Neutral Citation Number: [2023] EWHC 75 (TCC)

Case No: HT-2022-MAN-000027

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Manchester Civil Justice Centre
Date handed down: 20 January 2023

Before: His Honour Judge Stephen Davies sitting as a High Court Judge
Between:

STEPHEN JAMES KIRBY	**Claimant**
- and -	
ELECTRICITY NORTH WEST LIMITED	**Defendant**

Robert Darbyshire (instructed by **Napthens LLP, Solicitors, Preston PR1**) for the **Claimant**
Evie Barden (instructed by **Squire Patton Boggs (UK) LLP, Solicitors, Leeds LS1**) for the **Defendant**

Hearing dates: 28, 29, 30 November 2022
Date draft judgment handed down: 5 January 2023

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APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10am on 20 January 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

I direct that pursuant to CPR PD 39A paragraph 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.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

A. Introduction and summary of decision

1. This is a claim for damages by the claimant, Stephen Kirby, a Fylde coast farmer, against the defendant, Electricity Northwest Limited, the electrical distribution network operator for NW England, for damages for trespass and/or negligence. In short, in November 2017 the defendant's contractors (a company known as SPIE) entered onto agricultural land, a field lying to the east of Peel Road, Blackpool ("**the Peel field**") comprising some 17.13 hectares (42.33 acres), under rights conferred by two deeds of grant, to replace an existing 33kV underground cable with a modern cable.

2. The freehold owners of the Peel field are and were the trustees of a trust known as the Rigby Childrens Discretionary Trust ("**the Trust**"). The claimant says that he had the benefit of a lease of the Peel field and that he was planning to grow a number of crops, most significantly a crop of potatoes in the 2018 growing season, on the field. He says that he was unable to do so because the defendant's contractors caused serious damage to the Peel field whilst undertaking the works which had to be remedied before a crop could be grown. He says that as a result he lost the opportunity to grow crops on that field and sues to recover his loss on the basis that the defendant is liable for the trespass and negligence of its contractors.

3. It is a great shame that this claim, pleaded at £201,337.76 but revised downwards at trial (in the light of the valuation placed on the claim by the claimant's own expert) to £81,622.40 could not have been settled, especially since initially the defendant had agreed to compensate the claimant for his loss and both parties had appointed land agents to seek to agree the claim.

4. In my view there are two principal reasons why the claim was not settled[1]. The first was the exaggerated valuation put on the claim. The second was the defendant's stance in requiring the claimant to provide documentary proof of his claims which he was unable to provide, given the essentially informal way in which he carried on business, without recognising that an inability to provide documentation does not equate to an inability to prove a claim.

5. In its defence as pleaded and as advanced at trial the defendant adopted something of a scorched earth approach in contesting almost each and every building block of the claim. This has led to the case becoming far more complex than must have appeared at the time the damage occurred and the parties and their advisers were working to seek to agree the claim.

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[1] I say this of course without having seen any inadmissible offers or correspondence at this stage.

6. I heard evidence over two days and submissions over a further half day. I heard from: (a) the claimant himself; (b) Mr Bonnette, the land manager for the Trust; (c) Ms Cleghorn, the defendant's head of rights and consents since January 2018; (d) Mr Hughes, the claimant's expert agronomist[2]; (e) Mr Sweeney, the defendant's expert agronomist; and Ms Steer, the defendant's rural chartered surveyor. I received helpful submissions from both counsel, for which I am grateful. After submissions I adjourned to produce this judgment.

7. The crux of the case is whether the evidence given by and for the claimant can and should be accepted as essentially true and reasonably reliable, notwithstanding the absence of much of the documentation which the defendant and its advisers say that he ought, as a farmer, to have created and retained and the inconsistencies between some of the documentation provided and the claimant's case.

8. In my judgment the claimant has surmounted the hurdle of proving on the balance of probabilities that he is an honest and essentially reliable witness and, thus, has proved his case in its essential elements. Although there are a number of reasons for my reaching this conclusion, the key one is that there are really only three plausible explanations for the inconsistencies in the claimant's case and between his case and a number of the contemporaneous documents which have been obtained.

9. The first is that the claimant is putting forwards a claim, specifically that based on his having intended to grow a crop of potatoes in 2018 for his own account on land of which he was a tenant, which he knows is simply not true, i.e. that it is an attempted fraud on the defendant. I have no doubt that this is not the case. Indeed, apart from a final accusation that the claimant was "making it up as you go", in the context of his answers to difficult questions, there was nothing in the defendant's pleaded case or case as put at trial which amounted to a positive case to this effect, which is not surprising given the evidence.

10. The second is that the claimant is putting forward a genuine claim in good faith, but that on proper analysis the evidence does not demonstrate either that he was or would have been a tenant of the Peel field in 2018 or that he would have been growing a crop of potatoes there in 2018 for his own account. This is the essential case that the defendant has advanced but, in my view, and for reasons explained below, the claimant has satisfied me as to these two essential elements of his case.

11. For completeness, I should record that the defendant has not pleaded or advanced a fallback case to the effect that even if the evidence did demonstrate that he was a tenant of the Peel field and would have grown a crop of potatoes there in 2018, the way in which official records were - and would have been - submitted leads to the conclusion that any such claim would be irredeemably tainted by illegality and should fail for that reason. The defendant was wise not to do so, since in my view such an argument would inevitably have failed anyway on the view I take of the facts.

12. The third is that the claimant is putting forward a claim in good faith which, although inconsistent and lacking in documentary proof, is nonetheless essentially reliable and should be accepted in its broad thrust, although the precise quantification needs to be scrutinised with some care. Having heard the claimant cross-examined over an extended period I am satisfied that he is an honest witness, who knows his particular business extremely well but is not at all good at creating or retaining paper records, so that I can and should accept his case based on his own evidence, save where it does not satisfy me as reliable on the balance of probabilities.

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[2] An agronomist is an agricultural consultant, agronomy being the science of soil management and crop production. Mr Hughes, the claimant's agronomy expert, suggested that the role was similar to that of a general practitioner in medical practice, with agronomists having a good all round knowledge but not necessarily having specialist expertise in specialist areas as soil science.

13. I do not accept the case as put in the defendant's closing submissions that the claimant has deliberately failed to disclose documents, which he must have had, because they would have undermined his case. Instead, I am satisfied that the claimant does indeed have very few documents to disclose due to his essentially informal and undocumented business and has disclosed those which he does have. I do nonetheless understand the defendant's frustration with the claimant's approach to documents. A good example appeared from an email written by his land agent adviser, Mr Coney, to Ms Steer, on 8 February 2019 where he provided various documents to support the claimant's case which, on proper analysis, appeared to raise further questions and doubts which have confused, rather than assisted.

