Neutral Citation Number: [2022] EWHC 1202 (Ch)

Case No: PT-2021-LDS-000127
Case No: PT-2021-LDS-000108

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
PROPERTY TRUST & PROBATE LIST (ChD)

Leeds Combined Court Centre
1 Oxford Row, Leeds LS1 3BY

Date: 25/05/2022

Before :

HH JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

SUZANNE ELAINE PROCTER — **Claimant**

- and -

(1) PHILIP JOHN PROCTER
(2) JAMES GEOFFREY PROCTER
(3) GEORGE KNOWLES
(4) WOMBLE BOND DICKINSON (TRUST CORPORATION) LTD
(formerly Bond Dickinson (Trust Corporation) Limited)
(5) WIDE OPEN FINANCE LIMITED

And Between :

SUZANNE ELAINE PROCTER — **Claimant**

-and-

(1) PHILIP JOHN PROCTER
(2) JAMES GEOFFREY PROCTER

Defendants

- -
- -

Mr Bruce Walker (instructed by **Grays Solicitors LLP**) for the **Claimant in both claims**
Mr Edward Peters (instructed by **Ebery Williams Limited**) for the **1st and 2nd Defendants in both claims**
Ms Heather Murphy (instructed by **Womble Bond Dickinson (UK) LLP**) for the **4th Defendant in Claim no. PT-2021-LDS-000127**
The 3rd and 5th Defendants in Claim no. PT-2021-LDS-000127 were not represented and did not appear

Hearing dates: 4-8, 11 April 2022
Further written submissions were received in the period up to and including 10 May 2022

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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.

.....

HH JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 25 May 2022

HH Judge Davis-White QC :

Structure of Judgment

1. This judgment is structured as follows:

Introduction and representation

2. This judgment follows my earlier judgment ([2019] EWHC 1199 (Ch)) (the "First Judgment") in the first set of proceedings before me (PT-2021-LDS-00127) (the "Main Proceedings"). This judgment should be read with the First Judgment. I use the same definitions as in that judgment. I have, however, cited extracts from the First Judgment in this judgment for ease of understanding.

3. The claim number in the Main Proceedings has been changed since the First Judgment. This reflects the fact that those proceedings have been transferred into the courts' electronic filing system, CE File.

4. In the Main Proceedings, Suzanne Procter ("Suzie") is the claimant. She continues to be represented by Mr Walker of Counsel, instructed by Grays Solicitors LLP.

5. The first and second defendants, Philip Procter ("Philip") and James Procter ("Jamie") are Suzie's brothers (together the "Brothers"). They continue to be represented by Mr Edward Peters of Counsel, instructed by Ebery Williams Ltd.

6. I refer to Suzie, Philip and Jamie collectively as the "Siblings". As in the First Judgment, I refer to the Siblings by the names that they use for each other, and as were used before me, as a matter of convenience and intend no disrespect.

7. Both sets of proceedings before me involve a bitter family dispute between the three Siblings. In the First Judgment, I described that dispute as a war (possibly of attrition). The dispute at bottom is over what I have described as the Procter Family Inheritance. That Family Inheritance comprises approximately 600 acres. Of this some 128 acres or so comprises a golf course constructed between about 1990 and 1995.[1] The remainder is farmed as arable land by the family partnership, the present partners of which are the Brothers. Suzie "retired" from the Partnership in 2010. I use quotation marks for "retirement" as the precise legal effect of the same is hotly disputed. The land as a whole (leaving aside any agricultural tenancy) was valued by Suzie some time ago now as having a value of some £7.5 million or so, though this is disputed.

8. The land in question is held under various family and will trusts. The position is further complicated by title to certain parcels of freehold land having been left vested in the names of the trustees of Grandfather's will trusts (the sole remaining trustee by survivorship being Philip) with the beneficial interests, in part, being vested in family trusts.

9. Suzie's bottom line position is that she should have a one-third share of the overall inheritance. This may depend upon the exercise of relevant powers of appointment/advancement by the trustee under the relevant family trusts. However, she says, among other things, that as matters stand, it is not possible for her to receive a one-third share because her Brothers have certain alleged legal rights over or in relation to the land which has the effect of depressing the overall value of the land at the level of the freehold title, whilst favouring her Brothers. This affects both her own beneficial interests in certain small portions of the farmland but also the value of the land in which the family trusts have a beneficial interest. The issues in this case, at least in part, represent her attempt to undo or deny apparent interests of the Brothers in or over the land which she says have this effect.

10. The third defendant in the Main Proceedings, George Knowles is a solicitor formerly used as a family solicitor by members of the Procter family. He was originally joined as defendant because he was one of the trustees of various Procter family trusts. The current position is that he has been replaced as trustee with regard to such trusts, they being referred to in the first Judgment as the 1975 Trust, the First 1997 Trust and the Second 1997 Trust. He was dispensed by the court from playing an active role in the proceedings. A description of those trusts is set out at paragraphs [33] to [60] of the

[1] In the First Judgment I said about 1993 but the relevant accounts suggest works went onto 1995: see paragraph 78 below.

First Judgment. Mr Knowles was not represented and did not appear before me on this occasion.

11. The fourth defendant, Womble Bond Dickinson (Trust Corporation) Limited (formerly Bond Dickinson (Trust Corporation) Limited) (the "Trust Corporation") is, as its name suggests, a company offering corporate trustee services. It is now the sole trustee of the relevant Procter family trusts. It was represented before me by Ms Heather Murphy of Counsel, instructed by Womble Bond Dickinson (UK) LLP. As I shall explain, Ms Murphy attended on the second day of the trial (the first day being a reading day). She addressed me on a particular issue regarding the holder of title to the freehold of certain Procter Family land. Then, on the basis that the Siblings were, between them, raising any case that the Trust Corporation might wish to raise as trustee of the relevant Procter Settlements in relation to the matters before me and that an application by the Trustee Corporation for a vesting order regarding freehold title was adjourned until after the handing down of my judgment, she and her solicitors withdrew from the hearing.

12. The fifth defendant, Wide Open Finance Limited ("WOFL"), is a company owned by members of the Procter family. It owns various portions of land that form part of the family farm that I defined in my first judgment as the "Farm Inheritance". It was originally not a party to the Main Proceedings but was joined following the First Judgment. This is because WOFL was a Party to certain transactions in 2003 relating to part of the Farm Inheritance that has been turned into a golf course. The effect of those transactions was in issue in the Main Proceedings but in the First Judgment I declined to determine their effect. This was because WOFL itself was not a party to the proceedings, I had only heard limited argument and it had also emerged during the hearing that all the arguments that were open to the relevant trustee(s) of the family trusts were apparently not going to be canvassed before me.

13. I summarised the factual position regarding WOFL in paragraph 9 of the First Judgment as follows:

> "*[9] One part of the Farm Inheritance comprises freehold land (often referred to as Land at Moorlands) now owned by a family limited company, Wide Open Finance Limited ("**WOFL**"). Each Sibling owns 20% of the shares in that company. The remaining 40% shareholding comprises part of the estate of Father. This land is rented to the Partnership which pays rent for it. As regards that land there is no relevant dispute before me. It is unclear whether in due course there may be a dispute regarding WOFL itself. However, there is a dispute over deeds entered into by (among others) WOFL pertaining to some of the other land within the Family Inheritance and which comprises part of a golf course (the "**WOFL Transactions**")."*

14. WOFL itself was not represented before me and did not appear.

15. Part of the order made to give effect to the First Judgment was subsequently the subject of an appeal to the Court of Appeal ([2021] EWCA Civ 167; [2021] Ch. 395). The Court of Appeal confirmed that an agricultural tenancy, protected under the Agricultural Holdings Act 1986 (the "AHA 1986"), had been entered into by conduct in 1994 between the then freeholders of part of the Procter Family Inheritance (as landlords) and the then members of the Procter family partnership (as tenants). I had

held that the absence of writing was fatal to such tenancy but the Court of Appeal explained why that was wrong and varied my earlier order to the extent of making a declaration that the relevant land was subject to the tenancy that I have explained (the "1994 Tenancy").

16. Within minutes of the formal handing down of the Court of Appeal's judgment, Suzie purportedly served a notice to quit as one of the joint tenants holding the 1994 Tenancy on trust for the now partnership. The members of that partnership comprise only Philip and Jamie. Suzie had "retired" in July 2010 and the other partnership members had "retired" (in the case of Mother) or died (in the case of Father). The validity of such notice to quit, and related matters, is the subject of the second set of proceedings before me with number PT-2021-LDS-000127 (the "NtoQ Proceedings"). In those proceedings, Suzie is the claimant asserting that her notice to quit was effective. The Brothers are the Defendants. In brief, they assert that the notice to quit is not valid, alternatively that service of it amounted to a breach of trust or fiduciary duty on the part of Suzie and that if the notice is otherwise valid the court should undo its effect or, at the least, order Suzie to pay them equitable compensation. Their case is denied at every stage.

17. Before proceeding further, I express my thanks to Counsel involved in the case for their assistance before, during and after the resumed trial; the latter involving further materials and written submissions being placed before the court. I also thank the various firms of solicitors not least (and not only) for the helpfully prepared bundles in this case.

Relevant procedural directions following the First Judgment

18. By my Order of 17 September 2019, a number of matters were dealt with which included those set out below.

19. First, the Trust Corporation was appointed sole trustee of the 1997 Trusts and relevant vesting orders made with regard to the relevant trust assets.

20. Second, WOFL was joined as a party.

21. Thirdly, new statements of case were directed regarding matters then unresolved which included the WOFL Transactions; claims of Suzie regarding use and occupation of land in which she had a direct beneficial interest; whether the Spring Hill Farm AHA tenancy was a partnership asset; Suzie's entitlement to one third of the income from the 1975 Trust; the rent received from the letting of Wide Open Farm and the taking of a partnership account following Suzie's "retirement". All but the first and last of these (the WOFL Transactions and, in part, the Partnership account) have since been resolved.

