron Foster

74. But the Brakes also rely on certain statements in two witness statements made by Mrs Foster herself (not in these proceedings), and further statements made in a letter sent by solicitors on her behalf. The first of these is a witness statement made, on 6 November 2019, for interlocutory purposes in other litigation between essentially the same parties. It was subject to a statement of truth. In that statement she said this, amongst other things:

> "5. In early 2015, Alo telephoned me to tell me that her home, Axnoller Farm, was to be sold as a result of the dispute with her former business partner, Lorraine Brehme. I was aware of the dispute between the Brakes and Ms Brehme.
>
> […]
>
> 7. Alo knew that I had been looking at farms in the area with equestrian facilities with a view to acquiring one. I had looked at a farm very near to Axnoller in the spring of 2014. I knew Axnoller well having been there on numerous occasions. I explained to Alo that I would be interested in making an offer to purchase Axnoller. I did not have capital to purchase it, particularly as the time scales were very tight, so I would need to borrow the money. …
>
> 8. From the outset, I was very clear to Alo that I was happy for her, Andy, Tom and their horses to remain at Axnoller. My initial intention was that Alo and Andy would work and develop a business to service the finance. I didn't ever say so to Alo but my only motivation behind purchasing Axnoller was to save her and her family from having nowhere to live. …
>
> […]
>
> 9. … I wanted to make the Farm to generate an income and employed Rebecca Holt to run it as a wedding venue using the three holidays cottages and the party barn for the weddings. I said Alo and her family could live at the main house.
>
> […]
>
> 12. In late April 2015, I instructed Michelmores (on recommendation from Alo) and made an offer of £2.5m to buy Axnoller, confirming that vacant possession was not an issue for me. …
>
> […]
>
> 14. I left Michelmores and Alo in charge of arranging the loan facility and dealing with all of the formalities, including the incorporation of SPL. I trusted Alo completely and, given that my purchase of Axnoller was giving her and her family a place to live, I knew that she would take care of everything.
>
> […]"

75. In a further witness statement, dated 28 February 2019, in bankruptcy proceedings involving the Brakes, again made for interlocutory purposes and subject to a statement of truth, Mrs Foster says this (amongst other things):

> "6. I told the Brakes on behalf of SPL that that they could continue to reside in Axnoller House and to have exclusive use of it and the arena building which houses their horses."

76. Thirdly, there is a letter dated 12 March 2021, sent by solicitors on behalf of Mrs Foster. This obviously is not subject to a statement of truth. It is also double hearsay. Nevertheless, it states (amongst other things):

> "4. In early 2015, Mrs Brake, her good friend, telephoned my client to explain that her home, West Axnoller Farm, was to be sold as a result of the dispute with her former business partner, Lorraine Brehme. My client was keen to assist Mr and Mrs Brake and therefore decided to purchase West Axnoller Farm via a company called Sarafina Properties Limited.
>
> 5. My client was happy to allow Mr and Mrs Brake to remain at the property. Her initial intention was that Mr and Mrs Brake would develop a wedding and events business which would utilise the property. However, it should be noted that my client's main aim was to ensure that Mr and Mrs Brake did not lose their family home. That being said, my client was of the view that the business would be a success and would generate sufficient profits to service the debt..
>
> 6. My client understands that before final bids were submitted, the Cottage was excluded from the sale. However, my client was of the view that if Sarafina Properties Limited was the successful bidder, then Mr and Mrs Brake could live at Axnoller House.
>
> […]
>
> 8. The sale of the farm to Sarafina Properties Limited completed on 23 July 2015. As my client intended, Mr and Mrs Brake remained at Axnoller House and the horses in their care remained at the indoor arena. My client understood that the LPA receivers selling on behalf of the bank sold subject to the occupational rights of Mr and Mrs Brake. My client had no concerns of this nature and made it clear to Mr and Mrs Brake that they could continue to live at the property and, in due course, run a business from the property.
>
> […]
>
> 10. My client would ask the Court to note that she has never had keys to Axnoller House, or ever lived at the property and despite her company owning the property, she would not have turned up unannounced or uninvited. As far as she was concerned, this was Mr and Mrs Brake's family home."

77. It will be noted that the language of these statements is at its highest that of limited permission to make use of the property. The Brakes may live in the house as their family home, run a business from the property, and use the arena for their horses. The furthest that it goes is the short statement in the witness statement of February 2019 that the Brakes were "to have exclusive use of [the house] and the arena". There is no promise that they may stay there and use it for ever, or for as long as SPL owned it. And there is no mention at all of access ways and grazing land. In my judgment, these statements go nowhere near justifying the pleading of the 2015 Assurances.

78. Indeed, the letter from Mrs Foster's solicitors at paragraph 8 actually *subverts* the Brakes' argument in favour of the 2015 Assurances, because it explains the Brakes' continued presence at the property as based, *not* on any assurances by Mrs Foster herself, but instead on the belief by Mrs Foster that "the LPA receivers selling on behalf of the bank sold subject to the occupational rights of Mr and Mrs Brake." Those occupational rights could not emanate from any agreement *by Mrs Foster*. They would have to have been already in place when SPL bought the property. Moreover, when Mrs Foster's solicitors wrote their letter, they enclosed copies of an earlier letter sent by the claimant's solicitors Stewarts to Mrs Foster's earlier solicitors Withers, together with its attachment, the Re-Amended Defence and Counterclaim. Indeed, Stewarts' letter quoted paragraph 17 in terms. So it is clear that when she wrote her solicitors' letter Mrs Foster knew what the Brakes' case was, *and yet she did not support it*.

Admissibility and weight of Saffron Foster's witness statements

79. However, even if Mrs Foster's witness statements and letter had justified or supported paragraph 17 and the allegation of the 2015 Assurances, Mrs Foster did not make a witness statement in the present proceedings, and neither was she called to give evidence. This creates two problems. First, CPR rule 32.2 provides (so far as relevant):

> "(1) The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved –
>
> (a) at trial, by their oral evidence given in public; and
>
> (b) at any other hearing, by their evidence in writing.
>
> (2) This is subject –
>
> (a) to any provision to the contrary contained in these Rules or elsewhere; or
>
> (b) to any order of the court."

80. Then rule 32.4 provides (again, so far as relevant):

> "(1) A witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally.

> (2) The court will order a party to serve on the other parties any witness statement of the oral evidence which the party serving the statement intends to rely on in relation to any issues of fact to be decided at the trial."

81. And rule 32.5 provides (again, so far as relevant):

> "(1) If –
>
> (a) a party has served a witness statement; and
>
> (b) he wishes to rely at trial on the evidence of the witness who made the statement,
>
> he must call the witness to give oral evidence unless the court orders otherwise or he puts the statement in as hearsay evidence."

82. For the sake of completeness, I mention that rule 32.12 provides (so far as relevant):

> "(1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.
>
> (2) Paragraph (1) does not apply if and to the extent that–
>
> (a) the witness gives consent in writing to some other use of it;
>
> (b) the court gives permission for some other use; or
>
> (c) the witness statement has been put in evidence at a hearing held in public."

83. The Practice Direction to Part 32 relevantly provides:

> "27.2. All documents contained in bundles which have been agreed for use at a hearing shall be admissible at that hearing as evidence of their contents, unless –
>
> (1) the court orders otherwise; or
>
> (2) a party gives written notice of objection to the admissibility of particular documents."

84. No order was made by the court under rules 32.2(2)(b), 32.5(1), 32.12(2)(b), or para 27.2(1) of the Practice Direction. The upshot is that these statements of Mrs Foster would in principle be admissible as hearsay evidence of their contents. Section 2(1) of the Civil Evidence Act 1995 requires that notice be given of intention to rely on hearsay evidence. This is supplemented by CPR rule 33.2:

> "(1) Where a party intends to rely on hearsay evidence at trial and either –

> (a) that evidence is to be given by a witness giving oral evidence; or
>
> (b) that evidence is contained in a witness statement of a person who is not being called to give oral evidence;
>
> that party complies with section 2(1)(a) of the Civil Evidence Act 1995 serving a witness statement on the other parties in accordance with the court's order.
>
> (2) Where paragraph (1)(b) applies, the party intending to rely on the hearsay evidence must, when he serves the witness statement –
>
> (a) inform the other parties that the witness is not being called to give oral evidence; and
>
> (b) give the reason why the witness will not be called.
>
> (3) In all other cases where a party intends to rely on hearsay evidence at trial, that party complies with section 2(1)(a) of the Civil Evidence Act 1995 by serving a notice on the other parties which –
>
> (a) identifies the hearsay evidence;
>
> (b) states that the party serving the notice proposes to rely on the hearsay evidence at trial; and
>
> (c) gives the reason why the witness will not be called.
>
> (4) The party proposing to rely on the hearsay evidence must –
>
> (a) serve the notice no later than the latest date for serving witness statements; and
>
> (b) if the hearsay evidence is to be in a document, supply a copy to any party who requests him to do so."

85. Also relevant is rule 33.3:

> "Section 2(1) of the Civil Evidence Act 1995 (duty to give notice of intention to rely on hearsay evidence) does not apply –
>
> (a) to evidence at hearings other than trials;
>
> (aa) to an affidavit or witness statement which is to be used at trial but which does not contain hearsay evidence;
>
> (b) to a statement which a party to a probate action wishes to put in evidence and which is alleged to have been made by the person whose estate is the subject of the proceedings; or
>
> (c) where the requirement is excluded by a practice direction."

86. In my judgment rule 33.3(aa) does not apply to the two interlocutory witness statements made by Mrs Foster, because they were not made for use at trial. The distinction is between statements falling within rule 32.4 and those falling within rule 32.6. A "witness statement which is to be used at trial" is one within rule 32.4, *ie* "witness statements for use at trial".

87. I have not seen any hearsay notices served in relation to Mrs Foster's witness statements and solicitors' letter. Assuming that the notice procedure was not complied with, that does not mean that these statements are inadmissible. But it does affect their weight, because the claimant is denied the benefits that the procedure was designed to afford. And, at the end of the day, it is highly undesirable that important issues of fact should be determined on hearsay evidence. In the present case, Mrs Foster was not on oath, I could not see her demeanour in giving evidence, and she could not be cross-examined on these statements. This also goes to reduce their weight. Indeed, the solicitors' letter is even less weighty, being double hearsay. And in any event, although the statements refer to some sort of permission for the Brakes to occupy the property, they do not go anything like far enough to support the pleading in paragraph 17 of the Re-Amended Defence and Counterclaim. Indeed, as I have said, the letter from Mrs Foster's solicitors undermines it. I have decided that I can give very little weight indeed to Mrs Foster's statements.

88. But over and above all this, there is a further and more serious problem with Mrs Foster. That is the question whether any inferences adverse to the Brakes should be drawn by the court *because of* the omission to call Mrs Foster. I will consider the effect of that omission shortly.

Saffron Foster's "disclosure letter"

89. The Brakes also rely on the disclosure letter dated 17 February 2017, which was provided on behalf of Mrs Foster to Chedington upon the completion of the sale of SPL. In cross-examination Mrs Brake was asked why there was no reference to the 2015 Assurances in the heads of terms which she had drafted. Part of Mrs Brake's lengthy reply was (day 11, page 71):

> "I've done a million M&A-type transactions, you do not start writing about things that are completely extraneous to the deal, you do not start talking about somebody else giving you assurances, that is something for the disclosure letter and things like that, which Saffron did."

90. Subsequently she added this (day 11, pages 81-82):

> "The 2015 assurances were documented between Dr Guy and Mrs Foster in the disclosure letter and she made it quite clear both at the meeting on 15 December plus in her disclosure letter that she had allowed us to remain at Axnoller from 23 July 2015 until the day that he purchased the business, that she on behalf of SPL allowed us to remain, so we were there legally occupying Axnoller House and the equestrian bit."

91. However, the only possibly relevant part of the disclosure letter (which was put to Mrs Brake) reads:

> "The vendor has made the purchaser aware that she did not purchase West Axnoller Farm with vacant possession and allowed Mr and Mrs Brake to live there between July 2015 and the present date."

But that does not refer in terms to any promises or assurances at all. It is consistent (for example) with a bare licence, or even a belief that the Brakes had occupational rights hanging over from the period before SPL. When pressed with the question *where* in the disclosure letter the 2015 Assurances were set out, Mrs Brake replied (day 11, page 85):

> "Well, because it's patently obvious that she told Geoffrey that she had allowed to us remain at Axnoller between July when the company purchased the farm and the date that this document was signed. So he was fully aware that we were there lawfully and upon her say-so."

When counsel suggested that the disclosure letter in fact did not set out any promises or assurances at all, Mrs Brake changed tack, and replied:

> "Because this deals with warranties in the SPA, why would it?"

92. I then intervened, because I was confused, and wanted to understand exactly what Mrs Brake's evidence was (day 11, pages 86-87):

> "JUDGE MATTHEWS: You said the disclosure letter had them.
>
> A. Well, not the assurances in the terms that they are written in her witness statements or in the letter from Isadore Goldman because it's not -- when you are doing a deal you don't start --
>
> JUDGE MATTHEWS: All right. You say: well, they are not in the disclosure letter.
>
> A. They are not but she did disclose it, yes --
>
> JUDGE MATTHEWS: Sorry, I want to be clear what your evidence is. Your evidence is therefore, to me, that the disclosure letter does not contain the 2017 promises?
>
> A. Well, not the promises.
>
> JUDGE MATTHEWS: The 2015 assurances?
>
> A. The disclosure letter discloses that she allowed to us stay lawfully.
>
> JUDGE MATTHEWS: Yes, that we've seen. That's the bit you've been taken to. But it doesn't contain anything about the 2015 assurances?
>
> A. Well, in the judgment, your judgment in the section 283A trial, my Lord, you specifically referred to this document as evidencing the assurances and that's why I --
>
> JUDGE MATTHEWS: Did I?

A. You did."

93. I should say that I have since read and re-read my judgment in the section 283A trial, and the only paragraph referring to the disclosure letter is paragraph 94, which in its entirety reads:

> "On 17 February 2017, Chedington bought all the shares in Sarafina Properties Ltd from Mrs Foster. A disclosure letter provided by her as vendor on the same date said:
>
> > 'The Vendor has made the Purchaser aware that she did not purchase West Axnoller Farm with vacant possession and allowed Mr and Mrs Brake to live there between July 2015 and the present date'."

It will be observed that I said nothing corresponding to the words used by Mrs Brake in her answer, namely, that I "referred to this document as evidencing the assurances".

94. I am afraid that, once again, I am driven to the conclusion that in relation to the impact of the disclosure letter Mrs Brake was simply making up this evidence as she went along, and I reject it.

Was Saffron Foster a nominee for the Brakes?

95. In support of its case that Mrs Foster was a nominee for the Brakes, AEL relies on a series of documents and events. First of all, SPL was incorporated on 2 June 2015 by a law firm called BPE Solicitors LLP in Cheltenham. The single issued share was put in the name of Mrs Foster, whose address was given as West Axnoller Farm (which was also the registered office). However, the solicitors' invoice for their work was rendered in August 2015 to Mr Brake's niece Alice Wyatt at her home address in Chard, Somerset. The copy invoice in the bundle has the words "Paid by Sarafina 25/09/2015" in typescript at bottom right, and the words "Paid Cheque 8" written on it underneath and to the left in manuscript.

96. But, before I deal with the invoice itself, I must refer to some other matters involving Ms Wyatt. In cross-examination, Mrs Brake was taken to an entry in a bank statement for SPL (day 10, pages31-32):

> "Q. Do you see 27 June 2016?
>
> A. Yes.
>
> Q. There is a standing order for Alice Wyatt in relation to a car.
>
> A. Yes.
>
> Q. What is Alice Wyatt's car doing on these bank statements?
>
> A. I'm not really sure what this has do with possession but I'm going to say to his Lordship I'm not -- I don't understand what this has to do with our remaining rights to Axnoller House.

> JUDGE MATTHEWS: I think you must answer.
>
> A. I'll answer the question, it's fine, I have no problem with it. Alice had essentially -- this car was a car used in the business and that Alice had lent us, had basically done the finance for it.
>
> Q. It was your car, Mrs Brake, wasn't it?
>
> A. Well, no -- well, yes, I used the car, amongst other people.
>
> Q. And the reason it was in Alice Wyatt's name was to conceal it from your trustee in bankruptcy and your creditors?
>
> A. I don't think it's in any way unlawful for a family member to buy you a car and that's what happened."

97. I note first of all that the story changes almost from line to line. First it is "a car used in the business and that Alice had lent us." Then it was *Mrs Brake's* car, in the sense that she "used the car, amongst other people". Then it was "a family member [who bought me] a car" I do not accept any part of this story. There would be no reason for Alice Wyatt to buy a car for SPL. If SPL was genuinely owned by Mrs Foster, it could buy its own cars. But if Alice Wyatt were really buying the car herself, and allowing her aunt to use it, there would be no call for SPL to foot the bill. On the other hand, if Mrs Brake were buying the car, she would not want her trustee in bankruptcy and her creditors to know about it.

98. There was a yet further episode concerning Ms Wyatt raised in cross-examination. This concerned a parking penalty notice issued in Beaminster, Dorset (close to Axnoller) on 19 January 2018 in respect of a Volkswagen motor car, registered in the name of Alice Wyatt, at an address in Devon, that had been parked in The Square, Beaminster. An email had been sent from the account using the address enquiries@anxoller.co.uk to the relevant parking penalty appeals body. In the "Documents Claim", between essentially the same parties as this claim, Mrs Brake had told me that only she used that account. In this case Mrs Brake qualified that to say that Simon Windus and Rebecca Holt did so occasionally too. The email reads as follows:

> "Dear Sir/Madam
>
> I would like to appeal against the above penalty notice issued on the 19th of January.
>
> I had purchased a valid ticket and displayed it on the dashboard, I had an urgent doctor's appointment which overran by a few minutes.
>
> Kind regards
>
> Alice Wyatt".

99. Mrs Brake was cross-examined on the email (day 10, page 36):

> "Q. This was your parking ticket, wasn't it, Mrs Brake?
>
> A. The reason why Alice is dealing with is because she owns the car, right? So that's the first point. The second point is I cannot tell you at this stage that – whether Alice had come to visit or anything or whether she got a ticket. So that's the best I can --
>
> Q. It's much simpler than that, isn't it, Mrs Brake?
>
> A. Well, it could be -- it could be my parking ticket.
>
> Q. Just wait for the question. This was your parking ticket and you wrote the email that we see at the foot of page 4288.1 while pretending to be Alice Wyatt?
>
> A. No, I don't think so.
>
> Q. You were effectively deceiving the people to whom you were making the appeal?
>
> A. Well, if I was -- I don't have a recollection of this incident because it's really, really small; I mean, it's just a parking ticket."

100. She was further asked (day 10, pages 37-38):

> "Q. The explanation for all of this, Mrs Brake, is this, isn't it: you had put your car into the name of Mr Brake's niece to avoid your trustee in bankruptcy and creditors becoming aware that you were operating a car and you maintained that fiction when you appealed against the penalty notice?
>
> A. Absolutely not. Two questions there, not one. But the first one is Alice owned the car. It was financed fully, so actually the finance company owned the car and Alice let us use it. There's no -- there was no deceit about that. We did not own the car. And it was none of the trustees' business about whether Alice wanted to finance a car that we drove because you are allowed to have family help you when you're bankrupt is. It's not against the law. So that's the answer to your first question. The answer to your second question, whether there was some kind of deceit going on with the parking people, to be honest I can't remember but it may be that there was a porkie pie told but I don't remember and it wasn't some great scheme, it was simply that a parking ticket was given and so we just dealt with it, but I don't know.
>
> Q. I take it from that answer that you accept that you wrote the email --
>
> A. No, I don't.
>
> Q. -- at the foot of the page. Just wait for the question.
>
> A. Sorry.

> Q. I take it from that answer that you accept that you wrote the email at the foot of page 2488.1?
>
> A. It could as easily have been Simon. I just didn't write it. I don't have a recollection of this email particularly. It wasn't a big thing in my life."

101. I find that Mrs Brake was indeed telling "porkie pies". It was Mrs Brake's doctor's appointment, not her niece's. It was her car, not her niece's. She wrote the email, not Simon Windus. Contrary to what Mrs Brake says, however, in my judgment it is not "just a parking ticket". It is a further example of Mrs Brake being prepared to front her activities through a third person, in this case Ms Wyatt. With all this in mind, I return to the invoice for the incorporation of SPL. Asked in cross-examination why the invoice was made out to Ms Wyatt, Mrs Brake told a story (day 10, pages 29-30) about how "Alice had been working for me from home" and

> "I suspect it's because everything at the time that it was incorporated was in flux and nobody knew where anyone would be so she gave them her home address, I have no idea, that's the only explanation I can offer."

102. It was suggested to her that another explanation was to conceal her involvement in the setting up of SPL. Mrs Brake vehemently denied this. I am afraid I regard her denial as a childish lie, thought up on the spur of the moment. If Mrs Foster had been the client, there would have been no need to use Alice Wyatt's name at all. There would be no reason why Mrs Foster would need to conceal her identity. Indeed, both Mrs Foster in her own statements and Mrs Brake in her evidence have proclaimed that Mrs Foster was the true owner of SPL. But, if on the other hand Mrs Brake were the real client, then, given that she was then bankrupt, there would be every reason to conceal her involvement. Hence the need to use Ms Wyatt's name and address.