14. However, as against this, in his first email to the claimant after their first meeting, Mr Sweeney said that he appreciated that the claimant's "style of farming and business operation is not one which is dominated by excessive documentation". Although he continued that he would "attempt to ensure that the documents I request are ones that I would expect you to have", it seemed to me that this hope was not followed through, either in his requests or those made by Ms Steer or by the defendant itself. It also seems to me that one explanation for the fact that the claimant provided documentation which, as became clear at trial, is irrelevant to his case was his aim to provide anything he could which might satisfy the defendant even if not actually supportive of his case.

15. In making my decision on this essential question I have had firmly in mind the authorities referred to and the observations of HHJ Hodge QC (sitting as a judge of the High Court) in *Ahuja Investments Limited v Victorygame Limited* [2021] EWHC 2382 (Ch) at [21], to which Ms Barden referred me in submissions, where he said this:

"Inevitably, both counsel referred me to the frequently-cited observations of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) about the fallibility of human memory and the weight to be placed upon documentary evidence, leading to the conclusion (at [22]) that "the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts". I was also referred to observations of Males LJ (with the agreement of McCombe and Peter Jackson LJJ) in *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413, [2019] 4 WLR 112 at [48]-[49] about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned, culminating in the statement that "… in a case where there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, he should explain why they are not to be taken at face value or are outweighed by other compelling considerations". I have borne those observations firmly in mind when evaluating the evidence in this case."

16. By reference to the evidence which I accept as reliable I assess his damages in the sum of £54,652.40.

17. My reasons appear below. Although the parties had agreed a list of issues which very helpfully identified the principal issues in dispute as between them I have found it more helpful to approach the case by dividing the case into three broadly chronological sections, namely:

(a) What was the claimant's interest in the Peel field and what were his plans for that field prior to the works being undertaken in November 2017?

(b) What damage was done by the defendant's contractors to the Peel field from November 2017 and did it amount to a trespass and/or to negligence for which the defendant is liable to the claimant?

(c) How did the damage impact on the claimant's plans for the Peel field and what loss has he sustained as a result?

B. What was the claimant's interest in the Peel field and what were his plans for that field prior to the works being undertaken in November 2017?

18. The claimant has been a farmer since he left school some 40 years ago, initially working in partnership with his late father and later on his own account as E Kirby & Sons. The claimant said, and I accept, that his late father tended to deal with the paperwork and after his father's death he had not really taken over that role.

The arrangement with Bradley

19. On 1 February 2004 he entered into a "potato growing agreement" with another Fylde based business known as Colin Bradley Ltd ("Bradley"). This is obviously genuine – not least because it is so obviously a "home made" one page document signed by both parties which requires an understanding of their respective businesses to discern its purpose and effect. It is in the form of a joint venture agreement for the production of potatoes, whereby: (a) the claimant would provide and prepare the land, plant and harvest the crop and transport it to Bradley's farm; (b) Bradley would provide the potato seeds, fertiliser and pesticides and agronomy service; and (c) Bradley would have "first option to purchase the crop at market value".

20. In his evidence the claimant explained that Bradley was a large, well-established potato dealer who supplied potatoes to the market which, depending on their quality, in particular their freedom from skin blemishes, could be sold as peeling potatoes (intended for bulk volume users such as fish and chip shops) or – if their quality justified –as packing potatoes (intended for supermarkets and the like). The latter naturally commanded higher prices.

21. Under this agreement Bradley had the option to buy the whole crop at market value. It followed that Bradley had the right to buy the whole crop but had no obligation to do so. It was the claimant's evidence that he had a good relationship with Bradley and that, due to his potato growing expertise, he had historically always sold all his potatoes to Bradley at a good price.

22. The defendant contends that, notwithstanding what the potato growing agreement may have said, in fact it was Bradley which was the potato grower.

23. This is based upon the fact that Bradley included in its potato growing return to the Agriculture and Horticulture Development Board ("**AHDB**") the fields in which the claimant stated that he grew potatoes in the years from 2015 onwards, including the Peel field in its return for 2015, whereas the claimant himself did not.

24. The relevance of this is that it is common ground that under paragraph 25 of Schedule 3 to the Agriculture and Horticulture Development Board Order 2008 a grower of potatoes, liable to pay levy thereon, must notify the AHDB of the area and fields planted in each year and must pay the levy on the area planted. The defendant contended that if the claimant had indeed been the grower and Bradley the buyer then, had they complied with the AHDB Order, the claimant should have made the return and paid the levy as grower and Bradley should have made the return and paid the levy as buyer.

25. In his witness statement at [9] the claimant had suggested that this did not apply because Bradley was registered as a grower with the AHDB and he grew the potatoes for it. In the same way as with the basic payment scheme returns submitted by the Trust (dealt with below), the claimant clearly operated under a relaxed approach, taking the view that as long as someone made the return and paid the levy it really did not matter who did so. Whilst that was clearly not correct as a matter of

construction of the 2008 Order I nonetheless accept that explanation as consistent with the claimant's evidence generally as to the unorthodox way in which he dealt with his business affairs.

26. The defendant also points to a fertiliser plan report produced by Bradley for 2015 which records the planned use of fertiliser on the Peel field for the planned crop of Maris Pipers. However, this does not seem to me to be inconsistent with the terms of the potato growing agreement, since Bradley was to supply fertiliser and pesticides and agronomy services under that agreement anyway.

27. Further, there is some, albeit not very much, contemporaneous documentary evidence which does tend to support his case.

28. There is an invoice from the claimant to Bradley dated 2019 which records the sale of an unspecified quantity of potatoes for £7,980. There is another invoice from the claimant to Bradley dated 2021 which also records the sale of an unspecified quantity of potatoes for £28,500. Although Ms Barden drew attention to the invoice number of the latter being lower than the invoice number of the former, which would not make sense if the same invoice book had been used chronologically, the claimant has also produced bank statements which show payments in those amounts being received at the same time as the invoices. The claimant said that these invoices were for the net price due to him after deducting the costs incurred by Bradley which would be set off against the sale price. He said that he would meet with Mr Bradley and agree the relevant prices and costs, so that the invoice would just record the net amount due. Although Mr Sweeney suggested, reasonably, that a sensible farmer ought to ensure that he had details of the various prices and costs, so that proper returns could be made and proper accounts provided, that does not mean that the claimant must have had such details, let alone that Bradley did not have the necessary details for its own purposes. Although no details of the prices or costs have been provided, nonetheless these invoices provide evidence that there continued to be a business relationship involving the sale of potatoes from the claimant to Bradley.