22. An order of 19 October 2021 recites that (a) Suzie was no longer pursuing her claim regarding the Spring Hill Farm AHA Tenancy being a partnership asset; (b) settlement of the issues of compensation in respect of use and occupation and entitlement to income from the 1975 Trust had been reached on the basis of an agreed payment to Suzie of just over £27,000 and (c) that the Partnership account was settled with a liability of Suzie to make a payment of just over £42,000 to the Partnership, subject to an outstanding issue regarding compensation in respect of the 1994 Tenancy.

23. By Order of 7 April 2021, the parties were required (among other things) to produce schedules identifying by reference to identified issues:

    (1) paragraphs in the existing witness statements on which they wished to rely at trial and the issue to which each such paragraph went;

    (2) paragraphs in the First Judgment which they wished to rely upon and the issue to which each such paragraph went;

    (3) pages/passages from any transcripts of original trial evidence on which they wished to rely at trial and the issue(s) to which the same went.

24. The Order of 19 October 2021 also identified the list of issues for determination at the, to be resumed, trial.

25. By order dated 7 February 2022, I refused (subject to one point) an application of Suzie dated 25 January 2022 seeking directions for expert evidence and, in effect, adjourned any valuation issues and issues as to appropriate expert evidence regarding the remaining issue over the Partnership account. I also adjourned any question as to evidence of financial loss said to be payable as compensation for the alleged wrongful service of the notice to quit by Suzie until after this judgment.

26. Finally, during the course of the resumed trial, I determined that the revisiting of the costs order after the First Judgment, as directed by the Court of Appeal, should take place after the delivery of this judgment in case any party wished to advance a case that it had relevance to the issue of costs.

The main areas of dispute to be determined by this judgment

27. The effectiveness of Suzie's notice to quit relating to the 1994 Tenancy, served after the hand down of the Court of Appeal's judgment, was the subject of further oral evidence from Suzie which I describe and evaluate in the section of this judgment dealing with that dispute.

28. As I have indicated, one of the matters left over from the trial leading to the First Judgment was the effect of certain transactions in 1996 and 2003 between various members of the Procter Family (and in 2003 also involving WOFL) with regard to the golf course (the "WOFL Transactions"). I explain those issues in more detail later in this judgment. No further witness evidence was adduced in relation to this matter.

29. There is also the question of the effect of the purported retirement of Suzie from the Procter family partnership in 2010 (the "Partnership"). The Partnership is introduced at paragraphs [61] to [67] of the First Judgment. Agreement has been reached between the Siblings as to the sums due to and from Suzie from and to the Partnership other than in relation to one matter. That matter is whether or not, as outgoing partner, Suzie was and is entitled to payment for her Partnership share and whether or not her share of the Partnership assets includes the value to the Partnership of the agricultural tenancy found by the Court of Appeal to have come into existence in 1994. There are also disputes about how such share, if it should be compensated for, should be valued. No further evidence was adduced in relation to this matter. I should add that I have already ordered that the determination of any valuation and the question of whether further expert

evidence should be permitted should be deal with after judgment on this issues. That, however, was not to prevent the determination of certain points of principle.

30. Finally, in the context of the land the subject of the agricultural tenancy as found by the Court of Appeal, the Trust Corporation has raised an issue as to legal title. A one half beneficial interest in the land, or the majority of the land, the subject of the 1994 Tenancy is vested in the 1975 Trust. As trustee of that trust the Trust Corporation is concerned that title should not remain in the trustees of grandfather's will trust but there is a potential issue as to how that title has devolved over the years. In addition, days before the trial before me, the Trust Corporation issued an application seeking a vesting order in relation to the same. As I have indicated that application has been adjourned to be dealt with after this judgment, the other parties not having had time to deal with it.

31. It is unfortunate that such an application (with little supporting evidence) should have been launched so late in the day, given the attempts made to ensure that there were, unlike the last trial, no late surprises in the applications being made and respective positions of the parties and given, for example, the list of issues for determination at the trial settled as long ago as October 2021.

32. Certain documents were adduced before me on the issue of legal title but no new witness evidence was adduced.

33. During the oral hearing it became clear that there were certain matters that had not been addressed fully by the parties but which were relevant to the submissions made before me. That resulted in directions for further written submissions on specific issues. The issues included estoppel and merger raised in relation to the WOFL Transactions and that of remedies for breach of fiduciary duty in the context of the notice to quit served by Suzie. The last of those written submissions were received by me on 29 April 2022.

34. I turn now to deal with the relevant disputes that I have to determine. I deal with these more or less in the date order of the relevant events giving rise to the issues in question.

Main Issue 1: Title to the land which was originally held by Grandfather and the position of the trustees of his will trusts

35. In paragraph 33 of the First Judgment I explained the position regarding land originally held by Grandfather. This reflected my understanding of the agreed position. However, since then questions have been raised as to whether title has indeed devolved as I set out in that paragraph. Further documents have also been introduced into evidence. It is notable that the 1973 Deed was a rather late entrant to the documents before the court, being sent to me with Ms Murphy's skeleton argument, although it is fair to say there was an abstract of it in the trial bundle. This was despite my attempts to have issues and relevant materials assembled well before the start of the renewed trial before me.

36. I set out below paragraph 33 of the First Judgment with additions to the table under the heading "Document/event", to insert further information as indicated by italicised text.

> "[33] Grandfather's will is dated 18 June 1947. He died on 6 June 1954. Legal title to the land within his estate has remained vested in the names of the trustees of his will trust. They have been as follows:

Date	Trustee	Document/event
10.11.54	Grandmother and Father	Probate: *10.11.54* *Assent: 29.12.73*
31.12.73	Grandmother, Father and Mr Allison (family accountants)	*Deed of appointment of Mr Allison as additional trustee*
24.03.82	Father and Mr Allison	*By survivorship on death of Grandmother*
01.08.86	Father, Mother and Philip	*Deed of retirement of Mr Allison and appointment of Mother and Philip*
18.06.13	Father and Philip	*By survivorship on* Mother's death
18.01.14	Philip alone	*By survivorship on* Father's death
26.02.19	-	*Death of Mr Allison*

37. In circumstances where the parties are all agreed that title is currently vested in Philip, it might be asked why a declaration is necessary or appropriate. I am satisfied that a declaration of the position is appropriate for the following reasons. Any change now in title to the freehold will now involve first registration of title with the Land Registry. That is likely given the desire of the Trust Corporation to remove one level of complication and to have the freehold title vested in or transferred to the next level of owners in each case, as joint tenants at law (but with beneficial interests unchanged). Given the arguments that I have heard in the case generally, any of the Siblings is capable of raising legal arguments to create uncertainty if it is felt to be in their respective interest at the time. They can equally change their position as they have done in the course of the proceedings before me regarding other matters. Finally, although I have not heard argument from parties whose interests are in favour of arguing for invalidity of any vesting, I am satisfied that between them Ms Murphy and Mr Walker have raised the relevant arguments that might be raised.

38. The parties are agreed that on death of a joint tenant holding legal title, legal title will continue by survivorship in the remaining titleholders. Accordingly, the issues raised before me were whether:

(1) the Deed of Appointment in 1973 was effective to vest legal title in all three then trustees of Grandfather's will trusts (namely the new trustee, Mr Allison and the continuing trustees, Grandmother and Father); and

(2) the Deed of Appointment and Retirement in 1986 was effective to vest title in the ongoing trustees, Father, Mother and Philip.

39. These issues turn upon s40(1)-(3) of the Trustee Act 1925, which provide as follows:

> **"*40 Vesting of trust property in new or continuing trustees.***
>
> *(1) Where by a deed a new trustee is appointed to perform any trust, then—*
>
> *(a) if the deed contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover or receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become or are the trustees for performing the trust, the deed shall operate, without any conveyance or assignment, to vest in those persons as joint tenants and for the purposes of the trust the estate interest or right to which the declaration relates; and*
>
> *(b) if the deed is made after the commencement of this Act and does not contain such a declaration, the deed shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration by the appointor extending to all the estates interests and rights with respect to which a declaration could have been made.*
>
> *(2) Where by a deed a retiring trustee is discharged under [the statutory power] without a new trustee being appointed, then—*
>
> *(a) if the deed contains such a declaration as aforesaid by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, the deed shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates; and*
>
> *(b) if the deed is made after the commencement of this Act and does not contain such a declaration, the deed shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration by such persons as aforesaid extending to all the estates, interests and rights with respect to which a declaration could have been made.*
>
> *(3) An express vesting declaration, whether made before or after the commencement of this Act, shall, notwithstanding that the estate, interest or right to be vested is not expressly referred to, and provided that the other statutory requirements were or are complied with, operate and be deemed always to have operated (but without prejudice to any express provision to the contrary*

contained in the deed of appointment or discharge) to vest in the persons respectively referred to in subsections (1) and (2) of this section, as the case may require, such estates, interests and rights as are capable of being and ought to be vested in those persons."

40. From 1 January 1997, the words in square brackets set out above in section 40(2) are substituted by the wording: "section 39 of this Act or section 19 of the Trusts of Land and Appointment of Trustees Act 1996" (see paragraph 3, Schedule 3 to the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA 1996"). The statutory power under the provision as enacted is a reference to that contained in section 39 of the Trustee Act 1925 which, prior to 1 January 1997 was in the following form (but without the square brackets):

> "***39. Retirement of trustee without a new appointment.***
>
> *(1) Where a trustee is desirous of being discharged from the trust, and after his discharge there will be either a trust corporation or at least two [individuals] to act as trustees to perform the trust, then, if such trustee as aforesaid by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.*
>
> *(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done."*

The word "individuals" in square brackets in the above extract were substituted by "persons" pursuant to TOLATA 1996 as from 1 January 1997.