103. A further matter relied on by AEL was that (as confirmed by Mrs Foster herself) Mrs Brake organised the finance for the purchase of the property by SPL. In her witness statement dated 2 September 2019, made in other proceedings between the same parties, Mrs Brake said (at [60]) that Mrs Foster "had paid £2.5 million to purchase the property and had some legal and other costs above that". But in fact Mrs Foster did not put a penny into the project. Mrs Brake organised and obtained a valuation of the property, dated 17 July 2015, on a vacant possession basis, by Savills of £4.5 million. The valuation report identified Mrs Brake as the owner and occupier of the property, and Lendy's customer. I assume that this information came from Mrs Brake. Using this valuation, she obtained a loan of £2.88 million gross from a commercial lender called Lendy. However, the actual purchase price paid to Adam & Co's LPA receivers was only £2.46 million. So the loan advanced was *greater* than the purchase price. The receivers had obtained their own valuation of the property in September 2014 from Strutt & Parker, acting jointly with Crosthwaites Leisure and Property Specialists. The valuation was £2,100,000 for the freehold interest and £1,850,000 as a going concern.

104. It appears that there were problems with the transaction, because on 20 and 29 July 2015 Mrs Brake approached a man called Bruce Barclay to obtain a further £50,000 in finance. In the email of 20 July she pitched the request for a loan with a business plan and outline terms, including a 4% fee, a 3% redemption fee and interest at 1.5% per month. These high-cost terms indicate short-term finance. It is also clear from the second email (that of 29 July) that Mrs Brake had approached Mr Barclay out of what she called "Desperation I am afraid". But, essentially, she was writing to tell him that "we have completed the deal!!!" She went on to say that the property "literally next door has come up for sale and it is a smaller house than the main house here with the same amount of land and that is it and it is £1.5M more expensive so I think it was all worth the hassle." She then asked whether Mr Barclay would be interested in long term secured lending, and then says "If you are interested I would be delighted to host you here so you can see for yourself…". Neither email refers to Mrs Foster. The terms of the emails encourage the reader to assume that Mrs Brake and her husband are the beneficial owners of SPL.

105. In January 2016, Mrs Brake was organising the refinancing of the Lendy loan. There are some 20 pages of emails from that period in the trial bundle, passing between Mrs Brake, Liam Brooke (a director of Lendy), Tom Hyde of Michelmores (acting for SPL), and Clarke Wilmott (acting for Lendy). In the early stages, the emails are passing between Mrs Brake and Mr Brooke. They comprise hard-nosed negotiations on a final loan to enable the refinancing (with Barclays Bank) to take place. There is no suggestion of any reference (or need to refer) to Mrs Foster in those negotiations. I find that Mrs Brake is making all the decisions.

106. The next matter concerns the running of the wedding and events business carried on by SPL after purchasing the property. As I have already said, Mr and Mrs Brake were prohibited by an injunction dated 1 July 2015 from being involved in the wedding business at the property, for a period lasting six months. Originally the sole director of SPL recorded at Companies House was Mrs Foster. A friend of Mrs Brake's, Rebecca Holt, was brought in, ostensibly to run the business, from the beginning. She was also appointed a director of Sarafina on 1 September 2015. (She went on maternity leave in June 2016, but resigned in February 2017 before ever returning to work.) Yet, as Mrs Brake said in her witness statement dated 8 January 2019, at [29], she (Mrs Brake) "continued to be the central point in the running of the business".

107. Thus, on 25 August 2015, Mrs Brake sent an email to a competing events business concerning referrals by Axnoller of overflow business, that is, business which Axnoller could not cope with, in return for a commission. In that email, Mrs Brake said "all my emails are signed Rebecca at the moment. I will call and explain". Similarly, in an email of 28 September 2015 to that other events business concerning cancellation of a booking for one of the Axnoller holiday houses, Mrs Brake asked her contact to tell the cancelling party not to telephone her "as I do not work for the new co officially". In cross-examination, Mrs Brake said that the explanation for emails which she sent being signed "Rebecca" was that she was using a template which had been created so as to come from Mrs Holt. I do not accept this. Mrs Brake is

an exacting perfectionist. She is not the sort of person who cannot be bothered to get things right. If she used a template which signed off "Rebecca" and she did not change it to sign off with her own name (a matter of only a few keystrokes), it was because she wanted it that way.

108. In my judgment in the Documents Claim, at [71], I recorded that "In cross-examination, Mrs Brake accepted that she 'did occasionally dip in and help [Rebecca Holt] to … reorganise things'." That judgment also dealt with the instructions given by Mrs Brake to Allen Computer Services to create new Exchange-based email accounts for the company. So the work she was doing for the company extended beyond helping Rebecca Holt. For the purposes of this judgment, I find on the evidence before me in the present case that Mrs Brake *did* work in the weddings and events business during the six months that she was subject to the injunction granted by Sir William Blackburn. Moreover, it is clear that Mrs Brake's contribution was no occasional "dipping in". There are no documents in the trial bundle suggesting that Mrs Brake was carrying on any other business activity (unrelated to weddings) at this time, and Mrs Brake gave no such evidence herself. Yet she was not a person to sit on her hands.

109. When Mrs Brake was cross-examining Sherryl Dagnoni in the present case, there was the following exchange between them (day 7, page 55):

> "Would you say, Sherryl, that I wanted the business to succeed?
>
> A. Yes.
>
> Q. Would you say that I treated it like my own?
>
> A. Yes.
>
> Q. Would you have difficulty of even identifying that I didn't own the business?
>
> A. Yes.
>
> Q. It looked like it was my business, didn't it?
>
> A. Yes.
>
> Q. I've always acted like it was my business?
>
> A. Yes.
>
> Q. My baby?
>
> A. Yes."

110. And again, in cross-examination before me, although in relation to a different point, she said (day 9, page 44):

> "A. I'm heavily involved in anything I am absolutely a control freak you are absolutely right I am not someone who says you know oh I didn't know that happened, yes, you are right."

In cross-examination the next day she said much the same thing again (day 10, page 113):

> "I am a controlling and – I, like, have to have control of the situation…"

111. The relationship between Mrs Brake and Mrs Holt is also instructive. Mrs Holt was a director of SPL, and Mrs Brake was not. But not only did Mrs Brake not report to Mrs Holt, she actually gave instructions to Mrs Holt. So, for example, on 29 June 2016 Mrs Brake sent an email to Mrs Holt:

> "I am going to send you the bank statement for June as I would like you to reconcile the wedding payments from each wedding that we have not yet done (and show Simon how you do it) and also I would like to be sure that we have not overpaid (accidentally) any suppliers et cetera. Also please can you get together the files for the June management accounts so that Simon is not left floundering trying to do those. He can do the last day. Thank you."

Of course, this email was being sent just before Mrs Holt went on maternity leave, and Mrs Brake no doubt wanted to be sure that Simon Windus would be able to take over some or all of Mrs Holt's work. But the tone is not that of a subordinate speaking to a superior. It is the tone of the employer giving instructions to her employee.

112. The relationship between Mrs Brake and Mrs Foster is equally instructive. There is no trace of any document in the trial bundle evidencing any role played by Mrs Foster in the business. To be fair, Mrs Brake does not give any evidence to the effect that Mrs Foster did play any such role. But what is more significant than this is the fact that there is no trace of any *reporting* by Mrs Brake to Mrs Foster about the business, whether it is making any money, or losing it, whether the mortgage interest is being covered, and so on. If it really were Mrs Foster's business, one would expect to see such reporting.

113. Here, exceptionally, I bear in mind what Mrs Foster says in her witness statement of 6 November 2019, at [8]:

> "I was slightly concerned about the cost of the loans and therefore did consider that there was an element of risk but I was satisfied that I could eventually cover the cost by income generated by the farm. I own a wedding venue in Australia and know they can generate good levels of profit".

So Mrs Foster was aware of the risks, and the need for profits to cover costs including interest. But she was satisfied on this point because of her ownership of an Australian wedding venue. Yet Mrs Foster could only know that because in relation to that venture there is financial reporting to her. That is what one

would expect in a business which one owns beneficially. By contrast, here there is none.

114. Another indicator of the degree of control which Mrs Brake exercised, not only over the business, but also over the company, is to be found in the email which Mrs Brake sent to her accountant Gary Salter on 19 July 2016. It is evident that there had been a discussion between them as to whether Mrs Brake and her husband should be appointed as directors of SPL. In the email she says this:

> "In terms of us being set up as directors of Sarafina I think wait until I tell you. It may be useful not to be until the affairs of Stay in Style are finally put to bed."

Two things stand out from this email. First there is no reference at all to Mrs Foster. There is no suggestion that she needs to be involved. Secondly, Mrs Brake has the power to say Yes or No at a moment's notice, not only for the affairs of the business, but also for the affairs of the company itself.

115. The next matter relied on by AEL concerns the use by Mrs Brake of SPL's bank accounts and financial resources. First of all, it is clear on the evidence that Mrs Brake exercised complete control over the use of SPL's bank accounts. Monies were paid out of those accounts only on her instructions. As I have already said, Mrs Foster took no part in the business of the company, and I have not been able to find Mrs Holt, although a director, even once making a decision on her own to pay money out.

116. The second point is that although much of the expenditure recorded in the bank statements can be ascribed to business expenses, a great deal of it appears to be purely personal to the Brakes. It includes a standing order to Mr Brake's niece, Alice Wyatt (who was not an employee of the company), to pay for a motorcar in her name, direct debits for a subscription to Sky Television (which on the evidence was used by the Brakes in the house and also in the cottage), small card purchases from local food shops, chemists and supermarkets, purchases from Amazon, and, perhaps most remarkable of all, many thousands of pounds for school fees for Mrs Brake's son, Tom D'Arcy. When SPL was sold to Chedington in February 2017, Chedington's accountants identified all this personal expenditure, and treated it as a loan account in favour of the Brakes. The Brakes were obliged to repay this personally at completion. It amounted to £136,530 in total, over the period July 2015 to February 2017, a total of 19 months.

117. There are then a number of documents in the bundle in which Mrs Brake is described as the owner of Axnoller. For example, there is an email dated 21 August 2015 from a man called Bob Holt (who I understand to be related to Rebecca Holt) to the Dorset branch of Handelsbanken, saying

> "a very good friend of mine Alo Brake owns Axnoller a prestige event complex in Dorset and she is looking to refinance".

Another email, this time from Mrs Brake herself, was sent by her on 1 July 2016 to a lady called Rachael Palmer, in which she follows up an estimate sent a few days previously, and says

> "If there are any questions please do let me know. I am the owner of Axnoller and would be delighted to help."

118. The negotiations for the sale of SPL to Chedington are also significant. I will have to return to them in more detail later, but for present purposes the important point to note is that they were conducted entirely by Mrs Brake, without reference to Mrs Foster, with the possible exception of consultation with Mrs Foster at the outset of those negotiations and (at the end) her execution of the various documents needed to complete the sale. As I say later, there was only one meeting between Mrs Foster and Dr Guy, it was short and by then the deal had in effect been agreed, so there was no negotiation between them at that stage. In the meantime, Mrs Foster had confirmed to Stephen Ryde-Weller of Verisona Law that he could take instructions on all aspects of the transaction from Mrs Brake, and thereafter she was not involved.

119. Accordingly, Mrs Brake dealt with the sale of SPL to Chedington by herself, with the assistance of Mr Ryde-Weller acting in effect as her solicitor. She even gave instructions as to what was to be done with the net proceeds of sale. The total consideration paid by Chedington on the completion of the sale on 17 February 2017 was £7,067,002. From this, however, all the secured lending had to be paid off. The net proceeds (as subsequently adjusted) were accordingly £3,431,695.61. From the net proceeds some £41,857.56 were paid to the various professionals involved in the transaction, in settlement of their invoices, £136,530 was deducted in order to pay back the Brakes' "loan account" with SPL, £271,000 was spent on "gifts to Mr Brake" and £26,000 on "gifts to Mrs Brake". £340,354.36 was withheld in order to pay tax, so that the final cash balance was £2,615,953.69. Of that sum, £100,000 was stated to be "returned to client", that is, paid to Mrs Foster. The remainder, £2,515,953.69, was paid to Mr Brake. If the gifts and the repayment of the loan account are added in, the total benefit to the Brakes was just under £3 million.

120. The Brakes' evidence is that this was a very generous gift from Mrs Foster to them. Indeed, in a witness statement dated 2 September 2019 in other proceedings between the same parties, Mrs Brake said

> "72. Between February and November 2017, we received the total sum of £2.5 million in gifts from Mrs Foster. This did come as a shock to us. … "

121. She later rowed back from this, and at the outset of her oral evidence sought to rewrite her statement, and to say instead that the shock was how little Mrs Foster wanted for the property:

> "What's wrong with it is that obviously I was involved in the negotiations in respect of the gift so I wasn't astonished that I was given the money, what I was astonished about was the fact that Mrs Foster had said that she

> only wanted £4 million for the property and allowed us to benefit from the money that was gifted to us for the business so this gives a wrong impression" (day 9, page 17).

122. I do not accept this. There was nothing in paragraph 72 of Mrs Brake's witness statement about how much (or how little) Mrs Foster was willing to accept for the property. Indeed, so far as I can see, there is nothing in that part of the witness statement (dealing with the sale to Chedington) at all about this. To say therefore that the "shock" related, not to the gifts which have just been mentioned, but to a price which has not, is incoherent, and, for someone so punctilious as Mrs Brake is, incredible.

123. But in any event the whole 'gift' story is not only counter-intuitive, but also inconsistent with the contemporary documents. Mrs Brake had evidently communicated her intention to make the payment of £100,000 to Mrs Foster, because she asked for Mrs Foster's bank details. Mrs Foster replied to that request, giving the details of the accounts held by an entity which evidently managed her family's money. This is what she said to Mrs Brake:

> "Dear Alo
>
> Please find the bank details below. They are for both my personal account and also the tax money. Alder will hold both so I don't spend it! However I am going to pay off my credit card. And take the kids to Lanzarote (not nearly glamorous enough for you!) I really am so excited and grateful you have given me the option to pay my school fees as it does worry Charley and I so much. THANK YOU no one ever does anything like that for me. I am so pleased that it has worked out for you and Andy. It has been a pleasure to help. Now I think you and Andy should take some time out. So bloody likely! I'm longing to see the table you bought… See you when I'm back from Oz."

It is plain from the terms of this email that Mrs Foster did not expect to receive any money at all, was in need of money to pay off her credit card bill and to pay her children's school fees, and was accordingly delighted to be given the comparatively small amount of £100,000 from the net proceeds of sale. It is utterly inconsistent with what she says in her witness statement of 6 November 2019 at paragraph 27 (set out below), "It was my decision, and mine alone, to gift Alo and Andy the balance of the sale proceeds."

124. About ten minutes later, Mrs Brake sent a reply to Mrs Foster. It reads as follows:

> "Hon Saff
>
> Fortune favours the brave! You were incredibly brave to trust me and to lend us your very good name (as opposed to using our appallingly bad name)!
>
> I can't imagine why no one does things like that for you. You are lovely. Mad as a box of frogs but lovely.

> I will sort out the money on Monday and email you when done. Don't forget to sign the docs that C shredded and get them witnessed by the butler.
>
> Seriously Saff if you or Charley ever need us just ask. Both Andy and I are eternally grateful to you.
>
> Love you muchly. Sláinte
>
> Alo".

This email makes clear, and I find, that Mrs Foster "lent her name" to the Brakes, despite the risks that that involved. It also makes plain that Mrs Foster has done something very valuable for the Brakes, for which they are "eternally grateful". As I have said, the Brakes benefited by just under £3 million from the transaction. AEL relies on these two emails, in effect saying that, if this really had been Mrs Foster's company and business, they could not have been written in the way that they were. I agree.

125. This email exchange is commented on in Mrs Foster's witness statement of 6 November 2019 as follows:

> "29. I have been shown my e-mail exchange with Alo in February 2017. Alo was always very thankful to me because I had been able to purchase Axnoller when she could not. I had made clear to Geoffrey that I would probably gift the profit to Alo and Andy if I could (I did not know exactly what would be available after I had paid all of my expenses and tax). When I told Alo that I was going to do this she refused to accept it. I said that she needed money and I did not. She told me that I must have something that I could use the money for and she suggested school fees. I was amazed that she was refusing to accept money when she had nothing. I come from a wealthy family and everyone assumes that I have a lot of money. No one ever tries to give me anything. In fact, although our family has money it is tied up in various trusts. Regular expenses such as school fees are something that concern me. The purpose of my email was to thank Alo for thinking of my needs. Whilst my appreciation may seem odd to Geoffrey, it makes perfect sense to me and frankly, I do not see how my actions, intentions and responses can possibly be misconstrued as an attempt to defraud anyone."

I do not accept this explanation. In my judgment, it is a weak attempt to sanitise and explain away the deadly admissions made in the emails.

126. I note that the Brakes argued that Dr Guy was well aware of the "gift" by Mrs Foster, and of its magnitude. In her closing submissions, Mrs Brake submitted on the evidence that Dr Guy

> "was not only the architect of the gift, something he admitted in cross-examination and which he repeats in his 20 September 2021 witness statement and he was also fully aware of the magnitude of it".

She also refers to the judgment of deputy judge John Jarvis QC of 28 November 2019, where he refers (at [53]) to:

> "the clear evidence that shows that Dr Guy took an active part in negotiating the purchase price and the way in which it should be allocated."

127. I have considered these submissions carefully, and reviewed the evidence referred to. In cross-examination, Dr Guy did not admit that he was the "architect of the gift". Indeed, if he ever used that expression, I have not been able to find it in the transcripts. Nor did he use it in his witness statement of 20 September 2021. What he *did* say in that statement was that Mrs Brake in her revised draft heads of terms of 2 December 2016 had proposed that the sale consideration be split between two companies, and that he had immediately rejected this, "as it had no merit".

128. He then went on to say this:

> "24. Instead of such a split across two companies, I suggested Mrs Brake consider a gift in relation to her arrangements with Mrs Foster. It was, however, entirely a matter for her and Mrs Foster.
>
> 25. Further, there was never any suggestion that the Brakes would receive the entirety of the business profits of SPL / AEL. I was never privy to the anticipated profit share."

I do not accept for a moment that his suggestion made him the "architect of the gift". Indeed, what *is* made clear is that it was for Mrs Foster and the Brakes to make their own arrangements between themselves, and that he was not going to be party to them. Thus, he was *not* aware of the magnitude of the "gift". As Mrs Brake (quite correctly) said to him in cross-examination, it was none of his business.

129. As to what John Jarvis QC had said in his judgment, of course I accept that Dr Guy was involved in the negotiations. After all, he was the director of the purchaser conducting the purchase. I also accept that he did not want the purchase price split between two companies, but wanted to pay one sum to one company. But I do not accept that he had any greater role in apportioning the purchase price than that, and I do not think that Mr Jarvis QC was intending to say that he did.

130. On the other hand, the Brakes gave evidence that Mrs Foster had *not* been their nominee. Although I have already said that I can give almost no weight to Mrs Foster's hearsay statements, in fairness to the Brakes I will set out some relevant passages. In her witness statement for trial, dated 16 March 2021, in addition to the statements set out earlier, she also said:

> "76. On 31 October 2016 I received a call from Dr Guy. He telephoned during the day and asked if his daughter and her trainer could use the indoor arena that he had spotted on Google Maps. I was not very forthcoming and simply told him that the indoor arena was unfinished and

> could not be used commercially. He was undeterred and asked if there was a deal to be done whereby, he could pay to finish the building. I explained that we did not own the farm and that it was owned by Saffron Foster. I said I doubted she would have any interest. Still insistent, he asked if he could come and see me. Before I had time to really think about things, he arrived on our doorstep in his open top Bentley.
>
> […]
>
> 78. As soon as Dr Guy left, I rang Saffron and relayed to her the events of the day. We were both still suspicious that this was a rouse [sic]. She said to me that really, it was entirely up to Andy and me whether we wanted to enter into discussions with this man. …
>
> […]
>
> 85. Having spoken to Saffron and with her input on 7 November 2016 we went over to Chedington Court. Dr Guy wanted to pin down some of the variables and on 8 November 2016 in an email timed at 20:57 I wrote to Dr Guy again, this time I told him essentially what Saffron had said to me. I told him that I had finally managed to pin down Saffron that whilst she said she would be prepared to sell in principle, it would only be with our blessing. She had reminded me that when she bought the Farm, she had done so to keep a roof over our head and to allow us to have a livelihood, that was a promise that she had made to us. She had indicated that she would be happy with circa £4M for the property and if we wanted to do a deal then it was up to us to negotiate whatever deal we wanted to in terms of the business.
>
> […]
>
> 89. By 8 November 2016, we were at the point of trying to arrive at a valuation for the Farm. Dr Guy wrote to me and said that he hoped to have the 'size of deal' worked out by Friday. This was in response to my email to him of 8 November attaching detailed projections of the future turnover expectations of the business. On 9 November saying he was very encouraged by the projections and suggesting we meet so we could 'flex the model'. We met on 11 November and at the meeting Dr Guy and I discussed the methodology for arriving at a valuation.
>
> […]
>
> 90. It was in this way that Dr Guy and I arrived at a figure to be paid to us as part of the deal. In Dr Guy's eyes this was to compensate us for the current and future value of our input into the business – the Golden Handshake."