29. The claimant's case here has not been assisted by his land agents having also produced a further invoice to Bradley from 2017, which gives details of work undertaken by the claimant to Bradley and vice versa to reach a final balance, because when he was asked about this the claimant explained that this invoice related to cereals not to potatoes.

30. Although the claimant's description of the potato growing agreement in his witness statement differed a little from that of the agreement itself, in that in the former he said that Bradley undertook the harvesting, when that was not what the agreement said, that did not seem to me to be a particularly significant point. Where again the claimant did not help himself was for his land agents to provide a copy of an invoice from a supplier to him for the supply of seed potatoes, when both the potato growing agreement and his witness statement made clear that it was Bradley which provided the seed potatoes, so that this invoice was plainly unrelated to the seed potatoes planted on the Peel field in 2015.

31. The claimant's case was that his relationship with Bradley under the potato growing agreement was so informal that each year they would sit down, agree the market price for the potatoes and the quantity sold, agree the costs incurred by Bradley to be set off, and then conclude everything by just issuing one invoice showing the total price but not how it was arrived at. Whilst unusual no doubt in a more arms' length relationship between larger farming businesses, this does not seem to me to be so inherently implausible that the claimant's evidence on this point can and should be rejected.

32. I should also say that it seemed to me to be unwise for Mr Sweeney as an agronomist to have opined in [22] of his report that because the agreement was "unlike anything he had ever encountered before" he had "strong reservations about [its] validity and purpose". Whilst he was entitled to draw to the attention of the court the fact that in his experience most such growing contracts are issued annually and are considerably more detailed, in failing to acknowledge the claimant's evidence as to

– and indeed the evidence of the documentary evidence which tended to confirm – the essentially informal nature of the relationship between two family run local businesses who were well known to each other, I do not see how this could have led him as an expert agronomist to express an opinion as to the validity or the purpose of the agreement. I was wholly unpersuaded by his opinion, insofar as he was qualified to give it, that the lack of such details meant that the agreement in question in this case could never have operated as a successful basis on which to conduct business or as an ongoing contract from year to year.

33. Moreover, although there was no witness statement from Bradley to confirm the position, there was at least a letter dated 23 June 2022, signed by Mr Patterson as a director of Bradley, which confirmed that the potato growing agreement was "concurrent up to the season 2020". There was no suggestion that the defendant or any of its representatives, employed, legal or expert, had made enquiry of Bradley to see whether or not it was willing to confirm the claimant's case.

34. The essential issue is whether or not the claimant has proved on the balance of probabilities that his relationship with Bradley was that of grower and buyer, albeit under a close informal joint venture arrangement whereby Bradley would provide a number of services the cost of which would be contra'd off the eventual sale price, so that he was not merely an agricultural contractor providing farming services to Bradley which was itself the true grower and seller of the potatoes. On the evidence I am satisfied that he has proved his case in this respect.

The claimant's interest in the Peel field

35. The claimant's case and evidence, supported by Mr Bonnette, is that he first became a tenant of the Peel field on 1 November 2013. He relies upon a letter from Mr Bonnette dated 29 October 2013, signed by both, which records an agreement to rent three fields, Peel field as well as another field at Weeton and a field at Corner Hall Farm, from 1 November 2013, with a total rent payable in quarterly payments in advance of £21,924 based on 126 acres at £174 / acre. He relies on a further letter from Mr Bonnette dated 14 November 2014, providing notice of intention to extend the current lease agreements, with the lease of Peel field to be extended to 31 October 2017. This is also signed by both men.

36. Finally, there is yet another letter from Mr Bonnette, dated 6 February 2017 and headed "short term tenancy agreement", which refers to the Peel field and the Weeton field. It says "further to our discussions in November 2016 and the lease renewal date of 31 March 2017 we agree to extend this agreement on both blocks of land for a further rolling three years" at the same rent. The letter also refers to the fact that the defendant had submitted an amendment to the wayleave for works needed along the northern ditch of Peel field. It also refers to Mr Bonnette wanting the claimant to continue "your / our association with … Bradley … as this was a T&C of the original agreement at the onset in 2013", stating that "if this does occur you are reminded the rent for such realises the premium of £300/acre for the season". Again this is signed by both men.

37. All these letters are plainly genuine in my view, reflecting an informal yet essentially business-like arrangement.

38. The final letter is particularly illuminating, in that it evidences an existing relationship with Bradley, the commercial point of which was that where the claimant used the land to grow potatoes for Bradley then that would, because of the usual extra profitability of growing a potato crop as compared with growing spring wheat or other crops, result in the Trust receiving an additional premium. Whilst both this letter and the original 2013 letter referred to an association with another potato wholesaler, J Smiths, in relation to Weeton, whereas this is the first reference to Bradley, that makes sense if, as is the claimant's case and evidence, the first potato crop grown on Peel field was not until 2015. Further, although the reference to the existing end date of 31 March 2017 is not

consistent with the termination date for Peel field in the previous letter, that was the end date for Weeton field which is likely to explain the apparent inconsistency.

39. Given the existence of these letters the starting point and, so far as the claimant is concerned, the end point is that he was indeed a tenant of Peel field at all relevant times from November 2013.

40. The defendant however points to the fact that it was the Trust which applied for and received rural payments under the Basic Payment Scheme ("**BPS**") for a large number of fields in all of the years from 2015 to 2022 under which it was obliged to and did declare and confirm that it was a farmer and that these fields, including the Peel field, were at its disposal at the relevant date in each year. On the face of it, therefore, that course of conduct was inconsistent with the claimant having the rights of a tenant in relation to the Peel field over those periods.

41. When that was put to him in cross-examination the claimant accepted that this is what had been done and that he knew about it. He explained that to his knowledge it was general farm practice for an owner in the position of the Trust to do this, because otherwise the owner would simply increase the rent to cover the loss which it would suffer through not being able to do so. He also made the point that there was no double claiming of rural payments, since he had never made any application for payments under the BPS in relation to the Peel field. There is no suggestion to the contrary, so that it cannot be said that the claimant was party to a dishonest scheme in this respect.