41. The 1973 Deed of Appointment is dated 31 December 1973 and made between Grandmother and Father (described as "the Appointors") of the one part and Mr Allison (described as "the new Trustee) of the other part. The Deed recites first the will and codicils of Grandfather, his death and the proving of his will by the Appointors as executors. The second recital sets out the Appointors' assent of 29 December 1973, by which the freehold properties set out in the First Schedule to the 1973 Deed were vested in the Appointors in fee simple upon the trust for sale contained in Grandfather's will. The third recital sets out the desire to appoint the new Trustee as an additional trustee. The fourth recital confirms that the property subject to the relevant will trusts comprises the freehold property described in the first schedule and the investments described in the second schedule to the 1973 Deed. The fifth recital is as follows

> "*It is intended that the several Investments described in the Second Schedule hereto shall forthwith be transferred into the names of the Appointors and the new Trustee*"

42. The operative part of the 1973 Deed is quite short and provides that in exercise of the power given by the Trustee Act 1925 and every other power, the Appointors appoint

the new Trustee to be a trustee of Grandfather's will and three codicils jointly with the Appointors. The relevant power under the Trustee Act 1925 was of course that under section 36(6) of the Trustee Act 1925. It is common ground that the 1973 Deed does not contain a declaration within the meaning of s40(1)(a) Trustee Act 1925.

43. The short point raised by Ms Murphy and Mr Walker is whether or not the fifth recital is "an express provision to the contrary" within the meaning of s40(1)(b) of the Trustee Act 1925. In my judgment, it is clear that it is not. The recital simply confirms the intention of "forthwith" vesting as provided for by section 40(1)(b) Trustee Act 1925 regarding the investments (but not in terms saying anything about the freehold title). It does not, as suggested by Ms Murphy as being a possibility, amount to a recital that a separate deed, to be executed forthwith, will effect the conveyance of legal title to the freeholds. It is simply silent on the matter.

44. I receive some support for my view in the case of *Re King's Will Trusts* [1964] Ch. 542. In that case, Pennycuick J was faced with a deed of appointment of a trustee of a will trust in material respects containing the same operative parts and a recital mirroring the wording of the fifth recital contained in the 1973 Deed. In terms the relevant recital dealt with the investments but said nothing about the freehold title. Title to the relevant freehold properties within the estate had never been the subject of a valid assent under s36(1) Administration of Estates Act 1925, nor had they been separately conveyed. The actual decision was that a personal representative might make a written assent vesting an estate or interest in himself in another capacity but that he could not hold the property in that other capacity without such assent. Further, section 40 of the Trustee Act 1925 was only applicable to existing trust property held by an existing trustee as such and that transfer of a legal estate vested in such a person as personal representative could not be brought within section 40 so as to effect transfer (or vesting of) the legal title to ongoing (and additional new) trustees. There was however no suggestion that the recital which in this case forms the fifth recital to the 1973 Deed of Appointment itself was a manifestation of a "contrary intention" to immediate vesting of freehold title under s40 Trustee Act 1925.

45. The 1986 Deed of Appointment and Retirement raises a further issue. That is, whether s40 Trustee Act 1925 applies in circumstances where there is an appointment and a retirement. The argument raised by Mr Walker, against himself, was that s40(1) covers an appointment of a new trustee, that s40(2) covers the retirement of an existing trustee with no new appointment but that neither cover the situation where there is a retirement and an appointment at the same time with the effect that there is a lacuna in the Trustee Act 1925.

46. The 1986 Deed of Appointment and Retirement is dated 1 August 1986. It is made between Father (as appointor), Mr Allison (as retiring trustee) and Mother and Philip as new Trustees. The Deed recites (1) the documents that it is supplemental too including the 1973 Deed; (2) Grandmother's death on 24 March 1982; (3) that Mr Allison wishes to be discharged from the trusts of the will; (4) that Father and Mr Allison wish to appoint Mother and Philip as new trustees in place of Mr Allison; (5) the identity of the property remaining within the will trusts (as identified in the schedules to the deed) and (6) the intention forthwith to transfer the relevant investments (but the freehold titles are not mentioned) into the names of Father, Mother and Philip.

47. As will be clear, the first issue is whether the deed is caught by section 40(1) Trustee Act 1925. It was common ground that it is not caught by s40(2) as that section only applies to retirements where there is no new appointment.

48. Despite Mr Walker's submissions I am satisfied that the situation in the 1986 Deed is indeed caught by s40(1) of the Trustee Act 1925. First, the wording of the section is that it applies where a new trustee is appointed (which is the case as regards the 1986 Deed). Secondly, the vesting provision in s40(1)(b) is that the vesting of the freehold title will be in the persons who "become or are" the trustees. That covers the new trustees and the existing trustee and excludes the retiring trustee. Thirdly, it would be surprising if there were to be a lacuna as submitted by Mr Walker.

49. I have already dealt with the separate argument that a deed containing the limited recital in the form that I have mentioned in some way manifests a "contrary intention" such that s40(1)(b) Trustee Act 1925 cannot operate to bring about the vesting.

50. Following oral argument in this matter I was provided with extracts from various books of precedents and from one volume of annotated statutes which support the view of the law that I have taken on both the points raised.

51. The 21st edition (1926) of "Davidson's Concise Precedents in Conveyancing" by A.T. Murray contains a precedent (Precedent V) for a Deed of Appointment by continuing trustee and retiring trustee where the latter is prepared to join in the deed (at page 45). It thus covers the factual situation of the 1986 Deed in this case. The deed contains a recital akin to that which is the fifth recital of the 1973 Deed and the sixth recital to the 1986 Deed, regarding vesting of investments (but making no mention of vesting of freehold title) and, as in both cases, no express declaration pursuant to s40(1)(a) Trustee Act 1925. In this respect the wording is therefore not materially different to that employed in the 1973 and 1986 Deeds. One of the notes to the precedent is that "In this case a vesting declaration appears unnecessary." This follows on from Precedent IV which does contain such a declaration but which, it is pointed out in a note, may be omitted and reliance (instead) be placed on s40 Trustee Act 1925.

52. "Key & Elphinstone's Precedents in Conveyancing" 15th Edition (1953), in the context of a partnership where title is held on trust for the partnership, explains that, in certain circumstances, a new trustee may be appointed; that where a partner trustee is retiring, a new trustee may be appointed in his/her place and that in either event a vesting declaration will be implied under s40(1)(b). This supports the view I have taken on the point raised by Mr Walker as to a possible lacuna in the legislation.

53. "Wolstenholme and Cherry's Conveyancing Statutes" 13th Edition 1972 by J.T. Farrand explains, in its notes to s40 Trustee Act 1925, that an express declaration was then rare because it attracted extra stamp duty and courted the risks of defects in form. It also expresses the view that the declaration (which from the text clearly covers an express or implied declaration under s40(1)(a) and (b) respectively) operates in favour of the old trustees, if any are continuing to act, as well as the new or additional trustees. It thus supports my view on Mr Walker's argument as to a lacuna in the legislation.

54. The 13th Edition (1973) of "Kelly's Draftsman" by R.W. Ramage has, under the heading "Trusts and Trustees", Precedent 1 (page 832), being an appointment of new trustees of a will trust on the death of one trustee, the number of trustees being

increased. The precedent is, in all material respects, in the same terms as the 1973 and 1986 deeds in this case with the freehold titles being dealt with in the first schedule and other investments in the second schedule. There is a recital regarding the intention to vest the investments (but no mention being made of the freehold titles) and the notes refer to s40(1)(b) as avoiding the need for a vesting declaration but giving the wording for one if it is desired to be used. This therefore supports my view regarding the effect of the key recitals in this case.

55. I should also note that, if I am incorrect that s40 of the Trustee Act 1925 was sufficient to divest Mr Allison of legal title, he was in any event divested of the same by his death on 26 February 2019 and so Philip is in any event the sole holder of legal title to the relevant land by survivorship. Nevertheless, my determination that Mr Allison ceased to be one of the holders of legal title to the land in 1986 is significant because of the WOFL transactions, to which he was not a party.

56. Accordingly, I will make a declaration in a form to be determined after this judgment is handed down.

The 1994 Tenancy

57. Certain incidents of the 1994 Tenancy became relevant when considering (a) the WOFL transactions and their interaction with the 1994 Tenancy; (b) the rights of Suzie when she retired as a partner and (c) the purported service of the notice to quit in this case by Suzie. It seems to me helpful to set out some of my conclusions on these points at this stage.

58. First, the 1994 Tenancy has been declared by the Court of Appeal to be "a tenancy from year to year of the land in which the 1975 Trust has a 50% beneficial interest, protected by the Agricultural Holdings Act 1986 of which the [Siblings] are the tenants (holding on trust for the partnership)."

(a) The nature of the trust

59. I accept that the nature of the trust is not that the tenancy is held for the individual partners beneficially as individuals but rather one held for the partnership as such, the primary terms of which are to be gained from the partnership agreement itself and otherwise from the general law of Partnership (both statutory and common law). As it is put in *Key and Elphinstone* in the edition that I have already referred to, the right of any partner is not in any specific partnership asset but in the surplus (if any) after a winding up and the payment of the liabilities of the partnership. During the term of the partnership, the partner's rights are like those of a next of kin while the administration of an intestate's estate continues. The right is to have the property administered in accordance with the partnership agreement (and otherwise partnership law) but there is no beneficial interest in the property as such.

60. This is in accordance with s28 of the Partnership Act which provides that partnership property is held by the partners (or I would add by the legal owners of the title to any partnership land) to be held and applied by them exclusively for the purposes of the partnership and in accordance with the partnership agreement.

61. However, if all the partners agree a specific disposition of partnership property that will usually bind them whatever the partnership agreement otherwise provides for.

62. The point has been explained more recently by Hoffmann LJ (as he then was), in *I.R.C. v Gray* [1994] S.T.C. 360 at 377c–e, as follows::

> "*As between themselves, partners are not entitled individually to exercise proprietary rights over any of the partnership assets. This is because they have subjected their proprietary interests to the terms of the partnership deed which provides that the assets shall be employed in the partnership business, and on dissolution realised for the purposes of paying debts and distributing any surplus. As regards the outside world, however, the partnership deed is irrelevant. The partners are collectively entitled to each and every asset of the partnership, in which each of them therefore has an undivided share."*

(b) Restrictions on landlord's right to terminate

63. So far as termination of an AHA protected periodic tenancy is concerned, the legislation effectively limits the effectiveness of a landlord's notice to quit. Most agricultural tenancies protected under the AHA 1986 are converted into periodic tenancies. A periodic tenancy protected under the AHA 1986 may be ended by the landlord in two sets of circumstances.