131. Mrs Brake's evidence of the negotiations with Dr Guy is confirmed by Dr Guy's own evidence. Her evidence of the discussions with Mrs Foster is not. It may be that there was contact between them at this time. But I cannot see how Mrs Foster could have had any "input" to contribute to any decision-making,

as Mrs Brake says. As I have already said, there is no evidence of *any* reporting by Mrs Brake about SPL to Mrs Foster, and as a result Mrs Foster knew nothing about the business. The only concern which she may have had (and to which she refers in one of her witness statements) is that there should be enough money made from the business to service the loans. I do not accept that Mrs Foster played any material part in the decision-making process. It was all Mrs Brake.

132. In further opposition to the claimant's nominee argument, the Brakes also relied on statements made by Mrs Foster in writing, essentially in the same three sources as I have already mentioned. In the witness statement made, on 6 November 2019, Mrs Foster says

> "1. I am the previous owner of the entire share capital of Sarafina Properties Limited (SPL) (now Axnoller Events Limited).
>
> […]
>
> 5. In early 2015, Alo telephoned me to tell me that her home, Axnoller Farm, was to be sold as a result of the dispute with her former business partner, Lorraine Brehme. I was aware of the dispute between the Brakes and Ms Brehme.
>
> […]
>
> 7. Alo knew that I had been looking at farms in the area with equestrian facilities with a view to acquiring one. I had looked at a farm very near to Axnoller in the spring of 2014. I knew Axnoller well having been there on numerous occasions. I explained to Alo that I would be interested in making an offer to purchase Axnoller. I did not have capital to purchase it, particularly as the time scales were very tight, so I would need to borrow the money. This is not unusual. I own a number of properties and do use commercial lenders for finance. I knew Alo's background was in finance and asked her for help arranging finance to make an offer and, if successful, purchase the farm. She happily agreed to help me.
>
> […]
>
> 12. In late April 2015, I instructed Michelmores (on recommendation from Alo) and made an offer of £2.5m to buy Axnoller, confirming that vacant possession was not an issue for me. …
>
> […]
>
> 14. I left Michelmores and Alo in charge of arranging the loan facility and dealing with all of the formalities, including the incorporation of SPL. I trusted Alo completely and, given that my purchase of Axnoller was giving her and her family a place to live, I knew that she would take care of everything.

15. It was not unusual for me not to have day to day involvement with the practicalities of the purchase. I generally have advisers to do so for me. Alo took care of all of the practical and logistical arrangements for me.

16. There was no agreement that Alo and Andy would have any interest whatsoever in SPL or Axnoller. It was my company. It was my farm.

[…]

18. For those first few months, Alo reported to me that Ms Brehme was sending people posing as potential wedding parties to see if Alo was breaching the terms of the injunction. Ms Brehme did not contact me during this time to express concerns about the injunction being breached. I did not employ Alo to work in the wedding business at that time and therefore did not believe that she could be in breach. When the injunction expired, Alo did work at the wedding business.

19. In 2016, Alo informed me that Geoffrey Guy has visited Axnoller and asked if it was available to buy. We both thought this was another set-up by Ms Brehme. Axnoller was not for sale and I had never expressed any intention of selling it.

20. I told Alo to make a ludicrous offer to put him off. I recall the figure was in the region of £8,000,000.

21. I believe that initially Geoffrey Guy rejected that sale price but at some point later he proposed to Alo a figure of £7,000,000 but the actual offer was that he would pay some money to me for the Farm and a further figure was to be paid to Alo and Andy to tie them in to working for him at the Farm.

22. This was all very unexpected. Alo saw this as an opportunity to get back on her feet. She had just come out of bankruptcy and had absolutely nothing to her name. I told Alo that there was absolutely no need for me to sell Axnoller but I also said that if Geoffrey wished to pay her and Andy something directly to ensure they remained on the Farm and ran weddings I would agree to sell.

23. I met with Geoffrey and his wife, Kate, at their house, Chedington Court, which is nearby to Axnoller. I explained to them why I had purchased Axnoller in the first place and told them my goal was always to give Alo and Andy a place to live and the opportunity to earn a salary. I recall Geoffrey commended me for being such a good friend to Alo.

24. Geoffrey said that he too wanted to look after Alo and Andy.

25. I am aware that Geoffrey then negotiated with Alo and Andy to pay them something to tie them into SPL and various lawyers and accountants were involved in negotiations. In the end, Geoffrey decided not to pay Alo and Andy anything and offered a straightforward purchase price of £7m

for my single share in SPL. The figure was based on the offer from Geoffrey rather than a valuation of Axnoller.

26. Alo and Andy had no interest in SPL or Axnoller and so once I received the purchase price and paid tax on it, I was free to use the profit as I wished. Neither of them ever suggested to me that I owed them anything.

27. It was my decision, and mine alone, to gift Alo and Andy the balance of the sale proceeds. I had purchased Axnoller to give them somewhere to live and could not possibly have envisaged receiving such a large amount of profit in such a short period of time. Had the situation been different in February 2017 and Alo and Andy had come into money or I had any financial concerns, then I may have done things differently. I certainly felt under no obligation to pay them anything. I did however feel it was the right thing to do mainly because I didn't need the money but also because Geoffrey Guy had introduced the suggestion of paying something directly to Alo and Andy to ensure they continued to run the business but then paid the full sum to me.

28. As was the case when I purchased Axnoller in 2015, Alo took care of everything for me in connection with the sale to TCCEL and she had my full authority to do so. Without waiving privilege, I took my own advice as to the tax implications of the gift and Alo agreed to provide me with an indemnity against any liability which could arise from the sale to TCCEL.

29. I have been shown my e-mail exchange with Alo in February 2017. Alo was always very thankful to me because I had been able to purchase Axnoller when she could not. I had made clear to Geoffrey that I would probably gift the profit to Alo and Andy if I could (I did not know exactly what would be available after I had paid all of my expenses and tax). When I told Alo that I was going to do this she refused to accept it. I said that she needed money and I did not. She told me that I must have something that I could use the money for and she suggested school fees. I was amazed that she was refusing to accept money when she had nothing. I come from a wealthy family and everyone assumes that I have a lot of money. No one ever tries to give me anything. In fact, although our family has money it is tied up in various trusts. Regular expenses such as school fees are something that concern me. The purpose of my email was to thank Alo for thinking of my needs. Whilst my appreciation may seem odd to Geoffrey, it makes perfect sense to me and frankly, I do not see how my actions, intentions and responses can possibly be misconstrued as an attempt to defraud anyone.

30. I am extremely cross about the allegations and accusations made against me in proceedings to which I am not a party and in respect of which I have no forum to formally defend my name. I am also upset that, according to Alo, my personal and confidential information, including my bank details, have been circulated by Geoffrey to various people.

> 31. It appears to me that I have been caught up in a vendetta by Dr Guy to remove the Brakes from his land. It is wrong to suggest that the Brakes were somehow beneficial owners of SPL and that I was used as a 'front' for anything. It was my decision to purchase Axnoller and my decision to gift Alo and Andy the balance of the sale proceeds.
>
> […]"

133. In the witness statement dated 28 February 2019, Mrs Foster says

> "4. I set up SPL in June 2015. It made a. successful offer to purchase West Axnoller Farm (title number DT327772) in July 2015.
>
> 5. Andy Brake came to work for SPL straight away as my farm manager and Alo, as I know her, started working for me on 23 January 2016 running a wedding and events business. …
>
> […]
>
> 7. I have a similar but more extensive business in Australia which also is ruin as a wedding and events venue and I am used to leaving people to get on-with their jobs. This was particularly so in this case because it was Alo who had founded the original business and knew very well how to run weddings and events etc. I did not need to micro manage her in any way.
>
> 8. In or around the beginning of November 2016, Alo called me to say that she had been approached by a Dr Geoffrey Guy who was making enquiries, originally, in relation to renting the equestrian facilities for his daughter but had moved on and was now interested in acquiring the farm and the business. I told her that I trusted her to look into matters for me and so she did. After a short period of time, Dr Guy made an offer for the entire share capital of SPL which owns the farm.
>
> 9. I eventually accepted the offer and asked Alo to deal with everything on my behalf which she did. The deal was completed on 17 February 2017.
>
> 10. After the bulk of the funds had been paid to me, I decided to gift approximately £2.6 million (two million six hundred-thousand pounds) to Alo and Andy. I did this between the end of April 2017 and the end of November 2017. 1 did this because I wanted to. I have been asked whether there was any pre-arrangement with the Brakes in this respect and I can confirm that there was not. To be clear, it was a gift pure and simple. I wanted them to have some money to get back on their feet after the dreadful things they had been through.
>
> 11. This was a spontaneous act born out of my desire to look after my friends."

134. In the letter in these proceedings, dated 12 March 2021, from her solicitors, they say, overlapping the passages already cited above from this letter:

"7. Shortly before completion, my client discovered that Lorraine Brehme had obtained certain injunctions which would prevent Mr and Mrs Brake from working in a wedding and events business for 6 months. Therefore, my client decided that for those six months, she would utilise the services of Mr Brake as a farmer. My client has told me that she had a huge degree of confidence in Mr Brake's farming abilities.

8. The sale of the farm to Sarafina Properties Limited completed on 23 July 2015. As my client intended, Mr and Mrs Brake remained at Axnoller House and the horses in their care remained at the indoor arena. My client understood that the LPA receivers selling on behalf of the bank sold subject to the occupational rights of Mr and Mrs Brake. My client had no concerns of this nature and made it clear to Mr and Mrs Brake that they could continue to live at the property and, in due course, run a business from the property.

9. As far as my client was aware, the entire contents of Axnoller House belonged to Mr and Mrs Brake and nothing was moved from the property on or around 23 July 2015.

10. My client would ask the Court to note that she has never had keys to Axnoller House, or ever lived at the property and despite her company owning the property, she would not have turned up unannounced or uninvited. As far as she was concerned, this was Mr and Mrs Brake's family home.

11. My client recalls that in late 2016, Mrs Brake informed her that Dr Guy had visited the farm and asked if it was available to buy. My client's initial view was this was not a serious offer and that perhaps it was a rouse [sic] orchestrated by Lorraine Brehme. The property was not for sale and my client had not expressed an intention of selling it.

12. On this basis, my client asked Mrs Brake to negotiate the sale of the farm to Dr Guy but to start with a high sale price and to see what happened.

13. My client understands that after some negotiation between Dr Guy and Mrs Brake a sale price was agreed and that a part of that sale price would be paid to Mr and Mrs Brake. My client further understands that Dr Guy received tax and financial advice that the sale of the shares in the company which owned the property would be the best way to deal with the sale. Therefore, the money for the shares was due to my client (less any amounts required to repay any debt).

14. As part of the discussions regarding the sale, my client recalls meeting Dr Guy on 16 December 2016. From her perspective, the key points discussed were as follows:

a. That the farm was purchased out of receivership in 2015, without vacant possession,

> b. That she had procured the purchase of the farm to save Mr and Mrs Brake from losing their home and livelihood.
>
> c. That she had allowed Mr and Mrs Brake to remain at Axnoller House and to keep the horses at the farm.
>
> d. That she had allowed the weddings that were already booked to be honoured.
>
> e. That she had never lived at the farm or had any day to day involvement in the running of the business.
>
> f. That Mr and Mrs Brake were prevented from working for the business for 6 months but that after that they played an active role.
>
> […]"

The failure to call Saffron Foster to give evidence

135. I must now consider what effect the omission to call Mrs Foster to give evidence has on the fact-finding process in this case. I have already set out the relevant legal principles above. In recent times attempts to persuade the court to draw an adverse inference against an opponent because of failure to call this or that witness have multiplied exponentially. It is now rare to have a civil trial contested on the facts where the attempt is not made, at least faintly. In his recent decision in *The Serious Fraud Office v Litigation Capital Ltd* [2021] EWHC 1272 (Comm), Foxton J said that

> "45. … The tendency to elevate any missing witness from the role of second gravedigger to the missing prince is scarcely conducive to cost-effective litigation, and it is necessary to remember that there are many reasons why a particular witness might not be called other than a desire to keep unhelpful evidence from the court."

I respectfully agree, and have that admonition well in mind in the present case.

136. The first question is whether Mrs Foster might be expected to have relevant evidence to give. In the present case, I do not think it is pressing the analogy too far to regard Mrs Foster as at least the missing co-prince in relation to the questions whether the 2015 Assurances were given, and whether she was a nominee for the Brakes. The Brakes say that she did indeed give those assurances, and that she was not a nominee for them. Accordingly she must have relevant evidence to give on these questions. Indeed, I am pressed with the two witness statements and solicitors' letter referred to above to show just how relevant that evidence would be, though of course without subjecting the maker to any cross-examination in court.

137. The next question is whether she was available to give evidence. There are a number of points to bear in mind here. The first is that (according to documents filed at Companies House for SPL) Mrs Foster is British and lives in England. It is not suggested that she is physically or mentally unable to give

evidence at trial. Secondly, this trial was previously listed for April and May last year. In her witness statement for trial, dated 16 March 2021, Mrs Brake said this:

> "214. I telephoned Mrs Foster in or around the end of January and asked her if she would provide a witness statement in these proceedings. She said that although she had received threatening letters from Dr Guy's solicitors in 2020, she would. However, a short time after this, Mrs Foster telephoned me and said that her father Lord Vestey had died. Her stepmother had died shortly before him.
>
> "215. On Mrs Foster phoned me in tears. She said that she was not coping at all well with the death of her father and stepmother and was not well. She said she could not give evidence because she felt so intimidated by Dr Guy who was threatening to sue her for fraud and whilst at her best, she would have come to Court to confirm her position. She was not well enough to do so now. She said that she would provide a statement to her solicitor, which she has."

138. In paragraph 215, the date of the telephone call referred to is not given, and there is a blank in the text. Mrs Foster's step-mother, Lady Vestey, had died in November 2020. Her father, Lord Vestey, died in early March 2021, when her half-brother succeeded to the title. I can see that, at the time of her father's death in March, Mrs Foster might well have been pre-occupied by family matters and personal grief. The preparation of a witness statement for trial would have been difficult then, though not impossible. But, in the absence of professional, independent evidence of Mrs Foster's state of health or medical condition, her bereavements in November 2020 and March 2021 cannot explain her failure to give evidence in September 2021.

139. The second point is more substantial. This is the allegation that Dr Guy through his solicitors had been intimidating her by threatening to sue her for fraud, and that as a result she would not give evidence. Her refusal is somewhat weakened by the fact that her solicitors nevertheless wrote a lengthy letter to the court, on the basis that Mrs Foster

> "does want to provide certain information to the Court and asks that the Court attaches such weight to this information as it deems appropriate".

140. In this connection I bear in mind, of course, Mrs Foster's expressed complaint in paragraph 30 of her witness statement dated 6 November 2019 that she was

> "extremely cross about the allegations and accusations made against me in proceedings to which I am not a party and in respect of which I have no forum to formally defend my name".

The present proceedings would, of course, have provided Mrs Foster with such a forum, without the need to defend legal proceedings brought against her, without cost, and without being bound by the result. One might have thought that this would be ideal for her. But she has not taken advantage of that opportunity.

141. In fact, since Mrs Foster made her statement in November 2019, the situation has changed, and she has been threatened with proceedings from two different directions. On 23 July 2020 Stewarts on behalf of the Guy Parties wrote a letter to Mrs Foster's solicitors, Withers, in relation to allegations arising out of the present claim (that is, the Possession Proceedings). This letter said that the Brakes had claimed to rely on the 2015 Assurances said to have been given by Mrs Foster on behalf of SPL, but that Mrs Foster did not disclose these to Chedington on the purchase of SPL It asked whether Mrs Foster did give the Brakes the 2015 Assurances. If the answer was yes, it asked why Mrs Foster did not disclose this. It put Mrs Foster on notice of a contemplated claim against her for (fraudulent) breaches of warranty in the event that the Brakes were to succeed in the present proceedings.

142. More recently, on 14 May 2021 Moore Barlow on behalf of PWF/Mrs Brehme wrote a letter of claim to Mrs Foster personally, enclosing a letter of claim sent to Michelmores LLP on 7 May 2021. This letter accuses Mrs Foster of participating in an unlawful means conspiracy together with others, in acting as a "front" for the Brakes' business activities, and claims that PWF/Mrs Brehme have lost more than £9 million in consequence. As a result, Mrs Foster finds herself in a difficult situation.

143. Mrs Foster's position on the nominee issue, according to the statement she has made, and indeed according to what Mrs Brake said, is that she was *not* a nominee of the Brakes, but the genuine beneficial owner of SPL. In relation to that issue, it is difficult to understand why Mrs Foster should not wish to take the opportunity to tell the court exactly that. If she is telling the truth, then she has nothing to hide, and at the same time she would demonstrate that there was nothing in the proposed claim by PWF/Mrs Brehme, and nothing in the accusation by the Guy Parties that she was the Brakes' nominee.

144. On the other hand, the Guy Parties' proposed claim for breaches of warranty only goes away if the Brakes lose the Possession Proceedings. It would therefore be in Mrs Foster's own interests for her to give evidence that she never gave the 2015 Assurances to the Brakes. That would in fact be consistent with much of what her statements already say. But it would mean failing to support her "good friend" Mrs Brake. I can see that she would not find this easy to do.

145. Mrs Foster comes from a wealthy background and has her own business interests. She has access to professional advice. Indeed, the letter from Stewarts of July 2020 was written to Withers as her solicitors. She will therefore have been advised about the possible impact on the Brakes' case of failing to give evidence in their support. Looking at it realistically, I consider that she may have been advised that, whatever she does, the Brakes may nonetheless lose. If she gives evidence which does not go as far as the 2015 Assurances as pleaded, they may lose. If she does not give evidence, the court may draw an adverse inference against the Brakes, and they may lose. Faced with such an unappetising choice, Mrs Foster may well have been advised that she might as well keep out of it all, and hope for the best. That would be an explanation of sorts for her absence. But it would hardly be a satisfactory one.

146. I conclude overall that no satisfactory explanation has been given for the failure to call Mrs Foster.

147. Next, there is the question what other relevant evidence there is bearing on the points at issue. As I have already said, there is no contemporary documentary evidence of the 2015 Assurances. The parties said to have been involved are the Brakes and Mrs Foster. There is no suggestion that anyone else was involved. I have already referred to the evidence of the Brakes. The evidence of Mrs Foster is the only other direct source. Her interlocutory witness statements in other proceedings and her solicitors' letter in this make clear that she is able to give some relevant evidence on this issue, and in general terms what that evidence would be, although, on the face of it, not very helpful to the Brakes.

148. Finally, I consider the significance of those points in the context of the case as a whole. The factual issues between the parties on this part of the case are (i) whether Mrs Foster was a nominee of the Brakes or a beneficial owner, and (ii) whether she gave the 2015 Assurances to the Brakes. The only persons with actual knowledge of the relevant events governing these issues are Mrs Foster and the Brakes. The claimant and the other Guy Parties were not involved at all. The evidence of the Brakes is unsatisfactory and, viewed objectively, does not support the case they put forward. Mrs Foster's evidence on these issues would be highly relevant, and in some circumstances at least could be decisive. That evidence is withheld by Mrs Foster herself, in refusing to provide a witness statement, and by Mrs Brake, in declining to call her nonetheless. Mrs Foster's absence has not been satisfactorily explained. In my judgment, it is possible, and I consider it appropriate, to infer from Mrs Foster's absence that her evidence under cross-examination would not support the Brakes' case. To that extent, therefore, it goes to weaken the case put forward by the Brakes, and to strengthen that put forward by the claimant.

Conclusion on nomineeship

149. In reaching my conclusion on the factual question whether Mrs Foster was a beneficial owner or a nominee for the Brakes, I bear in mind the unsatisfactory evidence of the Brakes, the omission to call Mrs Foster, the lack of weight that I place on Mrs Foster's hearsay statements, and the many and cogent indicators that Mrs Foster was indeed a nominee. I am particularly struck by the evidence that Mrs Brake has used Alice Wyatt as a "front" for herself, and that the invoice for incorporation of SPL was addressed to Ms Wyatt. I find particularly eloquent the facts that Mrs Brake ran the company and the business without any reference to Mrs Foster, and negotiated the sale of both to Chedington on her own. I am further struck by the fact that it was Mrs Brake and not Mrs Foster (notwithstanding what she says in her witness statement of 6 November 2019) who decided what to do with the net proceeds of sale (£3 million for the Brakes, £100,000 for Mrs Foster), and above all the terms of the emails passing between Mrs Brake and Mrs Foster on the day of completion. Taking the evidence as a whole, I have no doubt whatever that Mrs Foster was simply a nominee for the Brakes, and that Sarafina was really their company.

Conclusion on the 2015 Assurances

150. In reaching my conclusion on the factual question whether Mrs Foster gave the 2015 Assurances to the Brakes, I take account of all the evidence, but I bear in mind, in particular:

(i) my rejection of Mrs Brake's own evidence that the assurances were given;

(ii) my rejection of Mr Brake's own evidence that the assurances were given;

(iii) the absence from the thousands of pages of documents before the court of anything in writing corresponding to such assurances, with the very limited exception of Mrs Foster's own witness statements made for interlocutory purposes in other proceedings and in a letter written by her solicitors on her behalf (which, as I have already said, do not go far enough);

(iv) the lack of weight that I place on Mrs Foster's hearsay statements;

(v) the absence from the thousands of pages of documents before the court of anything in writing thanking Mrs Foster for her generosity (in stark contrast to the email she sent her after the sale of SPL to Chedington);

(vi) the omission to call Mrs Foster to give evidence at trial;

(vii) the failure to invoke the 2015 Assurances at any time before the Brakes' dismissal in November 2018, despite the deteriorating relationship between the parties, or indeed for many months afterwards;

(viii) the failure to plead the 2015 Assurances at all until the Re-Amended Defence and Counterclaim of March 2020;

(ix) my finding that Mrs Foster was a nominee for the Brakes, and that therefore they did not need any assurances from her.