42. Mr Bonnette was subject to cross-examination about this. As with the claimant he came across to me as essentially honest and reliable as a witness. I acknowledge that he clearly had a good relationship with the claimant and believed that the defendant had handled matters very poorly from start to finish. He had also acted as the claimant's informal land agent adviser in presenting this claim on his behalf at an early stage (when it was hoped that the claims could have been resolved without the need for formal involvement of land agent or legal advisers). Nonetheless, it did not seem to me that he was obviously partisan as a witness.

43. Whilst one might have expected him, as a land manager acting for a family trust, to have been aware of the need for strict compliance with legal formalities, that was plainly not the case. However, what seemed to me to come across clearly from his evidence was that he was perfectly happy to grant the claimant informal leases of the Peel field, on the basis that this would enable the trust to maximise its income from the land both via receipt of rent and via continuing to claim under the BPS and – as he said - avoiding the creation of an formal agricultural holding tenancy under which the claimant would enjoy the rights and protections afforded by the Agricultural Holdings Act 1986. His approach plainly demonstrated a rather casual approach to the formalities and the legalities, but I am satisfied that this does not mean that his evidence was untrue or unreliable or that there was no genuine grant of a tenancy.

44. In particular, it was clear from his genuinely surprised rejection of the suggestions in cross-examination that: (a) the Trust never gave the claimant any tenancy of the Peel field; and (b) the claimant was merely a contractor providing farming services for the Trust over this period, that he had always proceeded on the basis that he had agreed with the claimant that there was a relationship of landlord and tenant as between the Trust and the claimant over the Peel field, albeit that it was essentially informal and allowed the Trust to claim payments under the BPS in respect of that field on that basis.

45. When he was asked about the truth of the declaration in the BPS applications submitted by the Trust I advised him that he was entitled to exercise his right to decline to answer such question on the grounds that it might incriminate him and he did so. Although Ms Barden suggested that an adverse inference could be drawn against the claimant in such circumstances that does not seem to me to be correct since, although Mr Bonnette was being called by the claimant as a witness, he was not the claimant nor was he the claimant's agent or representative (other than in the very limited short-term

sense referred to above). Moreover, as Mr Darbyshire observed in closing submissions, if he was intent on avoiding any repercussions from these declarations the sensible thing to have done was to agree that the declarations accurately reflected the true position, whereas it was obvious from his evidence that the Trust's right of disposal of the Peel field at the relevant times was subject to the informal tenancy granted to the claimant.

46. There was some question as to whether or not the effect of the third letter was to create a three year rolling tenancy, in the sense that if nothing happened to the contrary on or before the renewal date it would automatically renew for a further three years. Although the claimant had said in his evidence that he thought that this is what would happen, I agree that there is no obvious basis for this in the letter itself. Furthermore, in cross-examination Mr Bonnette explained that in his view it was an annual let but that the letter also recorded a "gentleman's agreement" that it would last for 3 years. However, that is of no more than academic interest to this case, since in any event the tenancy would plainly have renewed over from year to year if the relationship continued, as the evidence is that it did and has done ever since the first letter.

47. Ms Barden also suggested that the grant of a tenancy to the claimant was inconsistent with the fact that Mr Bonnette had also granted a right of access over the land to a local shooting club. However, I accept his explanation that this was essentially an informal arrangement which worked because local farmers such as the claimant had no objection to this happening, insofar as it did not impact on their own use of the land.

48. Ms Barden also explored with Mr Bonnette whether the lease had continued into 2018 and beyond. In April 2018 Mr Bonnette had said in an email to the defendant that the claimant had paid the rent due of £12,000 in two instalments in October 2017 (prior to the damage) and in April 2018 (post the damage). In contrast, a month later the Trust's solicitors wrote to the defendant asserting a claim for loss of rent of £12,000 p.a. and loss of shooting income. When asked to explain the discrepancy the Trust's solicitors never attempted to do so and it appears that subsequently both Mr Bonnette and the defendant proceeded on the basis that it would compensate the claimant for his rent where paid for land which he was unable to use. However, in October 2018 the Trust's estates account manager wrote to the defendant (copied to Mr Bonnette) stating that it had been agreed with the claimant that "the rental of the land for the next 12 months will be brought back in house to Rigby Estates" on the basis that "this eliminates the issue surrounding potatoes versus cereals for the next year (drainage compaction and soil conditioning) and the minimum rent for Rigby Estates land is now due". In November 2018 he explained this to the defendant, in an email copied to the claimant and others, on the basis that the claimant "was loath to continue renting a large plot which is unfarmable and will be till spring" so that the Trust agreed to take it "back in house" and would decide in spring whether or not to offer it back to the claimant".

49. It does appear clear, therefore, that this was the intention at that time. However, the evidence shows that at no time did the defendant ever make any payment to the Trust on this basis, and that once Peel field was able to be farmed again the claimant began doing so. Thus, this was at most in my judgment a temporary interruption of the tenancy whilst the problems due to the damage done to Peel field were resolved,

50. More importantly, so far as this case is concerned, I am satisfied that but for the damage to the Peel field the tenancy would not have been interrupted in this way and that the claimant would have continued to farm Peel field under the tenancy throughout 2018 and 2019. In the circumstances, it is irrelevant to the claimant's claim that as a result of the damage he did not in fact have a tenancy at that time.

51. Finally, as stated by the authors of *Clerk & Lindsell on Torts* 23rd edition at 18-10, under section 2 headed "Who may sue for trespass", "trespass is actionable at the suit of the person in possession of land … [so that] a tenant in occupation can sue, but not a landlord, except in cases of injury to the

reversion". At 18-21 the authors consider the requirement that possession be exclusive, as discussed in the well-known decision of the House of Lords in *Street v Mountford* [1985] AC 809 and in subsequent decisions of that court, the effect of which is summarised as being that "generally speaking, the intention of the parties to give exclusive possession to the occupant is evidenced by the terms of their agreement (unless the written agreement is a sham) and such a letting of residential premises for a term of time, normally at a rent, ordinarily gives rise to a tenancy. The question is not whether the parties or one of them were minded to give and take exclusive possession but whether the effect of their transaction is in fact the giving of exclusive possession. The general effect of subsequent decisions of the House of Lords is that a tenancy is necessarily created where exclusive possession is in fact conferred, and the fact of such possession does not depend on what they say or how they describe the transaction but on the effect of their arrangement". Finally, at 18-23 the authors consider the position of licensees, saying that "the terms of an occupational licence may give the licensee such control over access as to entitle him to the protection of the law of trespass against intruders. The typical lodger with non-exclusive possession has to be distinguished from the typical modern occupational licensee, since nowadays "a person who has no more than a licence may yet have possession of the land", and the terms of the licence may confer a sufficient right of possession".