64. The first set of circumstances arise where a landlord serves a notice to quit, the tenant serves a counter notice claiming the protection of s26 AHA and the landlord then applies to the appropriate Tribunal seeking its consent to the operation of his notice to quit. In such circumstances consent will only be forthcoming if the Tribunal is (a) satisfied that at least one of six statutory grounds is made out (such as that the carrying out of the purpose for which the landlord wishes to terminate the tenancy is desirable in the interests of good husbandry, or in the interests of the sound management of the estate of which the land forms part or it comprises) and (b) does not consider that what is called the "fair and reasonable landlord" condition prevents consent being granted. As regards the latter, the Tribunal must withhold consent if in all the circumstances it appears to it that a fair and reasonable landlord would not insist on possession.

65. The second set of circumstances arise where the landlord serves a notice to quit relying on one or more specific statutory "cases" set out in Schedule 3. Again, if one such case is made out then the notice to quit will take effect. In some cases, the relevant determination will be made by way of arbitration as provided for by the AHA 1986. In other cases the determination will be made by the court. The cases in schedule 3 AHA 1986 are eight in number and encompass such matters as relevant failures by the tenant to farm in accordance with principles of good husbandry or to comply with a relevant notice to pay rent or to remedy certain breaches of the tenancy or that the tenant has become insolvent or has died.

(c) Improvements, tenant's fixtures etc.

66. As a generality, anything affixed to the land let under a tenancy will become part of the freehold and owned by the freehold landlord. In the case of trade fixtures and fixtures affixed for ornamentation or convenience, there is an exception to the general rule. Such trade or ornamental/convenience fixtures are "tenant's fixtures", which belong to

the tenant and which he might remove at any time whilst he is still in possession (see *New Zealand Government Property Corporation v. H.M. & S. Ltd* [1982] QB 1145 (the "NZ Govt Case").

67. The usual rules regarding improvements, fixtures and the like are modified in relation to tenancies protected under the AHA 1986. As Dunn LJ put it in the NZ Govt Case:

> *"agricultural tenants never had the right at common law to remove tenant's fixtures (see Elwes v. Maw (1802) 3 East 38), and this exception has by necessary implication been recognised in the provisions of the Agricultural Holdings Act 1948, which contains a compendious code for the ascertainment of " tenant's rights"."*

68. Under the AHA, a distinction is made between tenant's improvements and tenant's fixtures and buildings.

69. As regards fixtures and buildings, section 10 AHA 1986 provides (so far as relevant)*:*

> *" **Tenant's right to remove fixtures and buildings.***
>
> *(1) Subject to the provisions of this section—*
>
> *(a) any engine, machinery, fencing or other fixture (of whatever description) affixed, whether for the purposes of agriculture or not, to an agricultural holding by the tenant, and*
>
> *(b) any building erected by him on the holding,*
>
> *shall be removable by the tenant at any time during the continuance of the tenancy or before the expiry of two months from its termination, and shall remain his property so long as he may remove it by virtue of this subsection.*
>
> *(2) Subsection (1) above shall not apply—*
>
> *……*
>
> *(c) to a building in respect of which the tenant is entitled to compensation under this Act or otherwise, or*
>
> *….*

.

> *(3) The right conferred by subsection (1) above shall not be exercisable in relation to a fixture or building unless the tenant—*
>
> *(a) has paid all rent owing by him and has performed or satisfied all his other obligations to the landlord in respect of the holding, and*
>
> *(b) has, at least one month before both the exercise of the right and the termination of the tenancy, given to the landlord notice in writing of his intention to remove the fixture or building.*
>
> *(4) If, before the expiry of the notice mentioned in subsection (3) above, the landlord gives to the tenant a counter-notice in writing electing to purchase a fixture or building comprised in the notice, subsection (1) above shall cease to apply to that fixture or building, but the landlord shall be liable to pay to the*

tenant the fair value of that fixture or building to an incoming tenant of the holding.

(5) In the removal of a fixture or building by virtue of subsection (1) above, the tenant shall not do any avoidable damage to any other building or other part of the holding, and immediately after the removal shall make good all damage so done that is occasioned by the removal.

….

(7) This section shall apply to a fixture or building acquired by a tenant as it applies to a fixture or building affixed or erected by him.

(8) This section shall not be taken as prejudicing any right to remove a fixture that subsists otherwise than by virtue of this section."

70. A right to remove a fixture other by virtue of section 10 might arise, for example, under a contract.

71. As regards improvements and tenant-rights, sections 64 and 65 of, and Schedules 7 and 8 to, the AHA 1986 provide (so far as relevant) as follows (I show the current form to give an idea of the matters covered. The Schedule below is in its current form, as amended):

"64. Tenant's right to compensation for improvements.

(1) The tenant of an agricultural holding shall, subject to the provisions of this Act, be entitled on the termination of the tenancy, on quitting the holding, to obtain from his landlord compensation for an improvement specified in Schedule 7 or Part I of Schedule 8 to this Act carried out on the holding by the tenant, being an improvement begun on or after 1st March 1948.

(2) In this Act "relevant improvement" means an improvement falling within subsection (1) above.

(3) …..

(4) ….

65. Tenant's right to compensation for tenant-right matters.

(a) *The tenant of an agricultural holding shall, subject to the provisions of this Act, be entitled on the termination of the tenancy, on quitting the holding, to obtain from his landlord compensation for any such matter as is specified in Part II of Schedule 8 to this Act.*

(2) The tenant shall not be entitled to compensation under subsection (1) above for crops or produce grown, seeds sown, cultivations, fallows or acts of husbandry performed, or pasture laid down, in contravention of the terms of a written contract of tenancy unless—

(a) the growing of the crops or produce, the sowing of the seeds, the performance of the cultivations, fallows or acts of husbandry, or the laying down of the pasture was reasonably necessary in consequence of the giving of a direction under the Agriculture Act 1947, or

(b) the tenant shows that the term of the contract contravened was inconsistent with the fulfilment of his responsibilities to farm the holding in accordance with the rules of good husbandry.

(3) Subject to paragraphs 6 and 7 of Schedule 12 to this Act, subsection (1) above shall apply to a tenant on whatever date he entered into occupation of the holding.

SCHEDULE 7
LONG-TERM IMPROVEMENTS BEGUN ON OR AFTER 1ST MARCH 1948 FOR WHICH COMPENSATION IS PAYABLE
PART I IMPROVEMENTS TO WHICH CONSENT OF LANDLORD REQUIRED

1. *Making or planting of osier beds.*
2. *Making of water meadows.*
3. *Making of watercress beds.*
4. *Planting of hops.*
5. *Planting of orchards or fruit bushes.*
6. *Warping or weiring of land.*
7. *Making of gardens.*
8. *Provision of underground tanks.*

PART II IMPROVEMENTS TO WHICH CONSENT OF LANDLORD OR APPROVAL OF TRIBUNAL REQUIRED

9. *Erection, alteration or enlargement of buildings, and making or improvement of permanent yards.*

10. *Carrying out works in compliance with an improvement notice served, or an undertaking accepted, under Part VII of the Housing Act 1985 or Part VIII of the Housing Act 1974*

11. *Erection or construction of loading platforms, ramps, hard standings for vehicles or other similar facilities.*

12. *Construction of silos.*

13. *Claying of land.*

14. *Marling of land.*

15. *Making or improvement of roads or bridges.*

16. *Making or improvement of water courses, culverts, ponds, wells or reservoirs, or of works for the application of water power for agricultural or domestic purposes or of works for the supply, distribution or use of water for such purposes (including the erection or installation of any structures or*

equipment which form part of or are to be used for or in connection with operating any such works).

17. *Making or removal of permanent fences.*
18. *Reclaiming of waste land.*
19. *Making or improvement of embankments or sluices.*
20. *Erection of wirework for hop gardens.*
21. *Provision of permanent sheep-dipping accommodation.*
22. *Removal of bracken, gorse, tree roots, boulders or other like obstructions to cultivation.*
23. *Land drainage (other than improvements falling within paragraph 1 of Schedule 8 to this Act).*
24. *Provision or laying-on of electric light or power.*
25. *Provision of facilities for the storage or disposal of sewage or farm waste.*
26. *Repairs to fixed equipment, being equipment reasonably required for the proper farming of the holding, other than repairs which the tenant is under an obligation to carry out.*
27. *The grubbing up of orchards or fruit bushes.*
28. *Planting trees otherwise than as an orchard and bushes other than fruit bushes.*

SCHEDULE 8
SHORT-TERM IMPROVEMENTS BEGUN ON OR AFTER 1ST MARCH 1948, AND OTHER MATTERS, FOR WHICH COMPENSATION IS PAYABLE

PART I IMPROVEMENTS (TO WHICH NO CONSENT REQUIRED)
1.Mole drainage and works carried out to secure its efficient functioning.

2.Protection of fruit trees against animals.

3.Clay burning.

4.Liming (including chalking) of land.

4A. (1) Application to land in England of manure, fertiliser, soil improvers and digestate

[…]

5A.(1) In relation to England, production of manure arising from the consumption on the holding of relevant feeding stuff by livestock and equidae where the manure is held in storage on the holding.

[….]

PART II TENANT-RIGHT MATTERS

7. Growing crops and severed or harvested crops and produce, being in either case crops or produce grown on the holding in the last year of tenancy, but not including crops or produce which the tenant has a right to sell or remove from the holding.

8. Seeds sown and cultivations, fallows and acts of husbandry performed on the holding at the expense of the tenant (including the growing of herbage crops for commercial seed production).