151. In my judgment, taking into account, not only these points, but all the evidence, it is clear beyond doubt that the 2015 Assurances were never given. For the avoidance of doubt, I make clear that this conclusion covers not only the house, but also the arena, and indeed the rest of the Farm. I may say that I would have reached the same conclusion even had I not been prepared to draw an adverse inference from the absence of Mrs Foster.

The "2017 Promise"

152. I turn now to consider the question whether Dr Guy made the promise or promises alleged in paragraph 25 of the Re-Amended Defence and Counterclaim (the "2017 Promise"). This paragraph reads as follows:

> "25. Dr Guy promised that, in the event that he (via his investment vehicle) purchased the share in SPL/the Claimant and the Claimant wished to obtain vacant possession:

> (i) a sum would be paid in compensation to terminate the occupation rights of the Defendants;
>
> (ii) that sum would be sufficient to enable the Defendants to find an alternative property with similar facilities for them and the Horses; and
>
> (iii) in any event, vacant possession would not be sought until the expiration of the period of five years from the date of the share purchase or when a suitable property was found to enable the Defendants to move there.
>
> ('the 2017 Promise')."

153. It is relevant also to consider paragraphs 27 and 28 of the pleading at the same time:

> "27. Mrs Foster and the Defendants were induced by the 2017 Promise to agree to Dr Guy (through his investment vehicle) acquiring control of the Claimant and to replace Mrs Foster as the individual with responsibility for observing and protecting the Defendants' rights to occupy Axnoller House and to have exclusive use of the Arena.
>
> 28. To reflect the 2017 Promise, written heads of terms were circulated to the Defendants and Mrs Foster in January 2017, providing for the Defendants to remain at Axnoller House for five years after the share sale. Dr Guy confirmed his agreement to these terms which, of necessity, included an agreement on behalf of the Claimant once it became under Dr Guy's control. No contract was executed. The Defendants were agreeable to the termination of their occupation rights but only upon the fulfilment by the Claimant of the 2017 Promise."

154. As set out in paragraph 25 of the Re-Amended Defence and Counterclaim, the Brakes claim that, in addition to the assurances which they say were given by Mrs Foster on behalf of SPL, which they say remain binding on SPL after its sale to Chedington, they also have rights by virtue of new arrangements made with Dr Guy on behalf of SPL (now renamed AEL). The Brakes' case is that Dr Guy also made various promises to them on which they relied. AEL's case (as set out in AEL's Amended Reply to the Re-Amended Defence and Counterclaim, paragraph 33) is that there were no such promises. AEL also says that the Brakes were allowed, as an additional "perk" of their employment by AEL, to stay in Axnoller House from time to time when it was not required for an event (Amended Reply to the Re-Amended Defence and Counterclaim, paragraph 44(2)), because the cottage was not as comfortable, nor as warm, as the house. They were also permitted to keep their horses in the equestrian facility.

155. An initial difficulty with the case put forward by the Brakes is that paragraph 25 of the Re-Amended Defence and Counterclaim was never put to Dr Guy in the witness box. It was never put to him that at some point or another he had made the promises alleged in paragraph 25. Moreover, the witness statements

of Mr and Mrs Brake do not say when or on what occasion the 2017 Promise was made. In cross-examination Mrs Brake said (day 11, page 42):

> "There wasn't one meeting where he said this is going to happen or these are the promises. This was a series – a period of time between November 2016 and actually April 2017 when he made a series of promises on behalf of SPL…"

156. Later on, looking at documents, Mrs Brake was asked (day 11, page 77):

> "Q. Again no sign of the 2017 promise. So, Mrs Brake, the question to you is this: where is it?
>
> A. It's in the disclosure letter.
>
> Q. What disclosure letter?
>
> A. Sorry, the 2015?
>
> Q. No, I am talking about – we've now looked at four documents described as heads of terms subject to contract.
>
> A. Yes.
>
> Q. There is no sign of the 2017 promise in any of them.
>
> A. In all – there are many, many documents that evidenced the 2017 promises from Dr Guy. They are in the form of emails, contracts of employment, meeting notes and the Heads of Terms would not be the right place to start talking about everything that has been promised between the parties because that is not how you do a deal."

157. The trial bundle in this claim contains several thousand documents. However, the 2017 Promise is not referred to in any of the documents that I was taken to. It is certainly not referred to in documents such as the letter of advice of Mr Chedzoy to Mrs Brake of 18 January 2017, or in Mrs Brake's note of the meeting of 6 November 2018, in both of which I would have expected such a promise to feature if it had been made. Instead, the cross examination of Dr Guy by Mrs Brake concentrated on the heads of terms drafted by Mrs Brake in connection with the sale and purchase of SPL (notwithstanding Mrs Brake's assertion set out above that that would not be the right place to find such promises), and the Brakes' written contracts of employment (which in fact were never signed).

158. In her closing submissions Mrs Brake refers me (at [70]-[71]) to about 30 documents concerned with possible "joint ventures" between Dr Guy and the Brakes to enable the latter to be able to afford from their own resources the country property to which they aspired. Only four of these were put to Dr Guy in cross-examination. But none of them evidences the 2017 Promise.

159. On this part of the case, I find that the relevant facts are as follows. In late October 2016, Dr Guy made an approach to the Brakes which ultimately led to

his company Chedington acquiring SPL. I have already referred in this judgment to the negotiations that took place between the parties. In particular, I have found that they were conducted entirely by Mrs Brake, without reference to Mrs Foster. There was only one meeting between Dr Guy and Mrs Foster, which took place on 15 December 2016, although by then the price and most of the other important negotiable features of the transaction had already been settled. (I will come back to the meeting in more detail later.) The first of the four versions of the heads of terms referred to in paragraph 28 of the Re-Amended Defence and Counterclaim was sent by Mrs Brake to Dr Guy on 21 November 2016. The final version was materially the same. I set the terms out below.

160. Dr Guy's evidence, which I accept, was that during the negotiations for SPL, Mrs Brake explained to him that the Brakes lived in the cottage, but stayed in the House between weddings. His further evidence, which I also accept, was that after the acquisition of SPL the Brakes continued to give that impression to him, although during the course of their employment he started to think that the matter was more nuanced than that. Dr Guy was challenged on this evidence, but without impairing it.

161. The original impression is confirmed by the Heads of Terms referred to below (which Mrs Brake originally drafted), which show the registered office of SPL as at Axnoller House, and the Brakes' address as West Axnoller Cottage. (In the Brakes' employment contracts their address is not given.)

The Heads of Terms

162. A number of documents are relevant. There were the original Heads of Terms between Dr and Mrs Guy on the one hand and the Brakes on the other, drafted originally by Mrs Brake and subsequently amended. These went through several iterations. The first of these was sent by Mrs Brake to Dr Guy on 21 November 2016. These relevantly provide:

> "SUBJECT TO CONTRACT
>
> Heads of Terms
>
> […]
>
> Background
>
> […]
>
> With the exception of the confidentiality provisions set out below, the parties do not intend to be legally bound by these heads of terms and the Arrangement is strictly subject to the execution of a legally binding agreement.
>
> The parties agree to negotiate in good faith until the execution of such a legally binding agreement.
>
> Terms

1. Price/Consideration:

a. the Acquirer agrees to pay a sum of £7 milllion [sic] pounds sterling for the Company including its assets, principally being West Axnoller Farm DT8 3SH and the business traded there from …

b. the Acquirer agrees to pay Mr and Mrs Brake a sum of £100,000 net between them annually as a salary for a period of 5 years from the execution of the Agreement to run the business of the event venue known as 'Axnoller', If the Acquirer wishes to discontinue the business of 'Axnoller' as an event/wedding/holiday venue, he will re-employ Mr and Mrs Brake in a different capacity in the development, of the Chedington Estate.

[…]

4. Parties' Obligations:

a. Mr and Brake [sic] and their son Tom agree to give vacant possession to the Acquirer upon completion of the sale of West Axnoller Farm.

b. Once the requirements for 'vacant possession' are fulfilled, Mr and Mrs Brake, their son, staff and horses will be allowed to continue to occupy Axnoller House and West Axnoller Cottage in the manner that they do now at peppercorn rent until 31 March 2018 on a licence or assured shorthold tenancy. For the avoidance of doubt the charges to be paid by the Acquirer include all utility charges associated with Axnoller House but not West Axnoller Cottage.

c. Mr and Mrs Brake agree to allow the use of the contents of Axnoller House … belonging to The Brake Family Trust to continue until 31 March 2018 free of charge, only subject to insurance, replacement and repair costs. After 31 March 2018 if Mr and Mrs Brake have not moved away from West Axnoller, they will continue to allow the business to use the contents of Axnoller House and other chattels on the same basis.

d. During the course of 2017 and 2018 Mr and Mrs Brake will gradually replace the items as and when they eventually require them for their own personal use from Axnoller House, subject to the dates referred to above. Mrs Brake solely, will be responsible for the sourcing of the furnishings and decorations at Axnoller House ensuring that it is furnished and decorated with items in her style for the benefit of the business. For the avoidance of doubt, the cost of the acquisition of the replacement items and any storage will be borne by the Acquirer.

[…]

j. Mr Brake agrees to oversee and project management of the equestrian facility as well as overseeing the management of the land at West Axnoller Farm.

[…]".

163. The second version of the heads of terms were sent by Mrs Brake to Dr Guy on 2 December 2016, although wrongly dated 2 January 2016. This had a different legal structure from the first version, because a new company was inserted to hold the wedding and event business, and the mechanism involved the grant and use of a call option. However, the ultimate aim was the same. Of the terms extracted from the first version and set out above, all except 1(a) (price) were to be found in identical form in this second version.

164. A third version of the heads of terms was sent by Dr Guy's lawyer John Hatchard of Moore Blatch to Mrs Foster's lawyer Tom Hyde of Michelmores on 3 February 2017. This version abandoned the structure and purchase mechanism of the second, and reverted to the original first idea. The relevant terms of this version are identical to those of the first version set out above.

165. A fourth version is to be found in the trial bundle. It appears to have been sent by Mrs Brake to Dr Guy on 17 February 2016, early in the morning. Again, the relevant terms of this version are also identical to those of the first version. In fact, however, none of the four versions of the heads of terms was ever signed. It will also be noted that each version is headed "SUBJECT TO CONTRACT" and contains the words "the parties do not intend to be legally bound by these heads of terms and the Arrangement is strictly subject to the execution of a legally binding agreement".

The meeting between Saffron Foster and Dr Guy

166. On 15 December 2016 the only meeting between Dr and Mrs Guy and Mrs Foster took place, at Chedington Court. I was not taken to any documents in the bundle which record what happened at that meeting, Dr Guy's witness statement of 14 March 2021 says:

> "22. In the course of the negotiations my wife and I only met with Mrs Foster once for about 40 minutes which I believe, having refreshed my memory by reference to an email referring to the meeting, took place on 15 December 2016 [70] at my home, Chedington Court. My wife, Kate, and Mrs Brake were also there. Nothing of substance was discussed, by this time the heavy lifting on negotiation was done and the principal terms of the deal such as price, vacant possession and share sale had been agreed and were reflected in a heads of terms document which had been passed to the lawyers. I recall Mrs Foster expressed how pleased she was that a solution had been found that allowed the Brakes to continue working at the Estate and she hoped the deal would be concluded. She made no reference to the Brakes residing at Axnoller House nor any arrangement whatsoever in that respect."

This evidence was not challenged in cross examination.

167. In relation to the same meeting, Mrs Brake's witness statement for trial however says:

> "110. On 15 December 2016, Dr and Mrs Guy met with Saffron to discuss the deal. The meeting lasted around 2 hours. Andy and I were also there. Saffron told him that she:
>
> a) had bought the Farm out of receivership in 2015, without vacant possession,
>
> b) had done so to save us from losing our home, and livelihood.
>
> c) had allowed us to remain at Axnoller House and to keep the horses at the Farm.
>
> d) had allowed the weddings that were already booked to be honoured.
>
> e) had never lived at the Farm or run the business.
>
> f) Andy and I were prevented from working for the business for 6 months but that after that they ran it for her.
>
> I told him again about:
>
> a) the Partnership dispute, and the problems with Lorraine Brehme
>
> b) The Court Orders Lorraine Brehme had obtained, including the Freezing Injunction and the Orders preventing them buying the Farm or working for the business for 6 months."

168. This may usefully be compared with Mrs Foster's solicitors' letter of March 2021, where she says:

> "14. As part of the discussions regarding the sale, my client recalls meeting Dr Guy on 16 December 2016. From her perspective, the key points discussed were as follows:
>
> a. That the farm was purchased out of receivership in 2015, without vacant possession,
>
> b. That she had procured the purchase of the farm to save Mr and Mrs Brake from losing their home and livelihood.
>
> c. That she had allowed Mr and Mrs Brake to remain at Axnoller House and to keep the horses at the farm.
>
> d. That she had allowed the weddings that were already booked to be honoured.
>
> e. That she had never lived at the farm or had any day to day involvement in the running of the business.
>
> f. That Mr and Mrs Brake were prevented from working for the business for 6 months but that after that they played an active role."

169. These six points are the same as the six points set out in Mrs Brake's witness statement. Moreover, they are in practically the same words and in the same order. I infer that either they were written by the same person or the second writer has copied from the first. To the extent that these accounts are different from the account given by Dr Guy, I prefer his version of events. I find that there was no discussion of the Brakes being entitled to occupy Axnoller House or the Arena. An astute businessman such as Dr Guy would have noticed immediately if there had been. In his witness statement for trial Dr Guy said:

> "32. I had made clear early in the negotiations that I expected vacant possession and there was no negotiation on the point, as it was a given from day one, and that was part of the justification for the high price of £7m that I agreed to pay. Had it been raised as an issue at any point it would have featured heavily in discussions. I do not believe I would have agreed to buy the Estate without vacant possession. … ".

The draft licence

170. On 8 February 2017 John Hatchard of Moore Blatch sent to Stephen Ryde-Weller, of Verisona Law, acting for Mrs Foster, a letter enclosing a draft licence intended to be granted to Mr and Mrs Brake in respect of their occupation of a property which was referred to as 'West Axnoller Cottage'. However, at the trial it was accepted that this reference was an error, and that the intention had been to refer to Axnoller *House*. This document was drafted so as to permit the "Licensee" (defined as Mr and Mrs Brake) to occupy the property for use as a private dwelling house for what was called the "Licence Period". This term was defined as the period from an unstated date until the date of determination in accordance with clause 4. Clause 4 stated that the licence should end and the earliest of an unstated date in 2018, the expiry of a notice given at any time in relation to breach of any of the Licensee's obligations and the expiry of three months' notice given by either party to the other. Mr Ryde-Weller sent the draft Licence by email to Mrs Brake, who responded that "This is premature. I will call you re this". In evidence Mrs Brake said she would never have agreed to this.

The Share and Purchase Agreement

171. As I have said, on 17 February 2017 the sale and purchase of SPL completed. The Share and Purchase Agreement, by which Mrs Foster (defined as "the Vendor") sold and Chedington (defined as "the Purchaser") purchased the single share comprising the entire issued share capital of SPL (defined as "the Company"), is dated that day. It relevantly provides:

> "1. INTERPRETATION
>
> In this Agreement (including the Schedules) the words and expressions listed in Part 1 of Schedule 3 shall (unless the context otherwise requires) have the meanings set out therein and the provisions of Part 2 of Schedule 3 shall apply to the interpretation of this Agreement.
>
> 2. SALE AND PURCHASE

The Vendor shall sell and the Purchaser shall purchase the Sale Share subject to the terms of this Agreement and with full title guarantee.

3. CONSIDERATION

3.1. Subject to adjustment in accordance with the provisions of this Agreement the total consideration for the sale of the Sale Share shall be:

> 3.1.1. the sum of … £3,288,244.61 which shall be satisfied in cash upon Completion (the "Initial Consideration");
>
> 3.1.2. the sum of … £200,000 which shall be satisfied in cash within 10 Business Days of the Settlement Date ("Deferred Consideration"); and
>
> 3.1.3 the sum of … £350,000 less the amount paid for by the Company in respect of the purchase of the Cottage, which sum shall be satisfied in cash within 10 Business Days of the Company purchasing the Cottage pursuant to clause 7 (the "Contingent Consideration").

[…]

4. COMPLETION

[…]

4.3. Subject to the Vendor complying with the provisions of clause 4.2, at Completion the Purchaser will:

> 4.3.1. transmit a wire or telegraphic transfer for the Initial Consideration to the bank account of the Vendors' Solicitors …
>
> 4.3.2. procure that the Company shall make a payment of £3,078,757.39 Pounds Sterling by telegraphic transfer to Barclays Bank plc in respect of repayment in full of the Barclays' debt …
>
> 4.3.3. procure that the Company shall make a payment of £107,460 Pounds Sterling by telegraphic transfer to Mr Robert Holt in full satisfaction of amounts owing to him …
>
> 4.3.4. procure that the Company shall make a payment of £42,540 Pounds Sterling by telegraphic transfer to Lendy LTD in full satisfaction of amounts owing to it …

[…]

4.5. Within 10 Business Days of the Settlement Date, the Vendor shall procure that Mr and Mrs Brake shall repay the sums due under the "Loan Account" currently maintained with the Company and disclosed in the Management Accounts.

5. COVENANTS AND INDEMINITIES

Without prejudice to any other remedy available to the Purchaser, the Vendor undertakes to indemnify the Purchaser … and keep the Purchaser … fully and effectively indemnified against any loss, liability, cost, expense and/or damage which may suffer or incur as a direct or indirect result of:

[…]

5.6. the Property not being in vacant possession as at Completion. For the avoidance of doubt, the Vendor and the Purchaser agree that certain chattels belonging to The Brake Family Trust and or Mr and Mrs Brake which are in use in the business but do not belong to the Company, and are therefore not listed in the agreed inventory of chattels may remain at the property until such time that those items are replaced but not before March 2018;

[…]

6. WARRANTIES

6.1. The Vendor warrants to the Purchaser in the terms of the Warranties and that the Warranties are true and accurate.

[…]

Schedule 3

Part 1

DEFINITIONS

[…]

“General Warranties” means the Warranties contained in Part 1 of Schedule 6;

[…]

“Warranties” means the general warranties and the Tax Warranties;

[…]

Schedule 6

Part 1

General Warranties

[…]

2. SHARE IN THE COMPANY

> 2.1. The Sale Share constitutes the whole of the allotted and issued share capital of the Company.
>
> 2.2. The Vendor is the sole legal and beneficial owner of the Sale Share.
>
> […]
>
> 8. DISPUTES AND INVESTIGATIONS
>
> 8.1 Neither the Company nor any of its Directors nor any person for whom the Company is vicariously liable:
>
> (a) is engaged in any litigation, administrative, mediation or arbitration proceedings or other proceedings or hearings before any statutory or governmental body, department, board or agency (except for debt collection in the normal course of business); or
>
> (b) is the subject of any investigation, enquiry or enforcement proceedings by any governmental, administrative or regulatory body.
>
> 8.2 No such proceedings, investigation or enquiry as are mentioned in paragraph 8.1 of this Schedule 6 have been threatened or are pending and there are no circumstances likely to give rise to any such proceedings.
>
> […]"

172. It will be noted that clause 5.6 of this agreement contains an indemnity by Mrs Foster for losses sustained by Chedington in case of "the Property not being in vacant possession as at Completion". This is inconsistent with any suggestion that the 2017 Promise was given. In the bundle there is a document also dated 17 February 2017, referred to as a disclosure letter, drafted so as to be given by Mrs Foster (although the version in the bundle is not signed by her). I referred to this letter earlier in my judgment. Of relevance to this part of the case is a specific disclosure given in relation to General Warranties 8.1 and 8.2 that:

> "The Vendor has made the Purchaser aware that she did not purchase West Axnoller Farm with vacant possession and allowed Mr and Mrs Brake to live there between July 2015 and the present date."

Although Mrs Brake did say at one point that the disclosure letter contained or evidenced the 2017 Promise (day 11, page 77), she abandoned that suggestion in cross-examination just ten pages later, in a passage which I have already set out above in connection with the 2015 Assurances (at [92]).

The draft employment contracts

173. Draft employment contracts between each of the Brakes on the one hand and AEL (formerly SPL) on the other were sent by Mrs Brake to Dr Guy with the fourth version of the Heads of Terms on the morning of 17 February 2017 (the date of completion of the purchase of SPL by Chedington). The covering email reads in part:

> "Although these will still need tweaking and bonus plans to be agreed, would you be kind enough to look over them and see that you are happy with the proviso that we look at them properly when there is more time? I have followed the Heads of Terms which I have attached."