52. Applying these principles to the evidence and to the findings I have made, I am satisfied first that the claimant had exclusive possession of the Peel field under the terms of the informal tenancy agreements made between the Trust and the claimant and, further, if for any reason no tenancy relationship subsisted, that the terms of the agreement conferred upon the claimant sufficient control and right of possession over the Peel field to allow him to maintain an action for trespass. That was the physical and economic reality of the position from November 2013 onwards, notwithstanding the various grants to the defendant (as discussed in section C below), notwithstanding the shooting rights granted by the Trust (whatever their precise nature and terms) and notwithstanding what may have been some informal understanding that the claimant's rights did not permit him to make any application for payments under the BPS.

The claimant's actual and proposed plans for the Peel field

53. The evidence from the witnesses of fact and expert evidence establishes that: (a) growing potatoes exhausts the soil so that crops cannot usually be grown in successive years; (b) there are a number of pests which can affect potatoes and adversely affect yields, of which PCN (short for potato cyst nematodes) was the one most referred to at trial.

54. So far as crop rotation is concerned, the claimant's evidence was that he, like other Fylde coast farmers, tended to plant potatoes between every third and fifth year. I accept the claimant's evidence on this point.

55. So far as PCN are concerned, they are roundworms whose eggs can survive in soil for years and, once hatched, will attack potato roots and dramatically reduce yields. PCN can spread through soil transfer. It is possible for soil to be tested for PCN by sampling and laboratory testing. This process is relatively inexpensive. If PCN are found to be present the options are either to apply pesticides (which is expensive), to grow resistant varieties or to allow a sufficient period between planting to reduce PCN levels to an acceptable level. The agronomists recommended testing for PCN and applying pesticides if found.

56. The claimant's clear evidence was that PCN were a problem which he had never experienced, so that he did not test for it and would not have done so anyway because in his view the cost of applying pesticide was prohibitive. It was suggested to him that by not testing for PCN he was risking his entire crop. He denied this. It seems to me that the claimant was indeed taking a risk in not doing so, but that I accept his evidence that based on his experience it had historically been an acceptable risk to take.

57. The claimant's evidence was that his farming practices were based on his long experience of potato growing on the Fylde coast and were not so far as he was concerned out of the ordinary. The claimant's case is that the evidence of the agronomists, who did not have his own detailed knowledge and experience of potato growing on the Fylde coast, was of no real assistance when seeking to reach a conclusion on what he did and planned to do on this particular field and the level of risk he was taking in doing so. I largely accept that argument. It is plain that the claimant would not have adopted the practices he did unless he had used them successfully in previous years. Indeed, Mr Sweeney accepted in cross-examination that there was always a range of possible options for a farmer when deciding what crops to grow and when in a location such as the Fylde coast and ultimately the decision was one for the farmer to make. Neither Mr Sweeney nor Ms Steer had detailed knowledge of the practices of Fylde coast potato farmers.

58. The evidence is that the climate on the Fylde coast is relatively wet (due to its proximity to the Irish sea and the prevailing westerly weather) but also relatively mild, at least away from the immediate coastal area. It is well known that inland, away from the built up tourist resort of Blackpool and its neighbouring resorts, it is largely rural with a well-established and successful agricultural industry with peaty or mossy soils suitable for growing crops such as potatoes. Mr Sweeney was prepared to accept that it might well have had a micro-climate different from north-west England in general.

59. The claimant's case and evidence is that he grew potatoes on the Peel field in 2015, albeit that his recollection was that it was a poor crop due to the wet weather that year.

60. This is consistent with the Trust's BPS application for 2015 which has the code AC44 recorded against the Peel field for its land use in that year, which is the applicable code for potatoes. Whilst this was made by the Trust, there is no reason to believe that it was not accurate, especially since the Trust was receiving additional rent for fields where the claimant grew potatoes.

61. Further, the Bradley fertiliser report for 2015, referred to above, is clear evidence that the plan was for potatoes to be grown on the Peel field in 2015.

62. As against this the defendant points to the Agrovista cropping report for 2014/15 which does not record any potatoes (or indeed any crop) being grown on the Peel field, although it does record a crop of winter wheat being grown there in 2015/16. Agrovista was an agronomy consultancy which provided agronomy services for the claimant at around this time, the individual concerned being Mr Ball. In his witness statement the claimant said that Agrovista had not in fact been his agronomist until 2016/17 and that this explained the error. Whilst this appeared inconsistent with Agrovista having produced reports dating from 2013/14 his explanation, which I accept, is that the earlier reports were produced by Agrovista as a record of what had been grown on the fields in the seasons before it became the claimant's agronomist. Nonetheless if, as appears likely, Agrovista did so based on information provided by the claimant, then it is likely that it was the claimant himself who was responsible for the error. This, however, is consistent with the claimant's lack of records and lack of interest in agronomy, preferring to rely on his own knowledge and memory.

63. Mr Sweeney had also suggested in paragraph 8 of his report that the land conditions at Peel field were such that growing maincrop potatoes would be "a very risky operation and not likely to occur". In my view this opinion is overstated, in that it is based on a overly pessimistically skewed reading of the drainage conditions of the land prior to the damage done by the defendant's contractors. I also considered it unwise for Mr Sweeney to move from a statement that in his opinion there were identified difficulties and risks with growing maincrop potatoes on the field to a statement that it was "not likely to occur", which would depend on a number of further factors about which he could not in my view confidently speculate.

64. Thus, on the balance of probabilities I am satisfied that there is clear evidence that potatoes were grown on the Peel field in 2015. Indeed, Mr Sweeney was prepared to accept this in cross-examination.

65. The claimant's evidence and case was that he had planned to grow potatoes on the Peel field again in spring 2018. He has been consistent in his evidence on this point from his earliest discussions with the defendant and its representatives. As I note in section C below, the first independent agronomist involved in the case, Mr Watson of ADAS, had no reason to doubt that this was the case when he met the claimant on his field inspection in March 2018. In Mr Bonnette's email to the defendant dated 12 January 2018 he referred to the Peel field as having been "due to have had a planting of potatoes and was committed to in terms of yield".

66. The defendant's scepticism comes principally from the lack of records to support the claimant's case that he had already decided by November 2017 to grow potatoes in the 2017/18 season.