9. Pasture laid down with clover, grass, lucerne, sainfoin or other seeds, being either—

(a) pasture laid down at the expense of the tenant otherwise than in compliance with an obligation imposed on him by an agreement in writing to lay it down to replace temporary pasture comprised in the holding when the tenant entered on the holding which was not paid for by him, or

(b) pasture paid for by the tenant on entering on the holding.

10.

(1) Acclimatisation, hefting or settlement of hill sheep on hill land.

[„„]

11.

(1) In areas of the country where arable crops can be grown in an unbroken series of not less than six years and it is reasonable that they should be grown on the holding or part of it, the residual fertility value of the sod of the excess qualifying leys on the holding, if any.

[….]"

72. Under the AHA 1986, Tenant's improvements and fixtures are also relevant to the setting of rent under the relevant tenancy. Section 12 of the AHA (supplemented by Schedule 2) provides for a process of, in effect, rent reviews. There are limits on how often the relevant process may be invoked. The version of section 12 in force as at the date of Suzie's resignation as partner was as follows:

"12. Arbitration of rent.

(1) Subject to the provisions of Schedule 2 to this Act, the landlord or tenant of an agricultural holding may by notice in writing served on the other demand that the rent to be payable in respect of the holding as from the next termination date shall be referred to arbitration under this Act.

(2) On a reference under this section the arbitrator shall determine what rent should be properly payable in respect of the holding at the next termination date following the date of the demand for arbitration and accordingly shall, with effect from that next termination date increase or reduce the rent previously payable or direct that it shall continue unchanged.

(3) A demand for arbitration under this section shall cease to be effective for the purposes of this section on the next termination date following the date of the demand unless before the said termination date—

(a) an arbitrator has been appointed by agreement between the parties, or

(b) an application has been made to the President of the Royal Institute of Chartered Surveyors for the appointment of an arbitrator by him.

(4) References in this section (and in Schedule 2 to this Act) in relation to a demand for arbitration with respect to the rent of any holding, to the next termination date following the date of the demand are references to the next day following the date of the demand on which the tenancy of the holding could have been determined by notice to quit given at the date of the demand.

(5) Schedule 2 to this Act shall have effect for supplementing this section."

73. Schedule 2 AHA provided, so far as relevant:

"SCHEDULE 2

ARBITRATION OF RENT: PROVISIONS SUPPLEMENTARY TO SECTION 12

Amount of rent

1(1) For the purposes of section 12 of this Act, the rent properly payable in respect of a holding shall be the rent at which the holding might reasonably be expected to be let by a prudent and willing landlord to a prudent and willing tenant, taking into account (subject to sub-paragraph (3) and paragraphs 2 and 3 below) all relevant factors, including (in every case) the terms of the tenancy (including those relating to rent), the character and situation of the holding (including the locality in which it is situated), the productive capacity of the holding and its related earning capacity, and the current level of rents for comparable lettings, as determined in accordance with sub-paragraph (3) below.

……

2(1) On a reference under section 12 of this Act, the arbitrator shall disregard any increase in the rental value of the holding which is due to—

(a)tenant's improvements or fixed equipment other than improvements executed or equipment provided under an obligation imposed on the tenant by the terms of his contract of tenancy, and

(b) landlord's improvements, in so far as the landlord has received or will receive grants out of money provided by Parliament or local government funds in respect of the execution of those improvements.

(2) In this paragraph—

(a)"tenant's improvements" means any improvements which have been executed on the holding, in so far as they were executed wholly or partly at the expense of the tenant (whether or not that expense has been or will be reimbursed by a grant out of money provided by Parliament or local government funds) without any

equivalent allowance or benefit made or given by the landlord in consideration of their execution,

(b)"tenant's fixed equipment" means fixed equipment provided by the tenant, and

(c)"landlord's improvements" means improvements executed on the holding by the landlord.

(3) Where the tenant has held a previous tenancy of the holding, then—

(a)in the definition of "tenant's improvements" in sub-paragraph (2)(a) above, the reference to any such improvements as are there mentioned shall extend to improvements executed during that tenancy, and

(b)in the definition of "tenant's fixed equipment" in sub-paragraph (2)(b), the reference to such equipment as is there mentioned shall extend to equipment provided during that tenancy,

excluding, however, any improvement or fixed equipment so executed or provided in respect of which the tenant received any compensation on the termination of that (or any other) tenancy."

74. Under s96(1) "fixed equipment" is defined as including:

"*any building or structure affixed to land and any works on, in, over or under land, and also includes anything grown on land for a purpose other than use after severance from the land, consumption of the thing grown or of its produce, or amenity, and any reference to fixed equipment on land shall be construed accordingly*".

Main Issue 2: The WOFL Transactions

(a) Introduction

75. The WOFL Transactions potentially affect land which is beneficially owned as to one half by the 1975 Trust and on which has been constructed part of the Golf Course. They also affect two other slivers of land in which the 1975 Trust does not have an interest as I explain below. The Golf Course is briefly described in paragraphs 28-31 of the First Judgment.

76. For present purposes, it suffices to note that, in the First Judgment, I said that the Golf Course was constructed between about 1990 and 1993. In fact the golf feasibility study prepared by ADAS was dated December 1991 and that, together with what is stated in the Partnership Accounts (considered later in this judgment), suggest that there was only limited expenditure incurred on the matter by April 1991 and that the main costs were incurred from April 1992 onwards. Limited trading by the Partnership in respect of the Golf Course is first recorded in the accounts for the year ending 4 April 1993.[2]

[2] The profit and loss account records zero figures or the year before, 1992. and simply two entries for 1993: wages of £500 and Depreciation of course equipment of £724.

77. A note of or for a Partners Meeting in March 2003 notes that:

> "*5.In 1991 we were in the CAP* [common agricultural policy]*; farm profits declined and diversification was the thing. So in May 1991, we began building the Golf Course."*

To some extent this is contradicted by Notes in support of a loan application to AMC which referred to construction as having commenced in 1990.

78. Further, the Partnership Accounts suggest that although the operation of the Golf club was such as to give rise to a separate profit and loss account in the Partnership Accounts from the year ending 5 April 2003, works continued in the financial years after that ending 5 April 1992, the most substantial expenditure being incurred in the years up to and including the financial year ending 5 April 1995.

79. I turn now to the key legal documents. For ease I cite paragraphs [143]-[147] of the First Judgment, dealing with the 1996 Declaration:

> " *[143] By Deed dated 1 September 1996, Father, Mother and Philip described as the "Owners") and who were at the time trustees of Grandfather's Will Trusts) entered into a deed with each of the Partners (the "1996 Declaration"). This Deed is one of those whose effect I have to rule upon being part of the "WOFL transactions". Having recited that the Owners were seized of the land forming the Golf Course, the Deed went on to recite that the Partners had constructed a golf course on that land with the knowledge and consent of the Owners incorporating a number of works then set out in detail including creation of tees, greens etc, the construction/creation of a club house and the conversion of a building into a professional shop and workshop and beer cellar and the creation of adjacent putting green, pathways, car park access road etc. all defined as "the Works". The third recital is that "The Partners are entitled to the value of the Works as is acknowledged by the Owners and the parties have agreed to enter into this deed in order to document the position". The operative part of the Deeds is short:*
> *"the Owners hereby acknowledge and confirm with the Partners that the Partners are entitled to the full value of the Works in the [Land]"*
>
> *[144] The background to this Deed is explained in the witness statement of Philip. I accept his evidence on this point. The position can be summarised as follows. The Partnership had constructed what are described in the 1996 Deed as the "Works", which for convenience I shall refer to as the "Golf Club Works".*
>
> *[145] In the normal way, and had the Partnership had the benefit of an AHA tenancy as submitted on behalf of Philip and Jamie, the Golf Club Works would have constituted tenant's improvements.*
>
> *[146] WOFL also owned some freehold land adjacent to Spring Hill House which it had purchased from the family. It was intended that WOFL would in due course sell the land to a developer, as residential development plots, once full planning permission had been obtained. The problem was that such sale would be likely to trigger a capital gains tax liability on the part of WOFL. The tax saving plan was*

that WOFL would use the sale proceeds to purchase the Golf Club Works from the Partnership. It was hoped that WOFL would then be able to claim rollover relief.

[147] The sums received by the Partnership would, in effect, reimburse it for its expenditure on the Golf Club Works. WOFL would then lease the Golf Club Works to the Partnership so that it could continue to operate the golf club."

80. I will have to return to the above background, as before me on the current occasion there was much more focus on the precise manner in which and timing over which matters had developed, not least by reference to the contemporaneous documents. This was particularly relevant to the issue of construction of the deeds effecting the WOFL transactions.

81. As regards the later deeds, executed in 2003 and which are also relevant and comprise three sets of assignments and leases of different portions of the Golf Course, it is convenient to set out paragraphs [157] to [164] of the first judgment:

"[157] In October 2003 a number of documents were executed as below, which form some of the documents which are part of the WOFL Transactions, upon whose effect I am asked to rule.

[158] By an assignment made on 3 October 2003 between (1) each of the Partners (defined as "the Assignors"); (2) WOFL and (3) Father, Mother and Philip, defined as "the Land Owners", the Assignors assigned the "Workings in Land" for the sum of £225,000 to WOFL (the "**First WOFL Assignment**"). The Landowners consented to that assignment and acknowledged that "*the Assignors prior to the assignment herein were the owners of and were entitled to the full value of the Workings in Land which are now vested in the Assignee*." Recital 2 to the Deed identified the "Workings in Land" as follows: "*The Assignors are the owners of and are entitled to the full value of the golf clubhouse and ancillary buildings upon the land at Skelton …shown* [on the annexed plan] *("the Workings in Land")*". The plan shows that part of the Golf Course close to Wide Open Farm House on which the Club House and other buildings, and the pond, were constructed.