174. The draft employment contract for Mrs Brake relevantly provides:

> "5. Obligations of Employer
>
> […]
>
> 5.9. To allow Mr and Mrs Brake and their son Tom to occupy Axnoller House on licence or assured shorthold tenancy for peppercorn rent until at least 1 April 2018. For avoidance of doubt, the Employer will be responsible for the payment of all utility and council tax charges of Axnoller House but not West Axnoller Cottage unless otherwise agreed.
>
> […]
>
> 6 Place of Work
>
> 6.1. Your principle [sic] place of work will be at West Axnoller Farm, Beaminster, Dorset DT8 3SH.
>
> […]
>
> 6.3. The Employee reserves the right to work from 'home' insofar as the duties that she fulfils are capable of being carried out from there.
>
> […]".

175. Mr Brake's Employment Contract relevantly provides:

> "4. Appointment
>
> 4.1. The title of the job which you are employed to do is Facilities and Land Manager at West Axnoller Farm, but you are also required to undertake such other roles and duties as the Employer considers appropriate having regard to your skills and experience.
>
> 4.2. You are employed to carry out the following duties:
>
> 4.2.1. Responsibility for the general management, upkeep and running of the Land, gardens and buildings at West Axnoller Farm; including all day-to-day management and running thereof. This includes all the land and buildings at West Axnoller Farm and is not limited to the buildings and land occupied by the events and wedding business and includes all land and buildings at West Axnoller Farm.
>
> 4.2.2. Responsibility for liaising with any tenants and occupiers of the Equestrian facility, West Axnoller Cottage (once acquired) and West

> Axnoller Bungalow and managing and coordinating any work required to the land and outside spaces at West Axnoller Farm.
>
> 4.2.3. In consultation with the Employer, responsibility for the scheduling and logistics of the development works at West Axnoller Farm.
>
> 4.3. In addition to your normal duties, you may be required to undertake further duties from time to time.
>
> […]
>
> 5. Obligations of Employer
>
> 5.1. Your Employer undertakes to ensure that all occupiers of West Axnoller Farm are informed that they must liaise with you regarding any works done at West Axnoller Farm at all times in order that it can be timetabled in a manner that does not disrupt the events business at West Axnoller Farm.
>
> 5.2. Your Employer undertakes to ensure that any occupiers of the land only stock the land in consultation with you and in line with the widely accepted standards of both land and animal husbandry and so is not ruin the view of the wedding and event business with overstocked, trampled and untidy fields.
>
> 6. Place of work
>
> 6.1. Your principle [sic] place of work will be at West Axnoller Farm, Beaminster, Dorset DT8 3SH.
>
> […]
>
> 6.3. The Employee reserves the right to work from 'home' insofar as the duties that she [sic] fulfils are capable of being carried out from there.
>
> […]".

176. It will be seen that Mr Brake's contract does not contain an equivalent clause relating to the occupation of Axnoller House, but of course he lives with Mrs Brake as her husband.

Discussion of the documents

177. During the course of the negotiations between the Brakes and Dr Guy, the Brakes were looking for another property to move to, away from Axnoller, in anticipation of obtaining a sufficient sum of money for this purpose from the sale of SPL. At the date of completion of the purchase of SPL by Chedington, 17 February 2017, they had still not found anywhere suitable, and continued looking. At that date, SPL owned West Axnoller Farm, including Axnoller House, West Axnoller Bungalow and the equestrian arena, but not at that stage West Axnoller Cottage. The legal title to this property was still vested in the Brakes and Mrs Brehme as trustees for the (now dissolved) partnership Stay in

Style. These matters form part of the factual matrix in which the Heads of Terms, the Sale and Purchase Agreement and the employment contracts to which I referred above were negotiated, and, in the case of the Sale and Purchase Agreement, executed.

178. So far as concerns reliance by the Brakes on the heads of terms, I have already observed that these were expressed both as being "SUBJECT TO CONTRACT" and also *not* to give rise to any binding legal obligations. But, in any event, each of the four versions contains an express obligation on the Brakes to give vacant possession of the property on completion of the sale and purchase (Clause 4a). This in itself contradicts the pleading in paragraph 25 of the Re-Amended Defence and Counterclaim, which is predicated on the basis that Chedington will not obtain vacant possession. The heads of terms then go on to provide:

> "b. Once the requirements for 'vacant possession' are fulfilled, Mr and Mrs Brake, their son, staff and horses will be allowed to continue to occupy Axnoller House and West Axnoller Cottage in the manner that they do now at peppercorn rent until 31 March 2018 on a licence or assured shorthold tenancy. For the avoidance of doubt the charges to be paid by the Acquirer include all utility charges associated with Axnoller House but not West Axnoller Cottage."

179. But this clause, even if it were expressed to be legally binding, could not support the pleading in paragraph 25 either. Unlike paragraph 25, it does not refer to paying a sum in compensation for giving up occupation rights, and it does not promise not to seek possession for five years after the share purchase. Even in its own terms, it would not itself grant any licence or property interest to the Brakes. The clause instead contemplates entry by the parties into another, separate arrangement to be agreed, namely the grant of a licence or an assured shorthold tenancy, albeit at a "peppercorn rent". There is insufficient certainty as to the other terms of any such arrangement.

180. But even if that problem were got over, all that would be promised would be a licence or tenancy which would last until 31 March 2018 at most, a date which had passed months before the Brakes were dismissed. Plainly, the selection of this date (by Mrs Brake, who drafted the document) was conditioned by the Brakes' current thinking that they would be able to purchase their own property well before that date. On 6 December 2016, for example, Mrs Brake wrote to Simon Neville of Savilles to make an offer for another property, Wellwood, in which she said:

> "I think you know our circumstances. We need to vacate Axnoller House as the business has grown and we need it to be employed permanently in the business. From that point of view Wellwood is perfect for us. … You are aware that we are cash buyers … As you know we would be able to move very fast to completion."

181. In my judgment, the heads of terms are of no assistance whatever to the Brakes in establishing the 2017 Promise.

182. I turn therefore to consider the Brakes' contracts of employment. These were negotiated, and written versions exist in the trial bundle, although it is common ground that no final version was ever signed by the parties. I have already set out the relevant terms of the latest versions above. The Brakes rely on clause 5.9 of Mrs Brake's contract (as I have said, there is no equivalent in Mr Brake's contract). This clause was inserted by Mrs Brake. For ease of reference, I set it out here again:

> "5. Obligations of Employer
>
> […]
>
> 5.9. To allow Mr and Mrs Brake and their son Tom to occupy Axnoller House on licence or assured shorthold tenancy for peppercorn rent until at least 1 April 2018. For avoidance of doubt, the Employer will be responsible for the payment of all utility and council tax charges of Axnoller House but not West Axnoller Cottage unless otherwise agreed.
>
> […]"

183. This clause covers much the same ground as clause 4b in the heads of terms, already considered. The main points are in substance the same. The Brakes and Tom D'Arcy are to be allowed to occupy the House. Occupation is to be governed by either a licence or an assured shorthold tenancy for a peppercorn rent. That arrangement will last until at least 1 April 2018 (a day later than in the heads of terms version). It is made clear that the employer is to be responsible for payment of utility bills and council tax on the House. Similar comments can be made about this clause as with clause 4b. It requires a further document to be negotiated and entered into between the parties. And there is no obligation on the employer for the arrangement to last beyond 1 April 2018. The choice of date is no doubt once more driven by the Brakes considerations of how long it would take for them to find their own property.

184. As with the clause in the heads of terms, this clause does not support the pleading of the 2017 Promise. There is no reference to paying compensation to the Brakes for giving up occupation of the House, and no reference to a five year period from the share purchase. In cross-examination and in submissions, Mrs Brake has sought to argue that the words "until at least 1 April 2018" mean that the employer is obliged to permit them to remain *after* 1 April 2018. In my judgment there is nothing in the circumstances of this case to permit, much less require, me to reach such a construction. The maximum obligation undertaken by the employer (assuming it to be enforceable at all) is to allow the Brakes and Tom to remain until 1 April 2018 a date which is already past. There is no obligation on the employer under this clause to allow them to remain after that.

Conclusion on the 2017 Promise

185. Taking account of all the evidence before me, and in particular (i) the absence of any documents containing or evidencing the 2017 Promise, (ii) the presence of documents *contradicting* the 2017 Promise, (iii) the inability of Mr and Mrs

Brake to refer to any occasion upon which they say that the 2017 Promise was made, (iv) the clear evidence of Dr Guy (which, as I have already said, I prefer to that of Mrs Brake) that no such promise was ever made, I conclude as a fact that no such promise was ever made, whether on any particular occasion, or taking the relevant events together and looking at them as a whole. Nor did Dr Guy do or say anything which could reasonably have created in the Brakes an expectation equivalent to such a promise. What *did* happen was that Dr Guy was content, once having obtained (as he thought) vacant possession of the whole property (including the house), to permit the Brakes and Tom to use, non-exclusively, both the house (when not required for weddings and other events) and the arena (for their horses) by way of revocable licence, although such licence might well be replaced by an assured shorthold tenancy in due course (although in the event this never happened). I deal later with the effect of the various notices to quit which have been served upon the Brakes upon any such licence.

186. Given that I have found that the 2017 Promise was never made, there cannot have been any reliance on it by the Brakes. But in any event the evidence (which I have accepted) is that, from the time that Dr Guy was negotiating to buy the Farm, the Brakes were actively seeking to buy another property for themselves away from the Farm and the cottage. I have already referred to the offer which they made to buy Wellwood in December 2016. The Brakes were prepared to agree to a cut-off date of 31 March 2018 in the heads of terms for their occupation of the house (and cottage) precisely because they considered that by then they would have somewhere else to go to. They could not therefore have been relying on the 2017 Promise to any greater extent than that, even if it had been made.

The dismissal letters of 8 November 2018

187. On 8 November 2018 the Brakes were dismissed from their respective employments with effect from 30 November 2018, and they were placed on "garden leave" until then. Written notice was given to them intended (amongst other things) to terminate any licence which they might have in relation to Axnoller House and the arena. So far as relevant, those notices were identical (save for the identity of the employer) and read as follows:

> "The following conditions will apply during the garden leave period:
>
> - You must vacate Axnoller House and move back to your place of residence, The Cottage, by close of business on 9th November;
>
> - You must return any property belonging to [AEL] or [Chedington] still in your possession to Colin Maddock by close of business on 9th November. …
>
> - You are no longer required to attend work unless specifically requested to do so.

- You must refrain from attending West Axnoller Farm or any premises belonging to [AEL] or [Chedington], unless requested to do so;

- You must not contact any of our customers, suppliers, employees, officers or representatives;

- You shall remain employed by [AEL/Chedington] and must be available during normal working hours to deal with any work related matters that may arise;

- You must not undertake any other business or profession without our prior written consent, or be or become an employee, officer or agent of any other firm, company or person.

- You must remove all your property from West Axnoller Farm, Axnoller House and from any other premises owned by [AEL] and/or [Chedington]. This includes removing all your furniture, vehicles, machinery and horses out of our properties by 30th November, at the latest."

188. The first bullet point made clear that any licence which the Brakes (and Tom D'Arcy) had enabling them to stay overnight in the House was withdrawn as from the next day. However, the last bullet point made clear that they were given until 30 November (just over three weeks) to remove all their property, including furniture, vehicles, machinery, and horses from West Axnoller Farm. This meant that, if the notice was effective, any licence which the Brakes (and Tom D'Arcy) had enabling them to enter upon the property *for the purposes of removing their own possessions*, would not terminate until then.

Further notices

189. The Brakes and Tom D'Arcy did not in fact give up occupation of Axnoller House or the use of the arena for their horses, and, on 5 December 2018, further notices were served upon them, under cover of letters addressed to them by AEL's then solicitors, Radius Law, dated that day. The covering letters stated that the enclosed notices to quit were served without prejudice to the earlier notices dated 8 November 2018. Each of the notices was headed "Notice to Quit a Dwelling", and was stated to be given by Radius Law Limited as agents for AEL as "Licensor". Each notice gave "notice to quit and deliver up possession of Axnoller House, West Axnoller Farm, Beaminster DT8 3SH on 3 January 2019". The notice contained the information prescribed by the Notices to Quit Etc (Prescribed Information) Regulations 1988.

190. When the Brakes filed and served their re-amended defence and counterclaim, on 16 March 2020, it contained a plea, in paragraph 4, that "the Defendants were entitled to (but did not receive) notice in accordance with the terms of the licence or tenancy and/or reasonable notice". This pleading prompted a further

letter from Radius Law, dated 28 July 2020, to the Brakes' then solicitors Porter Dodson LLP, in which they referred to in paragraph 4 and then said:

> "We are confident that any licence which your clients had to stay in the accommodation at Axnoller House between wedding bookings and/or to make use of any other parts of West Axnoller Farm has already been terminated, some considerable time ago.
>
> In order however to put the matter beyond any possible argument, that when this case comes to trial, and without prejudice to what we have said in our previous paragraph, please find enclosed three notices each of which is dated 28 July 2020…".

191. The enclosed notices (one for each of Mr and Mrs Brake, and one for Tom) stated that each notice was given by Radius Law as agents on behalf of AEL, who was once again referred to as "the Licensor". The material part read as follows:

> "On behalf of the Licensor, we hereby give You notice of termination in respect of any licence to occupy or use the Property and/or any of the land and buildings at West Axnoller Farm, Beaminster DT8 3SH as shown outlined in red on the enclosed plan and which are owned by the Licensor ("West Axnoller Farm"), the benefit of which you may have enjoyed hitherto, and which has not hitherto been terminated.
>
> Pursuant to this notice of termination, you must vacate and deliver up possession of the property and West Axnoller Farm by 28 November 2020 or if such date falls later, upon the expiry of a reasonable period, following service of this notice on You, for the termination of any such licence."

The plan attached to each notice showed that the property outlined in red was the whole of West Axnoller Farm. However, it did not include West Axnoller Cottage (which was not the subject of these proceedings, and of which Chedington was by then in occupation).

Assured agricultural occupancy

192. I turn now to consider the questions of fact which arise in relation to the Brakes' argument that Mr Brake is an assured agricultural occupant of the House. First of all, there can be no doubt that Mr and Mrs Brake occupied the Farm prior to its acquisition by Sarafina (later AEL) in right of the arrangements made with PWF in the Stay in Style Partnership. But those came to an end when the Farm was sold to Sarafina in 2015. Thereafter the Brakes claim to have occupied the Farm by some licence of Sarafina, including the alleged 2015 Assurances. I have however found that the purported owner of Sarafina, Mrs Foster, was the Brakes' nominee, and that the 2015 Assurances were never given or relied on. Given that the Brakes beneficially owned and controlled Sarafina, there was no need for any licence, and there was no evidence that any such licence was ever granted. Accordingly, I find that there was no tenancy or licence granted by the company to the Brakes, and certainly

not one for a term or for a renewable period. There was merely that tolerance of their occupation by the company that would be expected where the beneficial owner of a company makes informal use of its assets.

Employment by Sarafina

193. The question arises whether the Brakes were employed by Sarafina prior to the sale to Chedington in February 2017. As to this, Mr Brake was asked in cross-examination whether he was employed by Sarafina during this period. He answered:

> "I think must have been because I know that at the end of it there was some document called settlement or something like that which presumably deals with employment".

I may say that, several times in his evidence, Mr Brake made the point that he never dealt with legal or business matters, but left all of this to others such as Mrs Brake or the accountant. His evidence showed how hazy he was about formal matters of this kind. So I do not think I can place much weight on his statement that he and his wife were employed by Sarafina.

194. Moreover, a number of documents were put to Mr Brake in cross-examination (day 14, pages 24-28) which satisfy me that they were not so employed. Indeed, one of them is an email from Mrs Brake dated 18 January 2017, which says baldly: "Dear Stuart, I can confirm that we were not employed [by Sarafina]". This was a response to an email enquiry from Stuart Ritchie (The Brakes' accountant) in January 2017 to Gary Salter (Cheduington's accountant), copied to Mrs Brake, in which he asked,

> "I assume, but please confirm, that I should also not record [Mr and Mrs Brake] as having any form of employment with Sarafina Properties Limited for the year ended 5 April 2016."

195. Of course, this evidence does not relate to the period after April 2016. But that enquiry was made in January 2017, and there is nothing significant to suggest that the position changed thereafter before the sale. In addition, there is an email from Mrs Brake to Dr Guy dated 27 March 2017 which was put to Mr Brake in cross-examination, and in that email she said "We have not paid PAYE for a long time and that is why I put net on the Heads of Terms originally. I have not paid tax for years and years. …" If the Brakes had been employed by Sarafina they would have been in the PAYE system.

196. In the result, I find that neither Mr nor Mrs Brake was ever employed by Sarafina before its sale to Chedington in February 2017.

Occupation of the house and arena

197. There is a preliminary question as to whether Richard Morris, a gardener employed by AEL or Chedington (it does not matter which), should have been called to give evidence, and therefore as to whether some kind of inference adverse to the Guy Parties should be drawn. In written closing submissions

Mrs Brake said that he could give evidence about the occupation of the house and also about the agricultural use of the Farm. But this submission was not made good by reference to the evidence, and I saw no summary of what his evidence might be. There is already plenty of evidence bearing (both ways) on these issues. I see no reason to suppose that he had relevant evidence to give on these issues beyond that which has already been given. In addition, I have no evidence about his availability to give evidence. Overall, I can see no good reason in these circumstances for drawing an inference adverse to the Guy Parties.

198. The licence from AEL by virtue of which Mr Brake occupied the House and made use of the arena after February 2017 did not give him exclusive occupation of either. The House was the "jewel in the crown" of Axnoller, and essential to the business was carried on there (as Mrs Brake herself recognised in the email to Mr Neville-Jones of Savills on 6 December 2016). I find that AEL had no intention, in allowing the Brakes to use the House, of depriving itself of the ability to make use of it in the business. In particular, it had no intention of giving up legal possession to the Brakes, or of giving them exclusive occupation.

199. The "front of house" parts of the House were shown to prospective customers when they came for viewings, the drawing room of the House was licensed for weddings and used for that purpose, and the bedrooms were also used as accommodation, usually by the bride and groom and close family. There are five bedrooms in the house, of which the Brakes and Tom (when they were there) occupied only two. The utility room was used by AEL employees for its business, and Mrs Brake used the ground floor office for the same purpose in the course of her employment by AEL. The only parts of the House which were locked when it was let to customers were the ground floor office, a ground floor scullery and larder, and the dressing rooms off the master bedroom (which also prevented access to the second floor attic). These parts of the house are not contiguous, do not form, and could not have been let as, a separate dwelling. When the Brakes and Tom were not in occupation, the House was occupied by AEL for the purposes of its business.

200. Mrs Brake suggested, whilst cross-examining other witnesses, that she had the power to and did restrict who could come into the House (day 7, pages 12, 122). It appears that she confiscated Tracey Symons' key, but on the other hand allowed Sheryl Dagnoni in because she was Mrs Brake's friend. However, I can see no basis in the materials before me saying that, *as against AEL*, Mrs Brake had the right to control who came into the House. It was the property of AEL, acquired for and used in the business of weddings and events. Mrs Brake managed the business, and could no doubt restrict entrance by third parties in AEL's own interests (as she said on day 12, page 82), but not in her own. There was no suggestion in the evidence that *Mr Brake* had the right or power to restrict who could come into the house or use the arena, and I find that he had none.

Identity of Mr Brake's employer

201. There is a question as to who was Mr Brake's employer, AEL or Chedington, or both? The written (but unsigned) version of his contract of employment found in the trial bundle, and drafted (by Mrs Brake) before his employment began, states that his employer would be AEL. But Mr Bowyer's unchallenged evidence was that Mr Brake was paid by Chedington and was on Chedington's payroll. Dr Guy's evidence (which I accept) was that it was Mrs Brake who had proposed that Chedington rather than AEL employ Mr Brake, in order to reduce AEL's costs and thus increase its profitability, which would be to Mrs Brake's advantage in relation to any bonus scheme. Mr Brake's evidence was that he thought he was being paid by AEL, because Mrs Brake grumbled that his wages were falling on AEL rather than Chedington. Yet I saw a number of documents, including payslips, which indicated that Chedington was the employer. In addition, Mr Brake's own tax return for 2019 refers to his employer as "Chedington Court Estates". On the evidence, I conclude that Chedington was indeed Mr Brake's employer.

What Mr Brake was employed to do

202. The next question is what Mr Brake was employed to do. He comes from a farming background, but his family have also shown a talent for dealing with horses. Mr Brake himself certainly has a passion for keeping and working with horses, winning gold medals for equestrian sport in his younger days. West Axnoller Farm had previously been a dairy farm, but was derelict by the time that Mrs Brake bought it in 2004. Dairy farming was never resumed. Mrs Brake was not a farmer. She ran her business ventures from the property, initially on her own, then in partnership with Mr Brake, and finally also with PWF. These involved providing accommodation for short holidays and eventually running weddings and other events. Mrs Brake managed that side of the business.

203. In addition, Mr Brake managed the land, provided equestrian facilities, and had overall responsibility for maintenance and repair, but also carried on his own horse breeding and training business at the property, under the name "Andy Brake Sports Horses". Although Mr Brake's evidence was that this business formally came to an end in about 2009, having deregistered for VAT in 2008, on the evidence before me I am satisfied that it continued beyond then, albeit informally and at a reduced level, at least until 2017-18. In paragraph 24 of the original Defence and Counterclaim, filed on 8 January 2018, repeated in the Amended Defence and Counterclaim, filed on 14 February 2019, both containing a statement of truth signed by Mr and Mrs Brake, the Brakes themselves pleaded:

> "In the alternative, Mr Brake runs a horse breeding and training business from the equine facility and the land or part thereof".