67. In particular, the defendant points to the absence of evidence of PCN testing which would normally be undertaken in the autumn before the crop was to be grown. However, I am satisfied that, whatever the defendant's experts' views on the prevalence of and need for PCN testing, it was not and never had been the claimant's practice to undertake PCN testing, because he had never had a problem with PCN and because it would not have been his practice to apply nematicide to control PCN even if they were present.

68. More generally, given the nature of his arrangement with Bradley, there is no particular reason to expect him to have entered into a further specific contract with Bradley for the 2017/18 season nor for his to have already entered into contracts for the purchase of seed potatoes or fertiliser or insecticides other than nematacides. He said, and I accept, that he had already agreed with Bradley that he would grow potatoes on Peel field in 2018

69. Thus I am satisfied that this was the claimant's intention prior to the commencement of the works by the defendant's contractors in November 2017.

C. What damage was done by the defendant's contractors to the Peel field from November 2017 and did it amount to a trespass and/or to negligence for which the defendant is liable to the claimant?

70. It is a surprise that the defendant did not, subject to its arguments about the claimant's standing to claim for trespass or negligence, admit that if it did owe a duty to the claimant not to commit a trespass or to act negligently so as to cause damage to the Peel field then it was in breach of such duties, given the overwhelming contemporaneous and other evidence of breach.

71. The most comprehensive and damning contemporaneous account is to be found in the lengthy report provided on 28 March 2018 by Mr Stephen Watson, a senior consultant with the well-known consultancy ADAS, who was instructed by the defendant itself. His report was produced following a joint inspection of the land with the claimant, Mr Bonnette, Mr Ball (the Agrovista agronomist) and two representatives of the defendant. It is of note that neither were called by the defendant to give evidence notwithstanding that one, Ms Martins, has been involved in the case throughout and is still employed by the defendant and, unlike Ms Cleghorn, who was called by the defendant as its sole witness, had actually visited the site at the time and, hence, had something useful about which she could have given evidence.

72. The whole of the report should be read but for present purposes it is sufficient to note the following:

(a) The SPIE contractors had driven outside the original wayleave area because they had carried on working through extremely wet weather in November and made a "complete and utter mess of the field" by widening the trafficked area and tracking down through the centre of the field.

(b) Having carried on working, having pulled new cables into the ducting, and having belatedly then abandoned the works, the cabling had then been damaged through attempted theft so that the project was delayed and was still incomplete.

(c) As at the time of inspection the field was like a "bomb site" with "very severe damage". This included evidence of damage to the field drainage system. Although this needed to be inspected by a drainage expert, in Mr Watson's preliminary view the field required re-draining rather than trying to sort out the existing clay drainage pipes.

(d) "Mr Kirby was intending to grow potatoes in this field in 2018 and we have no reason not to believe him. Given the value of the potato crop and the high costs of establishment ENW should not let Mr Kirby plant potatoes on this field in 2018", since to do otherwise would "be exposing ENW to potentially even bigger claims for losses". He advised that the claimant should plant the field with a cover crop and plant the field with spring wheat rather than winter wheat that year.

(e) Concluding, he observed that "this is going to turn out to be a very expensive mistake on the part of your contractors, who clearly continued to work, when it was just not fit to do so … I only wish that someone had looked at the site in November and made the decision then that this job should have been left until it is dry in the summer".

73. Notwithstanding this contemporaneous assessment from a reputable agronomist who had been instructed by the defendant and had inspected the Peel field and seen the damage at the time, Ms Steer's opinion was that because only around 21% of the field area had been affected it would have been possible to grow a crop on the unaffected part. I am satisfied that whilst it was theoretically possible to attempt to grow crops on the unaffected area it was not unreasonable for the claimant to decide, based on the evidence available to him at the time, including his own knowledge and the views of the agronomists who were actually involved at the time, not to do so.

74. In accordance with Mr Watson's suggestion the defendant duly obtained a drainage report from a Mr Lambert in August 2018. He described little intensive draining in the western area but a number of different drains of varying ages, types, depths and conditions in the eastern area. He described this as not unusual where a landowner dealing with a wet area adds further drains as and when needed. He recommended a new interceptor drain and cable crossings to take drainage across the cables and new restoration drains to link into the new drain and crossings.

75. Ms Cleghorn fairly accepted in cross-examination that SPIE's vehicle drivers had been careless and had driven the vehicles outside the access areas enjoyed under the agreements. She also agreed – albeit as she said as a non-expert – that if SPIE had waited until weather conditions had been drier the damage could have been avoided. Although Ms Barden achieved some success in qualifying the scope of these admissions in re-examination, I am quite satisfied that Ms Cleghorn was right to accept what was put to her, based upon the contemporaneous evidence. This explains the fact that at the initial stages of this dispute the defendant did not seek to raise any argument that it was not liable in principle to compensate the claimant for any loss and damage he had suffered. Indeed, the defendant agreed to, and did, relay the drainage at its own expense in accordance with the recommendations in the drainage report without seeking to argue that it was not liable to do so on the basis either that its works had not caused – at least in part – the damage to the drainage or on the basis that even ignoring such damage the condition of the existing drains was so poor that it should not have to replace them.

76. The defendant had rights under the deeds of grant to enter onto the Peel field for the purposes conferred thereby. These deeds were registered and through Mr Darbyshire the claimant accepted that he had actual or constructive knowledge that the defendant had these rights of entry. However, the claimant's case is advanced on the basis that the defendant is liable for its contractor's conduct in causing damage which exceeded that which was contemplated or permitted under the deeds of grant, both insofar as the contractor chose to track over and to cause damage to areas of land outside the strips covered by the deeds of grant and insofar as the contractor decided to carry on working through wet weather, when it was or should have been obvious to them that this would cause serious damage to the field as agricultural land

77. In the circumstances, I am satisfied that the contractor's conduct was such as to cause damage which exceeded that which was contemplated or permitted by the deeds of grant and, thus, that the claimant is entitled to succeed against the defendant in trespass. The defendant has not pleaded or argued that it is not liable for the acts or defaults of its independent contractor. In any event, the claimant would be entitled to succeed on the basis that the defendant itself was in default for failing to instruct the contractor sufficiently or at all, either in advance of the works or once the risks caused by the wet weather became apparent, not to plough on with works if such was liable to cause damage to the use of the field for agricultural purposes. The defendant has sought to argue that it is in some way not responsible for the consequences of the wet weather and the third party theft and damage, but these arguments ignore the obvious point that the defendant had the option to decide whether or not to permit its contractor to carry on once the wet weather began and continued if that was going to cause serious damage to the field and also, having belatedly abandoned the works, to decide whether or not to leave the cabling unprotected. The defendant has called no evidence to make out its case in these respects, notwithstanding the comments in the ADAS report and their own previous willingness to pay out any substantiated claim.