[159] By a lease dated 3 October 2003, made between WOFL and the Partners, WOFL leased "the golf club house and ancillary buildings" (see Schedule 1) for a 25 year term at an initial rent of £13,000 per annum (the "**First WOFL Lease**"). The lease was a very full business tenancy as if the property leased was of land and contained clauses regarding e.g. insurance, repairing, painting, user, alienation and so on. Apparently according to an order of the York County Court dated 2 October 2003 the Landlord and Tenant agreed that ss24-28 of the Landlord and Tenant Act 1954 should be excluded.

[160] By a further assignment made on 31 October 2003 and again made between (1) each of the Partners, defined as the "Assignors", (2) WOFL and (3) Father, Mother and Philip (defined as "the Landowners"), the Assignors assigned the "Workings in Land" to WOFL for £222,000 (the "**Second WOFL**

Assignment"). Recital 2 to the Deed identified the "Workings in Land" as follows: "*The Assignors are the owners of and are beneficially entitled to the full value of the beneficial workings in land…shown* [on the annexed plan] *("the Workings in Land")*". The plan shows a significant portion (but not all) of the Golf Course situated on what had been fields of Park Farm and that part of the Golf Course at Plot 2333. The assignment otherwise contained the same terms (mutatis mutandis) as the First WOFL Assignment.

[161] By a lease dated 31 October 2003, made between WOFL and the Partners, WOFL leased "*the beneficial workings in land at Skelton*" shown on the plan attached to the Second WOFL Assignment to the Partners for a 25 year term at an initial rent of £12,000 per annum (the "**Second WOFL Lease**"). The lease is in similar terms to that in relation to the clubhouse and ancillary buildings (admittedly with some covenants left out, such as painting). However, many of the covenants make little sense in relation to a golf course with no relevant buildings but just fairways, bunkers etc. In this respect I have in mind, by way of example, covenants not to stop up or darken any light in the demised premises or to treat all materials surfaces and finishes of the interior and exterior of the demised premises. Again, Part II of the Landlord and Tenant Act 1954 was excluded, this time by virtue of an Order of the York County Court dated 27 October 2003.

[162] By a further assignment dated 25 November 2003, and again made between (1) each of the Partners, defined as the "Assignors", (2) WOFL and (3) Father, Mother and Philip (defined as "the Landowners"), the Assignors assigned the "Workings in Land" to WOFL for £178,000 (the "**Third WOFL Assignment**"). Recital 2 to the Deed identified the "Workings in Land" as follows: "*The Assignors are the owners of and are beneficially entitled to the full value of the beneficial workings in and…shown* [on the annexed plan] *("the Workings in Land")*". The plan shows a significant portion (but not all) of the Golf Course situated on what had been fields of Park Farm and the Glebe Field Sliver. The assignment otherwise contained the same terms (mutatis mutandis) as the First WOFL Assignment.

[163] By a lease dated 31 October 2003, made between WOFL and the Partners, WOFL leased the beneficial workings in the land shown on the plan attached to the Third Golf Assignment to the Partners for a 25 year term at an initial rent of £10,000 per annum (the "**Third WOFL Lease**"). This lease was in similar terms to that of the Second WOFL Lease. Again, Part II of the Landlord and Tenant Act 1954 was excluded by Order of the York County Court this time dated 10 November 2003.

[164] The accounts of WOFL for the year ending 31 March 2004 show acquisition of freehold land (categorised on the balance sheet as current assets, investments) with a value of £631,250 in the year. This seems largely to reflect the sum of £625,000 made up of the three sums payable [by] WOFL under the WOFL Assignments. In the accounts for the year ended 31 March 2004 the description of "Current Assets-Investments"
changes to "freehold land, buildings and workings in land"."

82. In April 2013 there was also a conveyance back from WOFL, to the Partners, of the workings in land the subject of the First WOFL Assignment (the "*2013 WOFL Re-assignment*"). This was dealt with in paragraph [202] of the First Judgment:

> "*[202] By an assignment dated 2 April 2013 and made between (1) WOFL, (2) each of the Partners and (3) Father, Mother and Philip (as the "Landowners"), WOFL assigned to the Partners the Workings in Land forming the subject matter of the First WOFL Assignment for the sum of £120,000 (plus VAT of £24,000) (the "**WOFL Reassignment**").*

83. In fact, the assignment was into the name of Father, Philip and James. I do not understand it to be in issue that the reassignment was beneficially in favour of the Partnership, such that beneficially the interest became Partnership property, rather than being an assignment in which the legal and beneficial interests vested in the three individuals in their own right and outside the Partnership.

84. The effect of the 2013 WOFL Re-assignment was itself apparently reversed, by a further deed dated 14 August 2017 between Philip and Jamie (as Assignors), WOFL (as Assignee) and Philip (as Landowner) (the "2017 WOFL Re-assignment"). That followed a similar form to the earlier assignments and involved an assignment back to WOFL of the Golf Club House for a sum of £150,000.

85. The 2017 WOFL Re-assignment was a document that emerged as a result of the further written submissions made after the hearing before me. According to Mr Walker, this document had not been disclosed by the Brothers before this, even though questions had been asked by Suzie's solicitors, by letter dated 28 June 2019, of the relevant accounts of WOFL about entries that apparently reflect the 2017 WOFL Re-Assignment. According to Mr Walker such letter never received a substantive reply.

86. Mr Walker raises issues as to whether the 2017 WOFL Re-assignment was approved by his client and, if not, whether it is voidable (at least on one ground, if not others) as being a substantial property transaction with its directors (the Brothers) which was not validly approved as required by s190 Companies Act 2006. For the purposes of this judgment I assume its validity but leave open the issue of whether it might be liable to set aside and that Mr Walker as expressly reserving his client's position in this respect and (without limitation) whether by reference to possible derivative proceedings, proceedings by WOFL or an unfair prejudice petition pursuant to s994 Companies Act 2006. I should also add that there may be a construction issue regarding precisely what area of land (in a surface areas sense) is the subject of the transfers in 2003, 2013 and 2017 and whether they are the same or not. That issue I also leave open.

87. In that part of the trial leading to the First Judgment the position of the parties and my preliminary conclusions are recorded in paragraphs [285]-[289] of that Judgment as follows:

> "[285] The claim as pleaded in the Particulars of Claim in relation to the WOFL Transactions is that:

(i) the effect of the 1996 Declaration was "at the most" to declare a charge over or beneficial interest in the proceeds of sale of the relevant identified land parcels representing the value added to the land by the workings described therein;

(ii) the effect of the Assignments was "at the most" to vest the "said charge over or beneficial interest in the proceeds of sale of the 1996 Declaration Land" in WOFL;

(iii)The three WOFL leases were ineffective to grant to Father and the Siblings (or the Partnership) "any legal estate or interest" in the "Golf Course Land" or "any rights of occupation or possession".

[286] The case for the Brothers is that the land under the Golf Course (and [under] any other Golf Course works such as the clubhouse) was not vested in WOFL but remained subject of the [1994] AHA tenancy….

[287] As regards the Golf Course itself and the relevant buildings, I understand the Brothers to assert that the effect of the 1996 Declaration and WOFL assignments to be that relevant freeholders in each case agreed and conveyed to, or at least acknowledged beneficial ownership of a stratum of the land in, the Partnership and then WOFL

[288] WOFL is not a party to the current proceedings and there is therefore a question as to how appropriate it is for me to grant any declaratory or other relief. Mr Walker says that the directors and shareholders are all parties and WOFL is deadlocked. That is as maybe. Had this been the only issue I would simply have joined WOFL. However, it is not.

[289] My concern is heightened by the fact that the Trustees of the 1997 Trusts are about to change and the current trustees of the 1997 Family Trusts are all hopelessly conflicted on the issues that arise. Further, the 1975 Trust's position (and that of the First 1997 Trust) was in a sense protected by Suzie's challenge to the WOFL transactions, but Suzie has since changed her position. Suzie, who in her pleadings and by submission challenged the efficacy of the WOFL transactions as a matter of law, by the time of closing submissions was saying that she would accept the position that the 1996 Declaration gives some sort of beneficial interest in the land to the Partnership. Going ahead on that course could create issues for the Trustees of the Family Trusts, especially given that I have decided that there is no current AHA Tenancy of the lands in which the 1975 Trust has a 50% beneficial interest. The trustees need to know what the current rights of occupation are in the land in which they, as trustees, have an interest (and in particular what, if any, interest the Partnership has had and now has in what land and which land or strata of lands it has occupied) both for the future and for the purposes of determining the rights, if any, they have in relation to the past position.

[290] I had considered giving a preliminary view on these issues but on reflection consider that it is inappropriate for me to do so until the new Trustees (and the 1975 Trust trustee) have considered their position and decided what to do and, if the matter is taken further, WOFL is joined into any proceedings. Having received a draft of this judgment for the purposes of providing

> corrections, Mr Walker sought to re-open argument on my decision and asserted that WOFL did not need to be a party because the directors and shareholders are before the Court and WOFL is deadlocked and that no further facts were needed for a decision as to the legal effect of the WOFL transactions to be made. As regards the first point, I would have readily joined WOFL as a party if that was the only procedural impediment. I do not agree that it is enough that the shareholders and directors of WOFL are parties, and that this would dispense with any need to joint WOFL. However, given the fact that Suzie has changed her position on the legal effect of the transactions and given that there must be the same locus questions that I address below as regards her ability to bring proceedings on behalf of the Family Trusts, I remain of the view that the (new where relevant) Trustees of the Family Trusts should have an opportunity to make representations on the issues."

(b) The relevant parties before the court

88. Since the First Judgment: the Court of Appeal has found that the Partnership has the benefit of the 1994 Tenancy; WOFL has been joined as a party and the Trust Corporation is now the sole trustee of each of the relevant trusts, the 1975 Trust and the two 1997 Trusts. As regards the 1994 Tenancy, legal title to the land leased to the Partnership (being the 1994 Tenancy) is held by the three Siblings by survivorship and is the subject of declaration by the Court of Appeal.