(It is right to point out that Mr Brake himself quite correctly said he thought that these words had been subsequently changed, and that this was not the final form of the pleading.)

204. In cross-examination, Mr Brake accepted that he was still running "a horse breeding operation" while he was employed by Chedington, but rowed back

on the *business* element. He insisted that there was no profit, and that it was a hobby. However, he accepted that a groom was employed to look after his horses, because "I did not want and I did not intend to be spending hours and hours and hours with horses myself", although the groom "also did some work around the gardens". Shown a magazine article in *Horse and Hound*, he accepted in cross-examination that in 2017 he and Mrs Brake paid £12,000 at Aintree for a colt called Jackman, which he intended to train. Moreover, in the trial bundle were invoices from "Andy Brake Sports Horses" dating from 2017 addressed to Dr Guy's daughter Ellie or a business belonging to her. In cross-examination Mr Brake denied that he was still trading in 2017. He said the business had deregistered for VAT in 2008 and that these invoices simply represented his doing a favour to Dr Guy to keep a horse at livery. Favour or not, this was still an equestrian business transaction for which Mr Brake was paid. Non-registration for VAT is irrelevant in this context. If the business turnover is not high enough, there is no obligation to register anyway. But business turnover, whether above or below the threshold, is still turnover from a *business*.

205. Earlier in this judgment, I referred to the contract of employment which was drafted for Mr Brake at the time that Chedington acquired SPL in February 2017, although it was never signed. For the sake of convenience, I set out the relevant clauses again:

> "4.1. The title of the job which you are employed to do is Facilities and Land Manager at West Axnoller Farm, but you are also required to undertake such other roles and duties as the Employer considers appropriate having regard to your skills and experience.
>
> 4.2. You are employed to carry out the following duties:
>
> > 4.2.1. Responsibility for the general management, upkeep and running of the Land, gardens and buildings at West Axnoller Farm; including all day-to-day management and running thereof. This includes all the land and buildings at West Axnoller Farm and is not limited to the buildings and land occupied by the events and wedding business and includes all land and buildings at West Axnoller Farm.
> >
> > 4.2.2. Responsibility for liaising with any tenants and occupiers of the Equestrian facility, West Axnoller Cottage (once acquired) and West Axnoller Bungalow and managing and coordinating any work required to the land and outside spaces at West Axnoller Farm.
> >
> > 4.2.3. In consultation with the Employer, responsibility for the scheduling and logistics of the development works at West Axnoller Farm.
>
> 4.3. In addition to your normal duties, you may be required to undertake further duties from time to time.
>
> […]

> 5.2. Your Employer undertakes to ensure that any occupiers of the land only stock the land in consultation with you and in line with the widely accepted standards of both land and animal husbandry and so as not to ruin the view of the wedding and event business with overstocked, trampled and untidy fields."

206. I accept that Mr Brake worked long days, and often at the weekend. I also accept that the total farm acreage was more than 90 acres, but the part physically occupied by the wedding business was much smaller, a few acres at most. However, on the evidence before me I am satisfied that Mr Brake's principal functions at West Axnoller Farm were to support the wedding/events business by so managing the whole of the land as to create and maintain the right bucolic ambience that gave that business its major selling point: "rustic chic", as Mrs Brake put it in evidence. Mr Brake in cross-examination put it this way (day 14, page 99):

> "It was my responsibility to make sure that no one on the land or any of their machinery or animals did anything that would damage the wedding business really".

207. Mr Brake further added in cross-examination that "it is how I would farm land anyway". But the fact is that he was not employed to *farm* the land as such, nor to supervise or manage anyone else that did. His work involved (amongst other things) repairing fences, mowing lawns, managing the repairing or replacing of broken features, and lifting and moving furniture for the wedding business. Even if a farmer might do *some* of these things, it does not mean that doing these things in the context of a wedding and events business constitutes 'farming'. I accept that, in addition, Mr Brake gave some advice to Dr Guy about the *possibilities* of sheep cattle and deer farming, and walnut and wasabi farming, but none of these came to anything before Mr Brake's employment was terminated. There was no such farming during his time.

208. Mr Brake was also engaged in important drainage works at West Axnoller Farm. The land was and is very damp because of rising springs, and it is close to the source of the River Axe (hence "Axnoller"). Because it was so damp, it could be used for grazing only at certain times of the year. The drainage works were intended to make it possible to make more use of the land in future.

209. Chedington acquired an adjacent property, Lower Chapel Marsh Farm ("LCMF"), in early 2017. Dr Guy decided to place the new equestrian facility, which had been originally intended for Axnoller, at this property. This was because it would otherwise impinge on the wedding business at Axnoller. The space available at LCMF meant that a larger facility, together with additional equestrian services and a cross-country training course, could be accommodated there. Dr Guy asked Mr Brake to oversee part of this. Although Mr Maddock (the estate manager at Chedington Court) subsequently took over the project, the work nevertheless took a significant amount of Mr Brake's time from July 2017 onwards, as he accepted in cross-examination (day 13, pages 70-71), and as evidenced by emails he sent to Mr Maddock on 28 and 29 September 2018.

210. Mr Brake also carried out the seasonal topping of fields (cutting old grass and weeds) at West Axnoller Farm, harrowing and rolling the land, reseeding where necessary and fertilising. This was required of Chedington by the terms of the grazing agreements which Mr Brake entered into on its behalf, so that there was grass on which grazing could take place. It was the licensee (the 'grazer') who grazed his own animals, and who cut the haylage and silage, if he did not use it for grazing. But this was not farming by Mr Brake. It was work needed to keep the land looking suitably bucolic as a backdrop for the wedding and events business. This was what was required by clause 4.2, and supported by clause 5, of the unsigned draft employment contract.

211. I find that, at the time when Mr Brake was employed by Chedington, neither Chedington nor AEL put any sheep, cattle or other livestock in the fields at the property, though it appears that they did so later. His employment contract required his employer (Chedington) to ensure that occupiers consulted with Mr Brake before stocking the land, "so as not to ruin the view of the wedding and event business". There were however grazing agreements with local farmers, Mr Bugler and Mr Sage, under which at certain times their animals could graze in some of the fields at West Axnoller Farm. There was also an agreement with the Johnsons, from whom Chedington bought the neighbouring Lower Chapel Marsh Farm ("LCMF"), to allow them to keep some of their livestock at LCMF after the sale until they made other arrangements. But that farming activity belonged to the farmers themselves, and not to Chedington or AEL. Mr Brake was not employed to carry it out.

212. I accept that, as Mr Brake had looked after livestock in the past, and he knew the farmers, he would no doubt have alerted the farmers if he had seen any problems. I willingly accept also that, if he became aware of an emergency, he would not wait for the farmer to arrive, but would step in in order to try to make the situation safe. That is the kind of person that he is. But Mr Brake himself was not *employed* to look after any of the livestock grazing on the land at West Axnoller Farm, or remaining at LCMF. And there was no "understanding", let alone any agreement, written or unwritten, between him and Dr Guy or Chedington that he would do so.

213. The Brakes sought to rely on the operation of the government's Basic Payment Scheme ("BPS"), in order to show that "farming" was going on. This is a scheme of subsidies provided to persons farming land in cases where certain conditions are fulfilled. But it applies to corporate as well as to individual farmers. So the receipt of BPS by a company does not indicate that any particular individual in involved in farming. The Johnsons (at LCMF) applied for and received BPS for their livestock kept at LCMF at this time. There is no evidence before me, and I do not find, that Mr Brake ever applied for BPS at this time, though I accept that he had BPS entitlements in the past, and used them up to 2015 (when he became bankrupt). Mr Brake gave evidence of having made a claim to BPS in 2017-18 on behalf of Chedington/AEL. But on the totality of the evidence (including Dr Guy's witness statement of 20 September 2021, [19]-[21]), I find that neither AEL nor Chedington applied for BPS during the time that Mr Brake was employed by Chedington. However, I accept that Chedington claimed BPS on the Farm from 2019.

Other questions

214. Two further questions are (i) how many hours a week Mr Brake was employed for, and (ii) whether he had worked whole time (more than 35 hours a week) in agriculture for 91 weeks. As to (i), there are no documentary records that I am aware of relating to Mr Brake's hours of work. But, even if some of his activities (*eg* the growing of grass) could somehow, and contrary to my own view, be regarded as agriculture for this purpose, there are many other activities he carried out (*eg* mowing lawns, assisting with events and weddings, development at LCMF, the breeding training and delivery of horses) which are certainly not. On the evidence before me, I am very far from satisfied that grass-growing and similar activities took up more than 35 hours of any week that Mr Brake worked, and accordingly I hold that they did not.

215. As to (ii), Mr Brake was first employed by Chedington from 17 February 2017. On 8 November 2018 he was placed on garden leave, having been given notice to terminate his employment on 30 November 2018. The letter of notice of termination dated 8 November 2018 expressly stated that "As of the date of this letter you are on garden leave until 30 November 2018… when your employment will terminate. … Your last day of employment will be 30 November 2018". It also said that the Brakes "shall remain employed by [AEL/Chedington] and must be available during normal working hours to deal with any work related matters that may arise". There are 90 weeks from 17 February 2017 to 8 November 2018, but *93* weeks from 17 February 2017 to 30 November 2018. In these circumstances, if I were required to find for how long Mr Brake's *employment* continued, I would find that Mr Brake had been employed for *93* weeks when his employment terminated on 30 November 2018.

216. But that is not in fact the test here. The question instead is whether at any time he had *worked in agriculture* "whole-time" for 91 out of the previous 104 weeks. It is accordingly related, not to the status of employee, but to *actual work*. In fact Mr Brake did no work at all for his employer after 8 November 2018, *because* his employer had put him on garden leave. So on the face of it he would not have *worked* whole-time (whether in agriculture or otherwise) for at least 91 out of the previous 104 weeks. But, if the following three weeks of 'garden leave' can be treated as weeks during which he "worked in agriculture", he would. For this purpose I will need in due course to consider the specific provisions of the relevant legislation. This is set out later in this judgment.

THE LAW

Leases and tenancies

217. Both 'lease' and 'tenancy' refer to the concept of the *estate or interest in land* under which *the right to exclusive possession* (and therefore exploitation) of *a defined area of land* is granted by the owner of a superior estate or interest in that land, called the 'landlord', to another, called the 'tenant', for *a defined period of time*. This period of time can be of any length, from days or weeks, to hundreds or thousands of years. It can be a single fixed period, or a series of

recurring periods (*eg* weekly or monthly). But the period (whether fixed or periodic) must be *definite at the outset*. A purported lease for an indefinite period (*eg* until an uncertain event occurs) is void. 'Exclusive possession' means and carries with it the legal power to exclude other persons from the land. It is to be distinguished from a *licence*, which, generally speaking, does not carry these rights, and does not have these requirements.

218. In the 1925 property legislation, a lease is referred to as a 'term of years absolute': see Law of Property Act 1925, sections 1(1)(b), 205(1)(xxvii). Another word for the same idea, but now rarely used, is 'demise', here meaning transfer of possession. The word 'lease' can *also* be used to refer to the *document* which creates such a lease. The equivalent expression in relation to a tenancy would be a 'tenancy agreement'. Generally speaking, the word 'lease' is used in practice only when the estate or interest has been created by deed, whilst the phrase 'tenancy' is used when that estate or interest has been created *either* orally *or* in writing not amounting to a deed. But there is no legal rule to that effect.

219. Strictly speaking, it is sufficient to create a lease or tenancy that *exclusive possession* of *particular* land is granted for *a specified term* (whether fixed or periodic). So a lease can be gratuitous. In practice, however, nearly all leases are granted at a rent, and such a rent (or its absence) is usually regarded as one of the indications that a lease has (or has not) been granted. That rent may be a full market rent (a 'rack' rent), intended to represent the real economic value of the use of the land over time, without paying any capital premium in advance. Or it may be a nominal (sometimes called 'ground') rent coupled with a substantial capital premium paid at the outset. The latter formula is common in relation to long leases of residential property, where the lease is likely to be for a term of anything from 99 years to 999 years (but I emphasise that there is no *legal* limit at either end of the spectrum).

220. A tenancy granted to take effect immediately in possession (that is, not granted to take effect at some point in the future) for a term not exceeding three years at a full market rent with no premium can be created *at law* orally or in writing: Law of Property Act 1925, section 54(2). Otherwise, the grant of a lease *at law* requires the making of a deed: Law of Property Act 1925, section 52(1). A lease or tenancy can also be granted *in equity*, although this is rare in practice. Most cases of equitable leases are either (i) cases of a specifically enforceable agreement (complying with the Law of Property (Miscellaneous Provisions) Act 1989, section 2) to grant a lease which has never been executed, or (ii) cases of a purported grant of a lease which has failed for want of formality. In even rarer cases, a lease in equity may also be created by way of a trust.

Proprietary Estoppel

221. A number of authorities were cited to me on this topic, but the law as to proprietary estoppel was not substantially disputed between the parties. For present purposes, I need say only this. In the leading case of *Thorner v Major* [2009] 1 WLR 776, HL, Lord Walker put the doctrine of proprietary estoppel in summary form in this way:

> "29. My Lords, this appeal is concerned with proprietary estoppel. An academic authority (Simon Gardner, *An Introduction to Land Law* (2007), p 101) has recently commented: 'There is no definition of proprietary estoppel that is both comprehensive and uncontroversial (and many attempts at one have been neither).' Nevertheless most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance: see *Megarry & Wade, The Law of Real Property* , 7th ed (2008), para 16–001; *Gray & Gray, Elements of Land Law* , 5th ed (2009), para 9.2.8; *Snell's Equity* , 31st ed (2005), paras 10–16 to 10–19; *Gardner, An Introduction to Land Law* (2007), para 7.1.1."

Licences

222. I must turn now to consider the question of licences, and, given the focus of the case, in a little more detail. In contrast to a lease or tenancy, and also to a proprietary estoppel interest, a licence is *not* an interest in land: *Ashburn Anstalt v Arnold* [1989] Ch 1, 13C-22D. It is simply that permission which prevents the activity of the licensee in relation to the land in question from being a trespass: see the old case of *Thomas v Sorrell* (1673) Vaugh 330, 351. It can be granted pursuant to a contract (*eg* for occupation of a room in a lodging-house), or it can be granted quite gratuitously (*eg* an invitation to dinner). It can be granted informally, or even assumed (as in the case of postmen and others delivering items to a particular front door), and it can even be indefinite. It can be limited to particular acts (as with the postman) or at particular times (as with a ticket for a theatre performance), or it can be quite general. Everything depends on exactly what permission is being granted.

223. A *contractual* licence can however be brought to an end in accordance with its terms. If there is no provision for notice to terminate it, an appropriate term will be implied, usually one requiring reasonable notice: *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173, HL. A *gratuitous* licence can be brought to an end by notifying the licensee at any time of such termination, though the licensee will not become a trespasser until a reasonable period has elapsed to enable the licensee to leave. This is sometimes referred to as the "packing-up period", or the "period of grace". Whether this is *additional* to the reasonable period of notice, or *included* in it, seems to be a difficult question, not yet definitively resolved: *Australian Blue Metal Ltd v Hughes* [1963] AC 74, 101-102, per Lord Devlin.

224. But in any event, what is a reasonable period will depend on the facts. Where the licensee will need time to withdraw from the land, or to remove any property, a reasonable amount of time must be given for this purpose. In some cases this will be measured in seconds or minutes. In others, it may be days or weeks, or even longer. But if a notice of a certain length is given, and a reasonable notice would be longer than that, the notice is not *invalid*. Instead, it will expire, and the licensee become a trespasser, only once a reasonable period has run out: *Minister of Health v Bellotti* [1944] 1 KB 298, 308, 309; *Australian Blue Metal Ltd v Hughes* [1963] AC 74, 102.

225. I should also refer briefly to the concept of an "equitable licence", which was also pleaded by the Brakes. In the cases where this term is used, such as *Williams v Staite* [1979] Ch 291, CA, it refers to the idea that, by reason of a promise or assurance followed by detrimental reliance, that is, what we now usually call proprietary estoppel, a landowner is obliged in equity to permit a person to occupy land which otherwise that person would be trespassing upon. Whether this creates a (proprietary) interest in land binding on third parties or not, in essence it adds nothing to a claim in proprietary estoppel. It is sometimes also called an "estoppel licence".

226. The Brakes also pleaded that they occupied the house and the equine facility by virtue of an "irrevocable licence". I take this to mean no more than a licence which cannot be revoked. The reason why it cannot be revoked is *either* because it is a contractual licence, and it is a term of the contract that it cannot be revoked, *or* that it is an equitable (or estoppel) licence where the court has decided that the equity that has arisen is to be satisfied by an irrevocable licence (see *eg* the decision of James Allen QC, sitting in Leeds as a deputy High Court judge, in *Charlton v Hawking*, 30 September 2003, unreported, No 570 of 2002). A bare licence, by definition, cannot be an irrevocable licence.

Assured agricultural occupancies

Statutory provisions

227. I turn now to the law of assured agricultural occupancies. The main legislative provisions are contained in the Housing Act 1988, sections 24 and 25:

> **"24.— Assured agricultural occupancies.**
>
> (1) A tenancy or licence of a dwelling-house is for the purposes of this Part of this Act an "assured agricultural occupancy" if—
>
> (a) it is of a description specified in subsection (2) below; and
>
> (b) by virtue of any provision of Schedule 3 to this Act the agricultural worker condition is for the time being fulfilled with respect to the dwelling-house subject to the tenancy or licence.
>
> (2) The following are the tenancies and licences referred to in subsection (1)(a) above—
>
> (a) an assured tenancy which is not an assured shorthold tenancy;
>
> (b) a tenancy which does not fall within paragraph (a) above by reason only of paragraph 3 [, 3A, 3B] or paragraph 7 of Schedule 1 to this Act ([or more than one of those paragraphs]) [and is not an excepted tenancy]; and
>
> (c) a licence under which a person has the exclusive occupation of a dwelling-house as a separate dwelling and which, if it conferred a

sufficient interest in land to be a tenancy, would be a tenancy falling within paragraph (a) or paragraph (b) above.

[(2A) For the purposes of subsection (2)(b) above, a tenancy is an excepted tenancy if it is—

(a) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 in relation to which that Act applies, or

(b) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995.]

(3) For the purposes of Chapter I above and the following provisions of this Chapter, every assured agricultural occupancy which is not an assured tenancy shall be treated as if it were such a tenancy and any reference to a tenant, a landlord or any other expression appropriate to a tenancy shall be construed accordingly; but the provisions of Chapter I above shall have effect in relation to every assured agricultural occupancy subject to the provisions of this Chapter.

(4) Section 14 above shall apply in relation to an assured agricultural occupancy as if in subsection (1) of that section the reference to an assured tenancy were a reference to an assured agricultural occupancy.

25.— Security of tenure.

(1) If a statutory periodic tenancy arises on the coming to an end of an assured agricultural occupancy—

(a) it shall be an assured agricultural occupancy as long as, by virtue of any provision of Schedule 3 to this Act, the agricultural worker condition is for the time being fulfilled with respect to the dwelling-house in question; and

(b) if no rent was payable under the assured agricultural occupancy which constitutes the fixed term tenancy referred to in subsection (2) of section 5 above, subsection (3)(d) of that section shall apply as if for the words "the same as those for which rent was last payable under" there were substituted "monthly beginning on the day following the coming to an end of".

(2) In its application to an assured agricultural occupancy, Part II of Schedule 2 to this Act shall have effect with the omission of Ground 16.

(3) In its application to an assured agricultural occupancy, Part III of Schedule 2 to this Act shall have effect as if any reference in paragraph 2 to an assured tenancy included a reference to an assured agricultural occupancy.

(4) If the tenant under an assured agricultural occupancy gives notice to terminate his employment then, notwithstanding anything in any

agreement or otherwise, that notice shall not constitute a notice to quit as respects the assured agricultural occupancy.

(5) Nothing in subsection (4) above affects the operation of an actual notice to quit given in respect of an assured agricultural occupancy."

228. Schedule 3 to the 1988 Act provides as follows:

"1.— (1) In this Schedule—

"the 1976 Act" means the Rent (Agriculture) Act 1976;

"agriculture" has the same meaning as in the 1976 Act; and

"relevant tenancy or licence" means a tenancy or licence of a description specified in section 24(2) of this Act.

(2) In relation to a relevant tenancy or licence—

(a) "the occupier" means the tenant or licensee; and

(b) "the dwelling-house" means the dwelling-house which is let under the tenancy or, as the case may be, is occupied under the licence.

(3) Schedule 3 to the 1976 Act applies for the purposes of this Schedule as it applies for the purposes of that Act and, accordingly, shall have effect to determine—

(a) whether a person is a qualifying worker;

(b) whether a person is incapable of whole-time work in agriculture, or work in agriculture as a permit worker, in consequence of a qualifying injury or disease; and

(c) whether a dwelling-house is in qualifying ownership.

2. The agricultural worker condition is fulfilled with respect to a dwelling-house subject to a relevant tenancy or licence if—

(a) the dwelling-house is or has been in qualifying ownership at any time during the subsistence of the tenancy or licence (whether or not it was at that time a relevant tenancy or licence); and

(b) the occupier or, where there are joint occupiers, at least one of them—

(i) is a qualifying worker or has been a qualifying worker at any time during the subsistence of the tenancy or licence (whether or not it was at that time a relevant tenancy or licence); or

(ii) is incapable of whole-time work in agriculture or work in agriculture as a permit worker in consequence of a qualifying injury or disease.