78. Moreover, the defendant does not contend that the claimant is bound by any exclusions or limitations contained in the deeds of grant, rightly in my judgment since he was not a party to the deeds and there is no basis for holding that he is any way bound by those clauses.

79. Finally, given my conclusions as to the claimant's rights in relation to the Peel field at the relevant time, in my judgment he was plainly owed a duty by the defendant to take reasonable care to see that the Peel field was not physically damaged during the execution of the works and/or to see that any unavoidable physical damage was repaired in a reasonable and reasonably prompt manner, so as to avoid or minimise its ability to be used as agricultural land such as might result in a total or partial loss of crop. This is not, therefore, a case where there is any need to consider authority on the question as to whether or not the defendant owed the claimant a duty of care in relation to solely economic loss. Nor is a case where a distinction can properly be drawn between damage to a crop being grown at the time of the damage or damage to a crop which would have been grown thereafter but for the physical damage to the land.

D. How did the damage impact on the claimant's plans for the Peel field and what loss has he sustained as a result?

80. At the risk of over-simplification, whilst growing potatoes can generally be an extremely profitable use of agricultural land, the market for potatoes depends on their condition and also on when, how, to whom and for what purpose they are sold.

81. As with other products, it is possible either to contract in advance for the sale at a pre-fixed contract price and quantity of potatoes not yet planted or harvested (i.e. a futures contract) or to wait and sell at the market value prevailing at the time of the harvest. Taking the market value option could result in a handsome profit in a good year if the potatoes were of good quality and the market price high,

but could also result in a significant loss if the potatoes were of poor quality or the market value low. Most potato farmers would hedge the risk by contracting in advance to sell a fixed tonnage (which they were confident they could produce) at a fixed price and to sell any surplus at market value. The farmer would hope that if there was a good harvest of good quality potatoes and the market was good they could make a significant profit on selling the surplus at market value. The claimant's oral evidence was that when he had done this (although, as I explain below, that was not what he said he did with Bradley) he would contract to sell approximately 60% of what he estimated would be the eventual crop and keep the remainder for sale at market price (also referred to as "free-buy").

82. So far as the claimant's marketing plans for the 2018 potato crop was concerned, the basis of his case as pleaded and his evidence at trial was that: (a) because he was operating under the potato growing agreement with Bradley, and because he had already agreed with Bradley that he would grow potatoes on Peel field in 2018, he was committed to selling them all to Bradley at market value; and (b) because he expected to produce good quality potatoes from the Peel field which were capable of sale as packing potatoes, he would have achieved a very good price for all of them.

83. However, in his expert report Mr Hughes had adopted a calculation based on the claimant selling 60% on contract and 40% based on free-buy.

84. There was some question as to why he had done so, given the claimant's pleaded case and his evidence at trial. In his report at [53] Mr Hughes had said that this was on the basis of what the claimant had told him would have happened. The claimant however suggested that he had simply agreed to this approach on the basis of Mr Hughes' advice. Under cross-examination Mr Hughes suggested that he had done so based upon Bradley's own AHDB potato growing returns, which showed that a number of potatoes had been grown under contract, and also based on the evidence from the claimant as to what a prudent potato grower would normally do.

85. Whilst it is a little difficult to be sure about this, what is tolerably clear is that Mr Hughes had adopted a prudent approach to the quantification of the claim based on the evidence available to him, rather than uncritically accepting the claimant's account as to what would have happened under the Bradley potato growing agreement. The claimant had not in its opening sought to persuade me not to follow Mr Hughes' valuation method and, instead, to adopt a free-buy valuation for the full yield.

86. In all the circumstances, it seems to me that Mr Hughes' valuation approach represents a reasonable way of taking into account both the claimant's evidence but also the vicissitudes of potato growing, which the claimant also acknowledged, saying in evidence on a number of occasions that he would have to adapt or change his plans depending on changes in the weather or other factors. I bear particularly in mind that there is no hard contemporaneous or independent evidence which demonstrates on an empirical basis on the balance of probabilities that the Peel field was capable of producing a high yielding crop of good quality packing potatoes in 2018 which would have allowed the maximum free-buy sale price to have been achieved on a maximum yield.

87. Indeed, the claimant's own evidence was that the overall price obtained from Bradley for the 2015 crop was not high and, whether that was explained by the poor weather experienced that year or otherwise, that is a factor which weighs against a case that things would have been completely different in 2018.

88. The defendant also contends that the evidence as to the poor condition of the existing drainage system meant that there was a significant risk of any yield in 2018 being adversely affected by wet soil conditions.

89. In cross-examination Mr Hughes suggested that if Peel field could cope with a potato harvest in 2015 then that indicated that the drainage system, albeit variable, was in reasonable condition. That

argument carries some weight in itself, although I do note the claimant's own evidence that the crop was a poor one in 2015 which was a wet year.

90. I do not accept that the defendant's evidence shows that even before the commencement of the works in 2017 the existing drainage system was in such a poor state that it could not cope with wet conditions. In my judgment the evidence shows that the drainage system was variable but overall adequate, although not good, prior to November 2017, and that the risk of any yield being adversely affected by wet soil conditions was no worse than average.

91. The defendant also contends that the claimant's decision to plant again less than 3 years before the previous 2015 harvest was sooner than normal or recommended and would have led to a significant risk of any yield in 2018 being adversely affected. However, I am satisfied that the decision to produce potato crops 3 years apart was, whilst at the minimum gap identified by the claimant, not too early, so that again the risk of the yield being affected was no worse than average.

92. The defendant also contends that the claimant's decision not to test for PCN and, thus, not to spray for nematicide meant that there was a significant risk of any potato crop planted in 2018 becoming infected by PCN.

93. In my judgment the evidence shows that the claimant was right to say, based on his experience, that the risk of a potato crop which would otherwise have been planted on the Peel field in 2018 being adversely affected by PCN was low. However, it cannot be denied that even a low risk carries with it a risk, which cannot be discounted as negligible, of very serious damage through PCN infestation.

94. In summary, I am satisfied that I should take the same approach as Mr Hughes, given: (a) the claimant's evidence, which I accept, that a potato crop grown in 2018 would probably have been sold to Bradley under the potato growing agreement; but (b) the claimant has not been able to demonstrate by detailed farming records that all potatoes grown and sold by the claimant to Bradley on all of his land in the preceding years had produced a high yielding good quality of packing potatoes which commanded a good price so as to enable me to conclude that the same would have happened in 2018; but equally (c) the defendant has not satisfied me that the particular risk factors it has identified are of such significance as to persuade me to adopt a more conservative approach than that taken by Mr Hughes.