89. As regards title to the freehold land which forms the vast majority of the land potentially affected by the WOFL Transactions, legal title is vested in the name of Philip alone as confirmed by me earlier in this judgment). The beneficial interests are vested as to one half in the 1975 Trust and, depending on the precise plot of land, the remaining one half beneficial interest is held either by the First 1997 Trust or in equal shares for each of the Siblings (so that each holds a one sixth overall beneficial interest in such plot of land).

90. As regards the 1994 Tenancy, as I have said, legal title is vested in the Siblings. They hold it on trust for the Partnership, which is now a partnership between Philip and Jamie (see Court of Appeal Order dated 12 February 2021, as amended under the slip rule, CPR r40.12, on 17 March 2021).

91. However, there are two slivers of land which form part of the Golf Course, which are purportedly affected by the WOFL transactions and which (leaving aside the WOFL Transactions) are held in different legal and beneficial ownership. These two slivers are Plot 2333, in which each of the Siblings has a one third beneficial share, and the Glebe Field Sliver, in which the First 1997 Trust has a two fifths beneficial interest and the Siblings each have a one fifth beneficial interest. Further identification of these plots is made in the First Judgment.

92. As regards legal title to Plot 2333, paragraph 38 of the First Judgment is in the following terms:

> "Plot 2333 was originally purchased by the Partnership. Legal title was originally conveyed to Mother, Father, Philip and Suzie to be held beneficially for Father, Mother and each Sibling as to one-fifth each. Father later gifted his one-fifth

> beneficial interest to Mother on 23 August 1996. Mother later gifted, by declaration of trust, her, by then, two-fifths beneficial interest to the three Siblings on 7 May 2006."

93. Legal title to the freehold of Plot 2333 is accordingly vested in Philip and Suzie by survivorship. It is held by them for each Sibling as to a one third beneficial interest each. Each legal and beneficial owner is a party before me.

94. As regards the Glebe Field Sliver, it is agreed that legal title to the freehold is held by Philip and Suzie. The beneficial interests are the First 1997 Trust (as to two fifths) and each of the Siblings (as to one fifth each). Each of the legal and beneficial owners is a party before me (the First 1997 Trust through the trustee, the Trust Corporation).

95. Accordingly, procedurally all the relevantly affected parties are before the court to enable me to make a declaration regarding the effect of the WOFL transactions in relation to the land purportedly affected by such transactions.

(c) The issues

96. Before me on the renewed trial, it became clear that the main points in issue were ones of construction, the application of the doctrine of estoppel by deed and the application or otherwise of the principle of merger.

97. The pleadings filed in relation to the WOFL Transactions following the First Judgment commenced with Points of Claim filed by the Brothers. In summary the Amended Points of Claim assert:

(1) The 1996 Deed was effective to confirm existing ownership or transfer of ownership, both legal and beneficial, in the relevant Golf Course land to the Partnership which had incurred substantial costs in creating the Golf Course. The land conveyed was a stratum of the relevant land (in effect, and in broad terms, the surface of the land to which the workings had been applied). Technically, title to this stratum was conveyed into the names of the individual partners (Father, Mother, and the three Siblings) and they held it on trust for the Partnership.

(2) Each of the 2003 Deeds of Assignment effected a transfer to WOFL by the Partners of the freehold title to (and beneficial ownership in) the relevant parcel of land the subject of the same. Alternatively, the parties thereto are estopped from asserting the contrary.

(3) Each of the 2003 Leases created a lease (and interest in land) in the partners (on trust for the Partnership) in respect of the relevant parcel of land the subject of the lease in question, alternatively the parties thereto are estopped from denying the same.

(4) The 2003 leases were leases of the reversion to the 1994 Tenancy. As such the tenants thereunder are mesne landlords of the 1994 tenants.

98. The amended Points of Defence and Counterclaim assert, and the following is a broad summary only:

(1) The 1996 Deed created no interest in land but only acknowledged an entitlement to value. Alternatively, if it did create an interest in land the value of that beneficial interest was the value by which the relevant land was increased by the relevant works.

(2) Consistently with the 1996 Deed, the three 2003 Deeds of Assignment simply transferred whatever interest had been confirmed by the 1996 Deed, namely an interest in the value of the relevant works, alternatively a beneficial interest in the land which was measured by the increase in value of the land by the works having been effected. No legal interest was conveyed or vested in WOFL. Estoppel by deed cannot operate to bring about a situation in which freehold legal title and beneficial interest are vested in WOFL by estoppel as the deed does not, on its true construction, say that WOFL is the freehold owner.

(3) The 2003 Leases were not legal interests, as WOFL had no title to grant the same. Further or alternatively, they took effect as contracts for leases only as they had not been registered. At most, a tenancy by estoppel is created.

(4) As regards the 1994 Tenancy, the estoppel in relation to the 2003 Lease terms means that the 1994 Tenancy cannot be asserted as being inconsistent with the 2003 Leases.

99. In paragraph [288] of the First Judgment I expressed concerns that the trustees of the 1975 and 1997 Trusts might have a separate interest in the determination of the effect of the WOFL transactions. I also expressed concern that Suzie, at that point having changed her case regarding the 1996 Declaration, and by then accepting that it gave some sort of beneficial interest in the Land to the Partnership, resulted in no-one arguing to the contrary (which might affect beneficiaries under, at the least, the 1997 Trusts or one or other of them). Since then, the position has changed again. Suzie has changed her position again on the 1996 Declaration. The Trust Corporation is now firmly in the saddle as trustee of the three trusts and has had an opportunity to consider its position in the light of the new statements of case and the skeleton arguments. Ms Murphy indicated that the Trust Corporation did not want to advocate any position on the WOFL Transactions but was content to leave the Siblings to put the various arguments. In those circumstances, she withdrew from the renewed trial so far as it concerned the WOFL transactions.

(d) The history and contemporaneous documents

100. Prior to the 1994 Tenancy, the farm, overall, had been the subject of various tenancies held by Mother or Father. The Partnership had farmed the land, in effect "paying" the rent on behalf of the relevant tenant as explained in the First Judgment (see e.g. paragraph [232] of the First Judgment regarding the manner in which rent was paid as a bookkeeping exercise). Various surrenders of tenancies were entered into on 28 June 1994. From that date the 1994 Tenancy started. For present purposes I do not need to consider the precise tenancy arrangements in place as regards Plot 2333 and the Glebe Field Sliver but it may be sensible for those plots to be addressed in due course, either by agreement or if necessary, by a short supplemental judgment.

(i) The accounts and Philip's explanations

101. The Partnership Accounts show expenditure (and disposals) regarding the Golf Course, which were capitalised in the balance sheet as fixed assets, as follows. The relevant matters relating to the Golf Course appear under the relevant notes to the balance sheet regarding "Fixed Assets". In the column headed "Year", the first date is the date of the financial year end covered by the accounts and, in parentheses, the date of signature of their report on such unaudited accounts by the accountants where available:

Year	**Balance sheet: Fixed Assets**
06.04.91	Golf Course: £1,367 (shown in 1992 Accounts)
05.04.92 (17.03.93)	Golf Course: £83,938
05.04.93 (11.06.98)	Golf Course Land (Hall Moor) £5,350 Golf Course: £253,908 ('92: £78,588) Clubhouse: £666 Course Equipment: £8,925
5.04.94 (11.06.98)	Golf Course Land (Hall Moor) £5,350 Golf Course: £359,311 Clubhouse: £54,927 Course Equipment: £14,770
05.04.95 (11.06.98)	Hall Moor Land: £5,350 Golf Course: £391,185 Clubhouse: £110,140 Course Equipment £21,322 Clubhouse Equipment £9,225

Year	**Balance sheet: Fixed Assets**
05.04.96 (20.10.97)	Hall Moor Land* £5,350 Golf Course* £411,820 Clubhouse* £153,880 Course Equipment £39,330 Clubhouse Equipment £19,844 *All workings in land to include those relating to the construction, improvement and operation of the golf course have been carried out and paid for by the partnership, the occupier, with the consent of the landowner. The partnership is entitled to the full value and/or benefit of such works which are therefore shown in the accounts as assets of the partnership.
05.04.97 (20.10.97)	Hall Moor Land* £5,350 Golf Course* £414,705 Clubhouse* £155,535 Course Equipment £35,226 Clubhouse Equipment £16,867 *All workings in land to include those relating to the construction, improvement and operation of the golf course have been carried out and paid for by the partnership, the occupier, with the consent of the landowner. The partnership is entitled to the full value and/or benefit of such works which are therefore shown in the accounts as assets of the partnership.

Year	**Balance sheet: Fixed Assets**
05.04.98 (09.12.98)	Hall Moor Land* £5,350 Golf Course* £417,582 Clubhouse* £155,535 Course Equipment £32,310 Clubhouse Equipment £14,337 *All workings in land, to include those relating to the construction, improvement and operation of the golf course have been carried out and paid for by the partnership, the occupier, with the consent of the landowner. The partnership is entitled to the full value and/or benefit of such works which are therefore shown in the accounts as assets of the partnership.
1999	Not available
05.04.2000 (02.01.01)	Golf Course and equipment: £504,642 (06.04.99 £467,995) Clubhouse and equipment: £167,596 (06.04.99 £168,228)
05.04.01	Golf Course and equipment: £502,905 Clubhouse and equipment: £165,787
05.04.02 (22.01.03)	Golf Course and equipment: £510,039 Clubhouse and equipment: £166,853
05.04.03 (15.01.04)	Golf Course and equipment: £547,516 Clubhouse and equipment: £165,155 All workings in land, to include those relating to the construction, improvement .and operation of the golf course have been carried out and paid for by the partnership, the occupier, with the consent of the landowner. The partnership is entitled to the full value and/or benefit of such works which are therefore shown in the accounts as assets of the partnership.