3.— (1) The agricultural worker condition is also fulfilled with respect to a dwelling-house subject to a relevant tenancy or licence if—

(a) that condition was previously fulfilled with respect to the dwelling-house but the person who was then the occupier or, as the case may be, a person who was one of the joint occupiers (whether or not under the same relevant tenancy or licence) has died; and

(b) that condition ceased to be fulfilled on the death of the occupier referred to in paragraph (a) above (hereinafter referred to as "the previous qualifying occupier"); and

(c) the occupier is either—

(i) the qualifying [surviving partner] of the previous qualifying occupier; or

(ii) the qualifying member of the previous qualifying occupier's family.

[(2) For the purposes of sub-paragraph (1)(c)(i) above and sub-paragraph (3) below–

(a) "surviving partner" means widow, widower or surviving civil partner; and

(b) a surviving partner of the previous qualifying occupier of the dwelling-house is a qualifying surviving partner if that surviving partner was residing in the dwelling-house immediately before the previous qualifying occupier's death.]

(3) Subject to sub-paragraph (4) below, for the purposes of sub-paragraph (1)(c)(ii) above, a member of the family of the previous qualifying occupier of the dwelling-house is the qualifying member of the family if—

(a) on the death of the previous qualifying occupier there was no qualifying [surviving partner]; and

(b) the member of the family was residing in the dwelling-house with the previous qualifying occupier at the time of, and for the period of two years before, his death.

(4) Not more than one member of the previous qualifying occupier's family may be taken into account in determining whether the agricultural worker condition is fulfilled by virtue of this paragraph and, accordingly, if there is more than one member of the family—

(a) who is the occupier in relation to the relevant tenancy or licence, and

(b) who, apart from this sub-paragraph, would be the qualifying member of the family by virtue of sub-paragraph (3) above, only that one of those members of the family who may be decided by agreement or, in default of agreement by the county court, shall be the qualifying member.

[(5) For the purposes of sub-paragraph (2)(a) above, a person who, immediately before the previous qualifying occupier's death, was living together with the previous occupier as if they were a married couple or civil partners shall be treated as the widow, widower or surviving civil partner of the previous occupier.]

(6) If, immediately before the death of the previous qualifying occupier, there is, by virtue of sub-paragraph (5) above, more than one person who falls within sub-paragraph (1)(c)(i) above, such one of them as may be decided by agreement or, in default of agreement, by the county court shall be treated as the qualifying [surviving partner] for the purposes of this paragraph.

4. The agricultural worker condition is also fulfilled with respect to a dwelling-house subject to a relevant tenancy or licence if—

(a) the tenancy or licence was granted to the occupier or, where there are joint occupiers, at least one of them in consideration of his giving up possession of another dwelling-house of which he was then occupier (or one of joint occupiers) under another relevant tenancy or licence; and

(b) immediately before he gave up possession of that dwelling-house, as a result of his occupation the agricultural worker condition was fulfilled with respect to it (whether by virtue of paragraph 2 or paragraph 3 above or this paragraph);

and the reference in paragraph (a) above to a tenancy or licence granted to the occupier or at least one of joint occupiers includes a reference to the case where the grant is to him together with one or more other persons.

5.— (1) This paragraph applies where—

(a) by virtue of any of paragraphs 2 to 4 above, the agricultural worker condition is fulfilled with respect to a dwelling-house subject to a relevant tenancy or licence (in this paragraph referred to as "the earlier tenancy or licence"); and

(b) another relevant tenancy or licence of the same dwelling-house (in this paragraph referred to as "the later tenancy or licence") is granted to the person who, immediately before the grant, was the occupier or one of the joint occupiers under the earlier tenancy or

licence and as a result of whose occupation the agricultural worker condition was fulfilled as mentioned in paragraph (a) above;

and the reference in paragraph (b) above to the grant of the later tenancy or licence to the person mentioned in that paragraph includes a reference to the case where the grant is to that person together with one or more other persons.

(2) So long as a person as a result of whose occupation of the dwelling-house the agricultural worker condition was fulfilled with respect to the earlier tenancy or licence continues to be the occupier, or one of the joint occupiers, under the later tenancy or licence, the agricultural worker condition shall be fulfilled with respect to the dwelling-house.

(3) For the purposes of paragraphs 3 and 4 above and any further application of this paragraph, where sub-paragraph (2) above has effect, the agricultural worker condition shall be treated as fulfilled so far as concerns the later tenancy or licence by virtue of the same paragraph of this Schedule as was applicable (or, as the case may be, last applicable) in the case of the earlier tenancy or licence."

229. It will be seen that that schedule refers back to provisions of the Rent (Agriculture) Act 1976. It is therefore necessary to refer to some of these. In particular, section 1(1), (2) of that Act applies for the purpose of defining 'agriculture':

"1.— Interpretation and commencement.

(1) In this Act—

(a) "agriculture" includes—

(i) dairy-farming and livestock keeping and breeding (whether those activities involve the use of land or not);

(ii) the production of any consumable produce which is grown for sale or for consumption or other use for the purposes of a trade or business or of any other undertaking (whether carried on for profit or not);

(iii) the use of land as grazing, meadow or pasture land or orchard or osier land;

(iv) the use of land for market gardens or nursery grounds; and

(v) forestry;

(b) "forestry" includes—

(i) the use of land for nursery grounds for trees, and

(ii) the use of land for woodlands where that use is ancillary to the use of land for other agricultural purposes.

(2) For the purposes of the definition in subsection (1)(a) above—

"consumable produce" means produce grown for consumption or other use after severance or separation from the land or other growing medium on or in which it is grown;

"livestock" includes any animal which is kept for the production of food, wool, skins, or fur or for the purpose of its use in the carrying on of any agricultural activity, and for the purposes of this definition "animal" includes bird but does not include fish."

230. In addition, Schedule 3 relevantly provides:

"SCHEDULE 3

PROTECTED OCCUPIERS IN THEIR OWN RIGHT

PART I

DEFINITIONS

Qualifying worker

1. A person is a qualifying worker for the purposes of this Act at any time if, at that time, he has worked whole-time in agriculture, or has worked in agriculture as a permit worker, for not less than 91 out of the last 104 weeks.

2.— (1) A person is, for the purposes of this Act, incapable of whole-time work in agriculture in consequence of a qualifying injury or disease if—

(a) he is incapable of such work in consequence of—

(i) an injury or disease prescribed in relation to him, by reason of his employment in agriculture, under section 76(2) of the Social Security Act 1975, or

(ii) an injury caused by an accident arising out of and in the course of his employment in agriculture, and

(b) at the time when he became so incapable, he was employed in agriculture as a whole-time worker.

(2) A person is, for the purposes of this Act, incapable of work in agriculture as a permit worker in consequence of a qualifying injury or disease if—

(a) he is incapable of such work in consequence of any such injury or disease as is mentioned in sub-paragraph (1) above, and

(b) at the time when he became so incapable, he was employed in agriculture as a permit worker.

(3) Where—

(a) a person has died in consequence of any such injury or disease as is mentioned in sub-paragraph (1) above, and

(b) immediately before his death, he was employed in agriculture as a whole-time worker, or as a permit worker, he shall be regarded for the purposes of this Act as having been, immediately before his death, incapable of whole-time work in agriculture, or work in agriculture as a permit worker, in consequence of a qualifying injury or disease.

3.— (1) A dwelling-house in relation to which a person ("the occupier") has a licence or tenancy is in qualifying ownership for the purposes of this Act at any time if, at that time, the occupier is employed in agriculture and the occupier's employer either—

(a) is the owner of the dwelling-house, or

(b) has made arrangements with the owner of the dwelling-house for it to be used as housing accommodation for persons employed by him in agriculture.

(2) In this paragraph—

"employer", in relation to the occupier, means the person or, as the case may be, one of the persons by whom he is employed in agriculture;

"owner", in relation to the dwelling-house, means the occupier's immediate landlord or, where the occupier is a licensee, the person who would be the occupier's immediate landlord if the licence were a tenancy.

Supplemental

4.— (1) The provisions of this paragraph shall have effect for determining what is whole-time work in agriculture for the purposes of this Part of this Schedule.

(2) A person works whole-time in agriculture for any week in which—

(a) he is employed to work in agriculture, and

(b) the number of hours for which he works in agriculture, or in activities incidental to agriculture, for the person or persons by whom he is so employed is not less than the standard number of hours.

(3) Where a person is employed in agriculture as a whole-time worker, any week in which by agreement with his employer or, where he has two

or more employers, by agreement with the employer or employers concerned he works less than the standard number of hours shall count as a week of whole-time work in agriculture.

(4) If in any week a person who is employed in agriculture as a whole-time worker is, for the whole or part of the week—

(a) absent from work in agriculture by reason of his taking a holiday to which he is entitled, or

(b) absent from work in agriculture with the consent of his employer or, where he has two or more employers, with the consent of the employer or employers concerned, or

(c) incapable of whole-time work in agriculture in consequence of an injury or disease (whether a qualifying injury or disease or not), that week shall count as a week of whole-time work in agriculture.

(5) If in any week a person (whether employed in agriculture as a whole-time worker or not) is, for the whole or part of the week, incapable of whole-time work in agriculture in consequence of a qualifying injury or disease, that week shall count as a week of whole-time work in agriculture.

5.— (1) The provisions of this paragraph shall have effect for determining what is work in agriculture as a permit worker for the purposes of this Part of this Schedule.

(2) A person works in agriculture as a permit worker for any week in which he works in agriculture as an employee for the whole or part of the week and there is in force in relation to him a permit granted under section 5 of the Agricultural Wages Act 1948.

(3) If in any week a person who is employed in agriculture as a permit worker is, for the whole or part of the week—

(a) absent from work in agriculture by reason of his taking a holiday to which he is entitled, or

(b) absent from work in agriculture with the consent of his employer or, where he has two or more employers, with the consent of the employer or employers concerned, or

(c) incapable of work in agriculture as a permit worker in consequence of an injury or disease (whether a qualifying injury or disease or not), that week shall count as a week of work in agriculture as a permit worker.

(4) If in any week a person (whether employed in agriculture as a permit worker or not) is, for the whole or part of the week, incapable of work in agriculture as a permit worker in consequence of a qualifying injury of

> disease, that week shall count as a week of work in agriculture as a permit worker.
>
> 6. For the purposes of this Part of this Schedule a person is employed in agriculture as a whole-time worker if he is employed to work in agriculture by the week, or by any period longer than a week, and the number of hours for which he is employed to work in agriculture, or in activities incidental to agriculture, in any week is not less than the standard number of hours.
>
> […]
>
> PART III
>
> SUPPLEMENTAL
>
> […]
>
> 12.— (1) In this Schedule "the standard number of hours" means 35 hours or such other number of hours as may be specified in an order made by the Secretary of State and the Minister of Agriculture, Fisheries and Food acting jointly."

Caselaw

231. I was referred to a considerable number of cases dealing with the question how far activities relating to horses are within the meaning of "agriculture" in this legislation. I hope I will be forgiven for not expressly dealing with all of them. The most important such cases seem to me to be the following.

232. *Belmont Farm Ltd v Minister of Housing and Local Government* (1962) 13 P & CR 417 was actually not a case involving the agricultural tenancy or holding legislation at all. Instead, it was a planning case, where the question was whether planning permission was required because of a material change of use of a farm, from agricultural to business use. The farm owners had decided to breed, exercise, and train show-jumping horses within an aircraft hangar which was constructed on part of their farm. The Queen's Bench Divisional Court held that there had been a material change from agricultural to business use, and hence planning permission was required. Lord Parker CJ said that, although he was construing the planning legislation, he observed that that legislation (the Town and Country Planning Act 1947) had received Royal Assent on the same day as the Agriculture Act 1947, and the definition in the two Acts was "broadly the same", although "the layout [was] different". He went on to conclude that "it is reasonably clear that Parliament did not intend the breeding and keeping of horses to be considered as agriculture, unless for the purpose of their use in the farming of land".

233. In *Clinton v McFall* (1974) 232 EG 707, CA, the tenant purchased a property, consisting of a farmhouse and outbuildings and some four acres of land, from the landlord, but at the same time agreed to take an "agricultural tenancy" of the remaining 56 acres of farmland. The tenant intended to carry on the

business of a stud farm at the property, and required the additional land for the purposes of that business. The horses were grazed on the demised land, the grass was cropped to make hay for the horses, some breaking in of horses took place on it and sometimes prospective customers were shown horses there. In addition, some 10 to 20 cattle belonging to a neighbouring farmer were grazed on the holding in the summer. In return, that farmer did the topping and fertilised the land.

234. The county court judge at first instance held that the running of a stud farm was "livestock breeding and keeping" and so within the definition of "agriculture." But he was not referred to *Belmont Farm Ltd v Minister of Housing and Local Government*. On appeal, the Court of Appeal, (which did refer to that case) held that that case was authoritative also in relation to the agricultural tenancy legislation, and that the county court judge's decision on this point was wrong. Nevertheless, his decision that this was an agricultural tenancy was upheld on other grounds.

235. Stamp LJ (with whom Russell and Orr LJJ agreed) said:

> "The holding is unquestionably used for pasture, grazing and haymaking, which is agriculture; and if you stop there, it cannot be doubted that the holding is agricultural land within the meaning of the Act. Assuming that the breeding of horses is not 'livestock breeding,' and so not agricultural, does it make any difference that the holding is also used, to the extent and in the way I have indicated, for that purpose? I share the view of the learned county court judge that it does not. The activities in relation to the stud farm which I have described, so far as they consist of the grazing of horses, pasturing of cattle and making of hay, are clearly agricultural. So far as they consist of the breaking-in of horses for riding, the little schooling that is done, the showing of horses to customers, and the jumps and jumping on the five-acre field I have mentioned, they are not, in my judgment, inconsistent with the agriculture carried on. The area of the holding is relatively large. Provided the use of land otherwise than for agriculture does not substantially impede the use for agriculture, the former use does not, in my judgment, prevent the land being agricultural land within the meaning of the Act."

236. *Gainsborough-Field v Hyde* [2005] EWHC 2229 (QB) was a case about a right of way which had been granted for the purposes of agricultural use. The question was whether it could be used in connection with the keeping and grazing of horses and ponies for recreational riding. HHJ Seymour (sitting as a judge of the High Court) was referred to a number of authorities, including *McClinton v McFall*, from which he cited the dictum set out above. HHJ Seymour said:

> "49. All of these references depend upon the construction of particular statutory provisions which are not directly relevant in the present case. The relevant statutory provisions seem to be similar one to another, but if they applied in the present case, the result would not be, as it seems to me, that for which Mr. Monnington contends. In particular, whether logical or not, it seems that there is a well-established distinction in each relevant

> area that while the grazing of horses is an agricultural activity, the keeping of horses (that is to say, stabling them and looking after them) is not. Only if the predominant activity in any particular case were grazing and other activities were ancillary to it, could the whole be treated as agricultural. …
>
> 50. Mr. Monnington submitted that, contrary to the submission of Mr. Hanham, the word 'agriculture', as an ordinary English word, encompassed the keeping of horses intended for recreational use. I reject that submission. In my judgment the ordinary meaning of 'agriculture' in the English language is as the dictionary definition records: the cultivation of the soil, the gathering in of crops and the rearing of livestock. Livestock are at any rate stock kept for the production of food, wool, skins, or fur, or for use in farming of the land. Livestock do not, as a matter of ordinary English, include horses kept for recreation, although the expression does include 'working horses used in agriculture'."

237. I was also referred to a decision of the (Scottish) Inner House of the Court of Session (the equivalent of our Court of Appeal), concerned with the operation of the statutory provisions in the Agricultural Holdings (Scotland) Act 1991. The basic facts were, as stated by the Lord Justice Clerk (Lord Gill, with whom the other judges agreed), that:

> "[1] The pursuer owns Braeside Farm, Moodiesburn. In 1989 the then proprietors of Braeside gave the defender an oral lease of Woodcroft Field, extending to 33.633 acres, which forms part of the farm. The lease ran from year to year. The anniversary date was 7 February. The subjects were let to the defender to be used by him for the business of a riding school. In connection with that business the defender was allowed to graze his horses on the subjects and to crop hay for their winter feed."

238. The question was whether a notice to quit, admittedly not in the form required by the 1991 Act, was valid or invalid. As the judge put it,

> "The principal line of defence is that the subjects are an agricultural holding within the meaning of the 1991 Act and therefore that the notice to quit is invalid."

He examined a number of (mostly English) cases, and concluded:

> "[21] On the view that I have taken, it is the purpose of the lease that defines the nature of the tenancy at the outset. It is possible that actual use may later become relevant; for example, if the tenant substantially abandons agricultural use of the holding (*eg Wetherall v Smith* [1980] 1 WLR 1290; *Hickson and Welch v Cann* (1977) 40 P & CR 218). In this case, however, the originally agreed use has continued throughout. Therefore, even if actual use were to be the criterion, it is clear that the character of the let in this case remains commercial.
>
> [22] On my interpretation of the sheriff's findings 6 and 17, I cannot accept his finding 23 (*supra*). It is a finding of mixed fact and law. In that finding the sheriff concluded that the subjects were used 'to a substantial

> extent' for the grazing of the horses largely on the basis that the horses grazed all the time, whereas the riding school was operated mainly at weekends. He therefore saw grazing as being the predominant use. That, in my view, is a fallacious approach. The grazing was part of a commercial enterprise. The land was grazed only because the horses were part of that enterprise. Therefore, no matter how extensive the amount of the grazing, the grazing was always ancillary to the commercial purpose of the lease. The sheriff erred, in my opinion, in concluding that grazing was the predominant use. This is clearly a commercial lease."

239. The judge also referred to the decision of the Court of Appeal in *McClinton v McFall*, and said this:

> "24. … The Court of Appeal decided that the uses of the land for the pasturing of the cattle, the grazing of the horses and the making of hay were agricultural and that the other activities in connection with the stud farm were not inconsistent with, and did not impede, the agricultural uses. Such non-agricultural uses therefore did not prevent the land from being agricultural land within the corresponding English definition. I find the logic of this decision unconvincing; but it may be that it can be distinguished on the basis that the tenancy was expressly granted as an agricultural tenancy and that the running of a stud farm was a permissible rather than an obligatory use of the land."

Sitting here in England, of course, I have not the luxury of being able to "find the logic … unconvincing". The decision of the Court of Appeal is binding on me, and, so far as it applies to the case at hand, I must follow it.

Commentary

240. I was also referred by Mrs Brake to statements in *Muir Watt and Moss on Agricultural Holdings*, 15th ed, at [8.43], and in Christopher Rodgers, *Agricultural Law*, 4th ed at [5.10]. The first of these passages is as follows (footnotes omitted):

> "With regard to horses, keeping or grazing working horses which are used for farming the land is within the definition (but now very rare), as is keeping or grazing of horses for the production of food or hides (rare but not unknown in Britain). As to horses used for recreation: it is now well established that, although the *keeping* of horses used for recreation does *not* come within the definition of 'agriculture', the use of land has grazing land for such 'non-agricultural' horses *does* satisfy the definition. Where land is used for grazing horses used for recreation, the grazing (as opposed to mere keeping) must be the predominant or substantial use. Although the grazing of stud horses is within the definition, the operation of a stud farm for breeding and rearing horses for the purposes of recreation is not; and nor is the use of land for gallops, *ie* for the exercise of racehorses over it."

241. The second passage is as follows (again with footnotes omitted):

> "Grazing is *per se* an agricultural use, as defined by s 96(1), irrespective of whether the animals grazed are themselves 'livestock' (above). Thus land used for grazing horses will be used for 'agriculture', even if land used for keeping or exercising horses is not. If the substantial user is predominantly for grazing, it follows that the land can qualify as an agricultural holding within the 1986 Act. The land must be used for grazing in connection with a trade or business to qualify as an agricultural holding, but the business need not itself be agricultural in nature. Land let for private grazing on a non-commercial basis is not, however, agricultural land within the meaning of the 1986 Act."

APPLICATION OF LAW TO THE FACTS

242. For the reasons given, I have found as facts that (i) no assurances were given, and no licence was granted, by Mrs Foster or Sarafina to the Brakes in relation to occupation or use of the house or equestrian facilities at the time of the acquisition of West Axnoller Farm in 2015, (ii) even if Mrs Foster *had* given any assurances, the Brakes did not rely on them, because they were the beneficial owners of West Axnoller Farm and Mrs Foster was simply their nominee, (iii) no assurances were given by Dr Guy or Chedington to the Brakes about the occupation of the house or equestrian facilities at the time of the acquisition of Sarafina by Chedington in 2017, (iv) neither Dr Guy nor Chedington granted the Brakes any contractual licence or tenancy to occupy any part of West Axnoller Farm for their own purposes, but Dr Guy permitted the Brakes to make use of the house when it was not required for a wedding or other event, and of the equestrian facility when not needed for other activities of AEL, in each case by way of a bare licence revocable on reasonable notice. I have also found that the Brakes could not have relied on the 2017 Promise**,** even if it had been made. Accordingly, the claims made by the Brakes in respect of the 2015 Assurances and the 2017 Promise, including any claims based on proprietary estoppel, must all fail.