95. Mr Hughes had taken a yield of 18 tonnes / acre. This was consistent with the average yield figure of 18.2 tonnes / acre for maincrop potatoes in the John Nix pocket book relied upon by Ms Steer, being a well-established farm pocketbook produced by a reputable organisation, albeit one which did not have information about specific locations such as the Fylde coast. It was suggested to Mr Hughes that the same source also recorded poor yields in that year, especially for unirrigated crops such as those which would have been produced on the Peel field in 2018. He argued that this data was too generic to be useful, covering as it did the main potato growing regions of the eastern UK. I tend to agree; the defendant's experts had not investigated the climate or potato yields in the Fylde coast in 2018, which would have been the most accurate source of information. It seemed to me that Ms Steer's yield was too pessimistic; indeed she accepted in cross-examination that her approach tended to be cautious, which may be a good thing in an adviser but is not an appropriate approach for me to take when making a decision as to the hypothetical 2018 yield on the balance of probabilities. I am satisfied that it is appropriate to take an average yield of 18 tonnes / acre.

96. I am satisfied that Mr Hughes was right when he said in cross-examination that there was no reason why a crop of high yield late maturing Maris Piper potatoes would not have achieved the average yield for all maincrop potatoes if grown on the Peel field by the claimant in 2018, so that in my judgment his figure of 18 tonnes / acre is a reasonable one to adopt.

97. Mr Hughes had assumed in [51] of his report a cropped area of 40 acres, based on the remaining 2.3 acres being used for machinery access and turning. He accepted however that the area declared for potatoes by Bradley in 2015 was 37 acres, indicative of a lesser growing area. I am satisfied that this previous year's record is a more accurate indicator than Mr Hughes' assessment and may reflect, for example, a reduction due to certain parts of the field being under or adjacent to pylons. I do therefore take a growing area of 37 acres.

98. Mr Hughes had taken in [53] of his report the cost of growing the potato crop, inclusive of rent but exclusive of nematicide, as being £1,840 / acre based on the evidence from Mr Watson and Mr Ball as to the national average cost of maincrop potatoes in 2018. Ms Steer had used John Nix to arrive at a cost of £1,987 assuming nematicide and £1,937 without. I prefer the figure of Mr Hughes, based as it is on the evidence of local experienced agronomists.

Contract and market prices

99. Mr Hughes had taken a contract price of £125 / tonne and a free-buy price of £330 / tonne.

100. As to his free-buy price, this was taken from Mr Ball's initial calculation as the mid point of a range from £300 - £360 / tonne based on an ADHB weekly potato price report for 17 August 2018 for Maris Piper chipping potatoes for the NW region. The difficulty is that he has been unable to obtain similar reports for late September / early October 2018 when any potato crop would probably have been harvested. That is particularly significant when one can see from the AHDB report obtained by Ms Steer that the average price for free-buy potatoes dropped from around £300 in August 2018 to around £270 in October 2018 and the overall average price dropped from around £220 to around £175 over the same period.

101. In contrast, Ms Steer had taken an overall average price of £155 based on the John Nix valuation to include both the contract price of £125 / tonne and the free-buy price.

102. Given that I accept the claimant's evidence about his agreement with Bradley I am satisfied that he would have been able to sell the hypothetical 2018 potato crop from Peel field to Bradley at around £250 / tonne. Mr Hughes' more conservative 60 / 40 contract / free-buy approach produces an overall average price of around £200 / tonne. If, however, I was to apply the £250 free-buy valuation for October 2018 to Mr Hughes' approach that would result in a revised figure of around £175 / tonne.

103. In the circumstances I adopt £175 / tonne as representing a fair valuation which adopts a reasonable approach to discounting for the risks of production but does not discount as far down as Ms Steer's figure of £155 / tonne, which seems to me to fail to take into account the claimant's particular circumstances and the local data.

104. On that basis the claim for the loss of a potato crop in 2018 may be calculated as follows: 18 tonnes per acre multiplied by 37 acres multiplied by £175 per tonne amounts to a loss of revenue of £116,550 which, less total costs of £1,840 multiplied by 37 acres (£68,080), produces a total loss of profit of £48,470.

The claim for the loss of spring barley

105. The claimant's evidence, which I accept as reliable (on the general basis identified in paragraph 12 above, particularly that the claimant has a reasonably good recollection of what he planted and when and where), is that the claimant grew spring barley on the Peel field in 2019 and 2020. The claimant's case is that as a result of the damage to the Peel field it took some years for the land to recover from the damage done and I also accept this (based on the overall evidence of the nature and extent of the damage done and its consequences, including the contemporaneous view of Mr Watson). The claimant's former agronomist consultant, Mr Ball, had produced a report identifying

the actual and expected yields for the years in question. Mr Hughes had relied on this information as to the actual yields, but had applied his own more conservative opinion to the issue of the expected yields and had taken the figures provided by the claimant as to the sale price received. On the basis of this information and his assessment, Mr Hughes valued the claim for loss of yield of spring barley as £6,182.40. This does not appear to be disputed by Ms Steer who, indeed, appears to value the claim subject to liability in a greater amount. In the circumstances I am satisfied that the claimant has made out his case in this respect.

106. In response to Ms Barden's post-draft judgment complaints that: (a) the court did not give reasons for accepting the claimant's evidence on this issue; and (b) the court should not have placed reliance on Mr Ball's report, given that he was giving opinion evidence but was not permitted to give such evidence as an expert I observe that:

(a) By way of clarification, I have summarised in the bracketed wording in paragraph 105 above the reasons why I accepted the claimant's evidence on this issue, bearing in mind that none of it was subject to serious challenge at trial;

(b) By way of answering this objection, the position is that Mr Hughes placed reliance on Mr Ball's figures for actual yields, which was a matter of fact which he was entitled to rely upon and which I was entitled to accept. In contrast, he used his own judgment to arrive at his figure for expected yields.

(c) Further, and more generally, this is a relatively small element of the claim, which received little attention at trial, which explains why I dealt with it relatively summarily.

Conclusion

107. The claimant succeeds as to the principal sum of £54,652.40 (i.e. £48,470 plus £6,182.40).

108. I will address questions of interest and costs insofar as there is any disagreement once the parties have had the opportunity to be heard post-judgment.