243. So far as concerns the claim to be entitled to remain in occupation of the house and the equestrian facility by reason of a licence granted by Dr Guy or his companies, I am satisfied that any such licence was revocable, and that it has been determined by reasonable notice. I have referred above to (i) the letter of 8 November 2018 requiring the cessation of use of the house as overnight accommodation by 9 November 2018 and the removal of all furniture, vehicles, machinery and horses from West Axnoller Farm by 30 November 2018, (ii) letters from AEL's then solicitors dated 5 December 2018 enclosing notices to quit by 3 January 2019, and containing the information prescribed by the 1988 Regulations, and (iii) the letter of 28 July 2020 from the same solicitors giving three further notices to quit. The last of these required that the defendants give up possession of the property by 28 November 2020, with an alternative formula for the expiry of a reasonable period following service of the notices.

244. In principle, in circumstances where the Brakes then had, and Dr Guy and AEL reasonably believed that the Brakes then had, alternative accommodation available to them, containing all the furniture, clothing and other items needed for daily living, only walking distance away at the cottage, the licence which

> they had to make intermittent use of the house could be determined very quickly indeed. In this connection it is important to note that the letter *also* gave the Brakes until 30 November 2018 to remove any items of personal property (for example, clothes, food, articles of domestic use, but also their horses) which they had at the property. I am satisfied that notice of one day was reasonable for the sole purpose of determining the licence to stay overnight in the house as a second home. I am also satisfied that three weeks was a reasonable time within which the Brakes could remove their personal property (including their horses) from West Axnoller Farm (including the house), and therefore a reasonable period of notice to determine any licence to keep their possessions at West Axnoller Farm. If I am wrong about that, then I consider that by 3 January 2019, a reasonable period of notice had certainly elapsed, and any licence had determined. The position regarding the notice given in late July 2020 is *a fortiori*. In any event, we are now in early 2022, years down the line from the revocation of the licence to use the house and the equine facility: *cf Minister of Health v Bellotti* [1944] 1 KB 298, CA, referred to above. On any view the bare licence has gone.

Is the claim premature?

245. The question then arises as to whether, if I am wrong, and the licence to occupy the house was *not* determined before 19 November 2018, it makes any difference that the possession claim was issued before that determination, on 19 November 2018. (The claim form was actually signed by AEL's solicitors on *15* November 2018, but not issued by the court until *19* November 2018. Hence the references to both dates in the documents.) That point arises in relation to the equine facility in any event, because the notice in relation to that facility had not expired by 19 November 2018.

The parties' views

246. The Brakes say that it *does* make a difference:

> "Whether AEL relies on the notice to quit of December 2018 or the notices to quit of July 2020, each post-dates the commencement of these proceedings. On any analysis, these proceedings were premature."

247. And again:

> "It appeared to be suggested that the letter which was given in 8 November 2018 to terminate the Brakes' employment with immediate effect represented adequate notice giving the Brakes until 30 November 2018 to move out of the House. … The argument does not bear scrutiny because, aside from the fact that Dr Guy accepted that the notice period for terminating the Brakes' contract of employment was a minimum of nine months, if it was suggested that the termination letter gave the Brakes until 30 November 2018 to vacate the House, that does not explain why it is that AEL considered that it was in a position to commence possession proceedings on 15 November 2018, served on or around 22 November 2018."

248. On the other side, AEL says that it does *not* make any difference that the possession claim was issued before expiry of the second or third notice. It says that

> "There is no rule of law that a bare licence … must have expired prior to the date on which proceedings are commenced. Equally, there is no requirement that any notices must have been served prior to the date on which proceedings are commenced. It would be contrary to the overriding objective to require a party each time to commence fresh proceedings to rely on notices served after the date on which a claim was issued."

Analysis

249. My analysis of the position is as follows. As a general proposition, a claimant brings a claim on the basis that he or she has a complete cause of action at that date. The claimant pleads the allegations of fact which are said to make good that cause of action. Sometimes it happens that the defendant then pleads a defence which, if proved, would prevent the cause of action succeeding. So the claimant pleads further facts in reply which, if proved, would prevent the defence succeeding. The present case is however more complicated than that.

250. In the present case, in the original particulars of claim in Form N121, AEL pleaded *inter alia* (i) its freehold title to the land occupied by the Brakes, (ii) that AEL allowed the Brakes to stay in the house "between wedding bookings as a gesture of goodwill whilst works were being carried out on the defendant's cottage", (iii) that "on 9 November 2018 [AEL] terminated the [Brakes'] employment and requested that [they] vacate the land", and (iv) that the Brakes "have refused and remain on the land without the licence or consent of" AEL. If all those facts were proved, AEL would have pleaded a complete cause of action.

251. However, on 17 December 2018, AEL served amended particulars of claim, with the permission of District Judge Davis given on 27 November 2018. These particulars repeated (at paragraph 3) AEL's claim to the freehold title to West Axnoller Farm, and (at paragraph 13) the licence granted to Mr and Mrs Brake

> "to stay in the accommodation at Axnoller House between wedding bookings, as a gesture of goodwill whilst works were being carried out on the Cottage. … The Licence was gratuitous and bare licence terminal at common law at the Claimant's will".

252. The amended particulars further pleaded (at paragraph 14) that "the Licence" extended to the third defendant, Tom D'Arcy, and (at paragraph 15) that it extended to permission to Mr and Mrs Brake to keep their horses stabled in the equine facility. The particulars went on to plead (at paragraph 19) that by notice dated 8 November 2018 the Brakes had been required to vacate the house on 9 November 2018 and the remainder of the land on 30 November 2018, but (at paragraph 20) that following expiry of the notice the Brakes had refused to vacate and remained on the land without the licence or consent of AEL. The particulars also pleaded the further notices to quit sent to the Brakes

dated 5 December 2018, which were due to expire on 3 January 2019, but which had not done so at the date of the amended particulars.

253. By their original defence and counterclaim, served on 8 January 2019, the Brakes did not deny the freehold title of AEL. Indeed, they pleaded at paragraph 5 that West Axnoller Farm was sold to AEL, then known as Sarafina. However, they did deny that AEL was thereby entitled to possession of the land, by reason of their own claim to certain rights, including that they had (at least) a licence to be on the land, and that those rights or that licence had not been disposed of or otherwise determined.

254. On 24 January 2019, AEL served re-amended particulars of claim pursuant to the order of Deputy District Judge Hebblethwaite on 17 January 2019. The amendment was consequent upon the removal of Tom D'Arcy as third defendant to this claim, but the opportunity was taken also to add a further claim (at paragraph 24) for damages for use and occupation or mesne profits. By the date of this pleading, the notice given on 5 December 2018 had expired, on 3 January 2019. The order of Deputy District Judge Hebblethwaite on 17 January 2019 also gave permission to the Brakes to file an amended defence and counterclaim, which they did on 14 February 2019.

255. In its Reply, dated 21 February 2019, AEL pleaded further allegations of fact to the effect that there were no such rights, or that, if there were, they had been determined by way of notice or notices. AEL also pleaded the notices already given, including that of 5 December 2018 (expiring on 3 January 2019), which was given and expired after the date on which the claim was originally issued, but before the date of the Reply.

256. On 20 January 2020, AEL served re-re-amended particulars of claim adding in further claims for damages against the Brakes, including claims pursuant to cross-undertakings given to the court on 4 December 2018 and 10 December 2018 and for wrongful interference with goods.

257. On 16 March 2020 the Brakes served a re-amended defence and counterclaim. This was in fact a completely new document, in substitution of the original defence and counterclaim. This statement of case pleaded (paragraph 2) that AEL had "no entitlement to possession or damages, as alleged or at all", and that the Brakes occupied the house "under an irrevocable and/or equitable and/or contractual licence/tenancy", as well as that Mr Brake had "a protected occupancy under the Housing Act 1988". It further pleaded (at paragraph 3) that "The notice of one day to quit and the later NTQs were of no effect". The rest of the statement of case set out a detailed pleading as the circumstances in which the Brakes' claimed rights were said to arise.

258. AEL responded to the re-amended defence and counterclaim by serving an amended reply and amended defence to counterclaim, on 9 September 2020. This too was a completely new document in substitution for the earlier reply dated 21 February 2019. The amended reply and amended defence to counterclaim denied (at paragraph 14) that the Brakes had any tenancy of the house or any other part of the land or "any irrevocable licence or licence incapable of termination prior to 2022 or any other fixed date". Instead, it

asserted that the Brakes had only the bare licence referred to in the amended particulars of claim and subsequently in the re-amended and the re-re-amended particulars of claim. It further asserted that this licence had been determined by the notices already pleaded, but that, if it had not been, it had been determined by notices served on the Brakes on 28 July 2020, expiring on 28 November 2020.

259. What this rather complicated history of the pleadings shows is that the present case is one in which the claimant claimed that it had the right to possession, as the owner of the fee simple estate in the land in question. The defendants did not challenge this title as such, but sought to raise various claimed rights, including a licence, by way of defence. It cannot be said that the claim as advanced at the outset was "incurably bad". It raised fairly and squarely the basis upon which the claimant claimed possession, that is, the ownership of the fee simple estate in the land and the alleged termination of the only licence accepted by AEL to have been given to the Brakes.

260. At the time of the issue of the claim the only notice which had expired was that given on 8 November 2018 in respect of the use of the house, which was to expire on 9 November 2018. The amended particulars of claim of 17 December 2018 pleaded the notice of 5 December, but that had not by then expired. However, the re-amended particulars of claim of 24 January 2019 were served after that expiry. So both the notices of 8 November 2018 and 5 December 2018 are properly pleaded by particulars of claim, the first originally and the second by amendment.

261. The notice of 28 July 2020 stands on a different footing. It has never been pleaded in the particulars of claim. It has however been pleaded in the amended reply and amended defence to counterclaim of 9 September 2020 (although by then the notice given had not expired). It may be that the appropriate course for the claimant to have taken in respect of the third notice was to apply for permission to amend *the particulars of claim* so as to plead that notice by way of alternative plea. That course was not taken. Nevertheless, the defendants were well aware therefore of what the issues were, and were not taken by surprise. The general rule is that, certainly where limitation questions are not in issue (and here they are not), permission is normally given to amend the claim so as to raise the real issues between the parties. I would therefore expect the court to have acceded to any such application by the claimant, subject to questions of permission to make consequential amendments and (perhaps) questions of costs.

262. It seems to me that in the present case the overriding objective in CPR Part 1 requires that, if the court considers that permission would have been given, it should proceed on the basis that it is the real issues between the parties that have to be tried here, rather than requiring a fresh action to be brought. Those issues include the questions whether, if there were any licences, they have been properly determined by notice. The court should therefore exercise its discretion and permit the claimant to rely on all the notices which served in this case. In my judgment, therefore, there is nothing of substance in the objection made by the defendants that the claimant relies in the alternative on

notices to quit served after the date on which the claimant was originally issued.

Maridive & Oil Services v CNA Insurance Co

263. I am supported in this view by the decision of the Court of Appeal in the case of *Maridive & Oil Services v CNA Insurance Co* [2002] EWCA Civ 369. This case was not cited to me by either party during the trial, and I remembered it only once I had reached this point in the judgment. I invited short email written submissions upon the decision. I received short, helpful comments from Mrs Brake, and a short separate note from the claimant's counsel, both of which I have taken into account. In fact it was not this decision that led me to my own view, since my own view was formed first. Nevertheless, it seems to me that my decision is supported by the view taken by the court in that case. In a sense, therefore, it is an additional explanation of the reasoning of my decision, rather than the basis for it.

264. In that case, one only of two claimants made a demand on the defendant to pay money under a particular bond. The defendant's defence pleaded that the demand had been made by the wrong claimant. The claimants promptly made a further demand of the defendant to pay the same sum, but this time in the names of both claimants. The second demand was within the contractual limitation period. However, they did not amend their particulars of claim, but pleaded the second demand only in their reply. After the contractual limitation period had run out, the defendant applied to strike out the reply, as an attempt to raise a new cause of action without first obtaining permission to amend. At first instance the judge held that the second demand could not be relied on, as it was made after the commencement of proceedings. The Court of Appeal however disagreed, and allowed an appeal by the claimants.

265. The leading judgment was given by Mance LJ. He said:

> "33. I consider that the appropriate course in the present case would have been for the plaintiffs, after the second demand, either to have started fresh proceedings upon the second demand, or to have applied to amend the statement of case to rely upon it. …
>
> 34. Contrary to the proper procedure, the appellants simply relied on the second demand in their reply. This was irregular, but it nonetheless amounted, in procedural terms, to the making of a new claim contrary to CP 16PD-10.2. Indeed, it was irregular *because* it amounted to the making of a new claim in the reply. A reply is a statement of case, and the appellants' new alternative case was clear from 14th March 2000 onwards. Irregular though it was, I see no basis for treating it as a nullity. The respondents could of course have applied to strike out the reference in the reply to the second demand, e.g. under CPR 3.4(1) and (2). If the court had simply struck out the reference, without more, the new claim would have gone. But, on any such application, the court would also have had to consider what other courses might be open to it, pursuant to its general powers to make orders to deal with cases justly (cf. CPR 1.1(1) and 3.1(2)(m)) and/or pursuant to the specific provisions of CPR 3.10. …

> 35. Had the respondents applied to strike out the reference to the second demand in the reply, at any time during the remaining five and a half months of the contractual limitation period up to 30th August 2000, the appellants would, without much doubt, have been stirred into applying to amend their particulars of claim and/or into commencing fresh proceedings. The court would, in my view, have been likely to decline to strike out the reply. Rather, it would have allowed the particulars of claim to be amended to plead the second demand, which would have regularised the reply. As it is, however, no such application was made. The respondents, presumably, either did not see anything wrong with the reliance placed on the second demand in the reply or preferred to let sleeping dogs lie.
>
> […]
>
> 37. The question whether the new claim introduced by the reply constituted the bringing or maintenance of a suit, action or other proceeding within the terms of the third condition in the Bond is a question of construction of the Bond. But the concept of bringing or maintaining a suit, action or other proceeding can only be understood by reference to the domestic procedural law of whatever is the legal system under which it is suggested that such a suit, action or other proceeding has been brought or maintained. Once one concludes, as I do, that the reply on 14th March 2000 introduced a claim, which was, though irregular, nonetheless not a nullity, and that the irregularity can be cured by allowing the claim to be proceeded with by subsequent amendment of the particulars of claim, I have no doubt that the third condition was satisfied as from 14th March 2000."

266. Chadwick LJ said:

> "54. … There is no absolute rule of law or practice which precludes an amendment to rely on a cause of action which has arisen after the commencement of the proceedings in circumstances where (but for the amendment) the claim would fail. The court has a discretion whether or not to allow the amendment in such a case; a discretion which is to be exercised as justice requires. In the present case I have no doubt that, had the claimants sought to amend their particulars of claim (so as to rely on the demand of 13 March 2000) within the period from 12 April to 30 August 2000, they should have been permitted to do so. There was no reason why they should have been required to commence new proceedings."

267. Ward LJ said:

> "74. There was, thus, an error of procedure because of the failure to comply with that practice direction but the error did not invalidate the step taken in the proceedings: see CPR 3.10. However irregular, the claim made in the reply stood. Had this been a statutory period of limitation to which CPR 17.4 applied, I would have treated the reply as claiming a remedy in the proceedings and as putting in issue the same facts as arose

> out of the new claim. All the material averments for the new claim were already pleaded - a good second demand and a continuing failure to pay. Had the claimant sought to amend the particulars of claim relying on the failure to pay after that second demand and before the expiry of the contractual time-bar, then permission would undoubtedly have been given."

Mew v Tristmire Ltd

268. The note from the claimant's counsel also referred to another decision of the Court of Appeal, *Mew v Tristmire Ltd* [2011] EWCA Civ 912. The claimant landowner sought possession of certain plots of land below the high-water mark in Bembridge Harbour, Isle of Wight. Each of the plots had a wooden platform on which a houseboat rested. The houseboats were not owned by the landowner but by the occupants. The main question in that case was whether the defendants occupying those houseboats were licensees or assured tenants of the plots. Notices to terminate any licences had been given to each defendant before the proceedings were issued. Further notices were served on another three occasions, on each occasion to deal with specific arguments raised by the defendants, and a final set of notices were served after the trial taken place and the draft judgment had been circulated to the parties. In the final version of his judgment, the judge held that the occupants were only licensees of the plots, and that the final notices given would be effective to terminate such licences, even though they were served after the proceedings had begun.

269. On appeal, the Court of Appeal held that the occupants were indeed licensees and not tenants. At the end of his judgment, Patten LJ (with whom Maurice Kay and Arden LJJ agreed) said this:

> "44. Mr Glen, as part of the appeal, kept open the point as to whether the judge should have allowed the claimant to rely upon the notices to quit served after the trial but there is no absolute bar on relying on a cause of action which post-dates the issue of the proceedings and, in my view, the judge was entitled in this case to allow an order for possession to be made on the basis of the last set of notices."

This decision further supports the view to which I had already come.

Claim to assured agricultural occupancy

270. In relation to the claim to an assured agricultural occupancy, the facts I have found mean that that claim must fail. There was no exclusive possession, no tenancy, and no licence giving exclusive occupation, and in any event not for a term or for a renewable period capable of qualifying under section 24(2)(c). So the so-called Tenancy Condition is not satisfied.

271. Moreover, and more fundamentally, Mr Brake did not "work in agriculture" for the purposes of the agricultural occupancy legislation. He was engaged to manage the land used in a commercial business enterprise, which ran weddings and other events, and in which the Farm played the part of a stage

set, and had to be looked after accordingly. Such activities as might in other circumstances be regarded as agricultural, such as topping the fields, mending fences, growing grass, grazing animals, making haylage and silage, were either carried on as part of the set-dressing (and in any event were only a small part of Mr Brake's weekly activities), or were carried on by third parties (and not by Mr Brake).

272. In addition, the house was not in qualifying ownership, because Mr Brake's employer was not AEL (which owned the house) but Chedington (which did not), and there is no evidence to satisfy me that Chedington made arrangements with AEL for the house to be used as housing accommodation for Mr Brake. Even if there were, it could not have been for the purposes of being used as housing accommodation for a person *employed in agriculture*. So the so-called Agricultural Worker Condition is not satisfied either.

273. However, I need to deal with one point for the sake of completeness. In finding the facts relevant to this part of the case, I said I would have to consider whether the three weeks which Mr Brake spent on 'garden leave' could be treated as weeks during which he "worked in agriculture". If, contrary to my own view, he *had* "worked in agriculture", then, by virtue of paragraph 4(4)(b) of Schedule 3 to the Rent (Agriculture) Act 1976, as applied by paragraph 2(3) of Schedule 3 to the Housing Act 1988, he would be treated as having so worked during his garden leave, because the reason he did not work during those weeks was the express instruction of his employer. But this point does not affect the result, and, as I say, I deal with it only for completeness.

THE CLAIM FOR A SERVICE OCCUPANCY

274. As I said at the outset of this judgment, the original defence and counterclaim (at [15]) claimed that the Brakes were service *tenants* (but not service *occupiers*) of the house. This claim was maintained in the amended defence and counterclaim, but then abandoned in the re-amended defence and counterclaim. The claim and counterclaim have now been tried. Without any application for an amendment of the re-amended defence and counterclaim, the Brakes have in their closing submissions boldly advanced a new claim that they were service *occupants* of the house. This includes new factual allegations that they were "installed as service occupants" (at [84]), and "for the purposes of the proper fulfilment of their roles" (at [85]). The consequence is that AEL has been denied the opportunity to adduce evidence on these matters. In procedural terms this is unfair.

275. The only evidence that can be said to support the new allegation is the evidence of the tax forms P11D, prepared by Chedington's then accountants, for 2017-18. On their face, these show that, *in the opinion of those preparing them*, the Brakes were service occupants of the house. They were put in cross-examination to Mr Bowyer, but he said that he did not prepare them, and that he did not know why they had been prepared on that basis. They were also put to Dr Guy, but he said he had not seen them before and could not help. In my judgment, the internal correspondence and the P11D forms are a good example of accountants trying to be helpful by tying up loose tax ends without

considering either whether the statements express or implied can be properly justified or indeed the wider picture. In my judgment they go no further than this. In my judgment, here there is insufficient evidence that Chedington regarded the Brakes as service occupants.

276. I consider that the Brakes are not entitled to run this new case at this late stage, but that, if even they were, on the material before me it would fail.

THE CLAIM FOR INTERFERENCE WITH THE CLAIMANT'S GOODS

277. Paragraph 20C of the re-re-amended particulars of claim alleges that the Brakes have wrongly interfered with the goods of AEL, by removing furniture and other chattels from the house and refusing to deliver up such chattels to AEL. This is in effect denied by the Brakes in paragraph 93 of the re-amended defence and counterclaim. Paragraph 95 of the amended reply challenges a number of points and joins issue with the re-amended defence and counterclaim but it also identifies the problem that the goods concerned are or were in the house, to which AEL is currently denied access. That meant that AEL had no information about which items claimed were aware, and accordingly there could be no argument about this part of the case at trial. I will therefore adjourn it over to a further directions hearing to decide how best to take it forward, assuming that that is what AEL wishes to do.

CONCLUSION

278. The result is that all the defences put forward by the Brakes to the claim for possession fail, and that AEL's claim for possession to the whole of West Axnoller Farm succeeds. There is equally no defence to the claim for mesne profits. The counterclaim fails. I will hear the parties on the form of order to be made. This will need to deal with the injunction granted on 10 December 2018 and the undertakings given on 17 January 2019.