Year	**Balance sheet: Fixed Assets**
05.04.04 (05.12.04)	Golf Course and equipment: £103,380 (disposal of £447,078) Clubhouse and equipment: £165,155 (disposal of £165,155) All workings in land, to include those relating to the construction, improvement and operation of the golf course have been carried out and paid for by the partnership, the occupier, with the consent of the landowner. The partnership is entitled to the full value and/or benefit of such works which are therefore shown in the accounts as assets of the partnership
05.04.13	Fixed Assets Tangible Assets Golf Course and Equipment: Addition of £121,452

102. The Partnership accounts covering the period of the 2017 WOFL Re-assignment are not in evidence before me.

103. A narrative description of the relevant parts of the 2004 and 2005 WOFL Accounts is set out at paragraph [164] of the First Judgment (which contains a typo: the second reference to 2004 accounts, as the context makes clear, should be to the 2005 accounts). Expanding upon that paragraph, the unaudited WOFL accounts for the year ending 31 March 2004 contain an accountants' report dated 20 December 2004. The balance sheet shows investments of £689,250, under the heading "Current Assets". Note 7 to that entry records an addition of in the year of £631,250. The note goes on to state that:

> "*The Investments are of freehold land which are shown at cost."*

104. The WOFL unaudited accounts for the year ended 31 March 2005 contain an accountants' report dated 4 December 2005. The relevant note states that:

> "*Investments consist of freehold land, buildings and workings in land, which are shown at cost*".

105. The relevant entries in the Partnership Accounts for the year ending 5 April 2013, as in the above table, appear to reflect the 2013 WOFL Re-Assignment. Partnership accounts covering the period in which the 2017 WOFL Re-assignment took place are not in evidence.

106. As regards the WOFL accounts, those for the year ending 5 April 2013 show Freehold Property at cost of £689,00 with a note that "The freehold land, buildings and workings in land were valued at an open market value [by Philip] of Chesterton Humberts on 8 September 2011, at not less than £689,250." At this time the directors of WOFL were Father, Mother and the Three Siblings.

107. The treatment of the 2013 WOFL Re-Assignment in the WOFL accounts for the year ending 31 March 2014 (Accountants' Report dated 17 December 2014) is dealt with in

paragraph [203] of the First Judgment (though there is a typo, corrected below, the reference in the First Judgment to 2004 should be to 2014):

> *"[203] The accounts of WOFL for the year ended 31 March 2014 show the disposal of what by then were described in the balance sheet as "Fixed Assets-Tangible Assets" and in the notes to the accounts as "Land and Buildings Freehold", assets with a cost value of £135,000. The notes to the accounts record the sale to the Partnership of "property..for £120,000*".

108. The 2017 WOFL Re-Assignment appears to be recognised in the WOFL accounts for the year ending 31 March 2018. These were placed before me by Mr Walker as part of his reaction to the revelation of the 2017 WOFL Re-Assignment by Mr Peters. Those accounts show additions to Land and Buildings, in fixed assets, of £150,000.

109. With regard to the rent paid by the Partnership as a matter of generality, I refer to paragraphs [207] to [217] of the First Judgment. I must now deal in slightly more detail with the rent position regarding the Golf Course. It is accepted as between Mr Peters and Mr Walker that factually there has been an apportionment of rent under the 1994 Tenancy. Mr Walker says that this has never been challenged by his client. Nevertheless, at least in theory, others may be in a position to challenge it and for completeness it is sensible if I set out the position.

110. Mr Peters provided me with a written summary of the factual position after the trial which I did not understand to be challenged by Mr Walker. It was, as regards the position prior to the 2003 WOFL Transactions, as follows:

> "*Prior to the WOFL transactions, there had already been an apportionment of the rent payable by the Partnership under the 1994 AHA tenancy, from 1999 onwards, as between (a) the area of the demise that had been turned into the golf course, and (b) the other areas of the demise. Thus of the overall rent of £15,475 p.a., £4,434 p.a. was apportioned to the golf course area of the demise, and £11,041 p.a. to the other areas of the demise. That apportionment was based on the respective acreages of those areas, in line with advice which had previously been given by the family accountants concerning the apportionment of rent. That rent was payable for the underlying land occupied by the golf course area, but not for the golf club works that were subsequently the subject matter of the WOFL transactions (on the basis that the Partnership had paid for those itself). That apportionment of the 1994 AHA tenancy rent between the golf course area of the demise and the other areas of the demise was then reflected in the annual agreed accounts of the Partnership, which from 2000 onwards divided the Partnership P&L accounts between its main farming activities and the golf course."*[3]

111. I would only qualify that statement by making clear my understanding that the apportionment of the rent under the 1994 Tenancy was pro rata by respective acreage as a percentage of the overall acreage and that the apportionment did not treat that area covered by the Golf Course as having any greater (or lesser) value per acre than the land which continued to be farmed in the traditional manner. I also do not understand

[3] See w/s of Philip Procter paras. 756 - 757 (esp. 756(5) & 757) at **[2/219 - 220]** & 7765(4) **[2/226]** (& para. 237 re the previous advice re acreage as the appropriate basis for an apportionment: **[2/212]**); & e.g. 2000 partnership accounts at **[4/110 at 113, 114]**, 2001 Partnership accounts at **[4/117 at 120, 121]**, etc.

this apportionment to have been calculated on the basis that, at the time, there had been any split in the freehold reversion to the 1994 Tenancy as regards the land on which the Golf Course was situated (that is reflecting what Mr Peters submits occurred in 1996 or 2003, namely that there were two freehold reversions to the land on which the Golf Course was situated, a freehold reversion to the surface and a freehold reversion to the sub-surface).

112. As regards the position after the 2003 WOFL Transactions, the factual position is explained by Mr Peters as follows. Again, I do not understand this to be challenged, either as a description as to what has happened or in terms of seeking to make any claim in respect of the same, by Suzie.

> "Following the 2003 WOFL Deeds of Assignment between the Partners and WOFL, and the grant of the 2003 WOFL Leases from WOFL back to the Partners, the Partnership then paid WOFL the annual rent reserved by those three WOFL leases (£13,000 p.a., £12,000 p.a. & 10,000 p.a. respectively: a total of £35,000 p.a.), in addition to the rent payments in respect of the 1994 AHA Tenancy.[4]

113. As I understand it, this means that after the 2003 WOFL Transactions, the Partnership paid WOFL the rents under the WOFL Leases (of £35,000 p.a.) and also paid £4,432 in respect of the 1994 Tenancy, so far as applying to land on which the Golf Course stood. The position after each of the 2013 WOFL Re-Assignment and the 2017 WOFL Re-Assignment were not enlarged upon.

114. I turn to the accounts in evidence before me.

115. As regards the rent payable by the Partnership in respect of the Golf Course that is recorded (with rates) in the "Golf" Profit and Loss accounts[5] contained within the Partnership's accounts and (after the 2003 WOFL Transactions) within the WOFL accounts. As regards the WOFL accounts there is simply an entry for "Rent received" which may cover rent other than in respect of the WOFL leases. After 2006 the notes make clear £37,000 was received from the Partnership. The total rent payable under the 2003 WOFL Leases was £35,000 made up as to £13,000 (First WOFL Lease), £12,000 (Second WOFL Lease) and £10,000 (Third WOFL Lease).

Accounts Y/E (Partnership usually had financial year end of 05.04; WOFL usually had financial year end of 31.03)	**Partnership Accounts Golf Club P/L account "Rent and rates" except where otherwise identified***	**WOFL Accounts (Rent received from partnership)**
Apr 1993	-	

[4] See w/s of Philip Procter paras. 775(6) - 776 **[2/226]**; & e.g the 2004 Partnership accounts at **[4/140 at 144]** (part year only, after the WOFL leases were granted in Oct/Nov 2003), the 2005 Partnership accounts at **[4/148 at 152]**, etc.

[555] Up to and including 1998 the relevant Profit and Loss account is headed up not "Golf" (as it was afterwards) but "Forest of Galtres", the name of the Golf Club, although the index to the accounts refers to this page as being "Profit and Loss account- Golf Course".

Apr 1994	£1,114 (described as "Rates and Water")	
Apr 1995	£1,219 (described as "Rates")	
Apr 1996	£6,114 (described as Rates)	
Apr 1997	£4,767 (described as "Rates")	
Apr 1998	£5,534 (described as "Rates")	
Apr 1999	(Accounts not in evidence)	
Apr 2000	£10,071	
Apr 2001	£11,470	
Mar/Apr 2002	£11,355	£2,000 (rent receivable: source not identified)
Mar/Apr 2003	£14,206	£2,000 (rent receivable source not identified)
Mar/Apr 2004	£27,899	£16,354
Mar/Apr 2005	£52,567	£37,000
Mar/Apr 2006	£58,199	£37,000
Mar/Apr 2007	£55,625	£37,000
Mar/Apr 2008	£56,398	£37,000

Mar/Apr 2009	£57,152	£37,000
Mar/Apr 2010	£57,523	£37,000
Mar/Apr 2011	£57,225	£37,000
Mar/Apr 2012	£56,970	£37,000
Mar/Apr 2013	£57,670	£37,000
Mar/Apr 2014	£49,670	£29,134.71
Mar/Apr 2015	£50,502	£29,000
31.03.17 (taken from 2018 accounts)		£29,000
31.03.18		£32,337

*In some cases the figure shown in the Partnership accounts for rent and rates for the year of the accounts in question is a slightly different figure to that shown in the following year's accounts as being the previous year rent and rates charge to the Golf profit and loss account.

(ii) Other contemporaneous documents

116. I turn now to other contemporaneous documents.

117. In August 1999, there was a proposal that WOFL purchase "workings in land" from the Partnership. A letter dated 6 August 1999 from the accountants refers to this as follows:

> "*If the company is to acquire the workings in land etc., from the partnership then the partnership must charge the company VAT on the market value of the workings in land etc., sold to the company."*

118. In September 2000, Father wrote to the accountants, Barron & Barrpn, proposing that WOFL would purchase "items" from the Partnership. This was against the background of another part of the proposal which was that the Partnership would repay the loan account that it held with WOFL.

119. By March 2001, the proposal was spelled out by Father as follows:

> "*GW Procter and Ps propose to accept a loan from NWB of £60,000 for the purpose of repayment of the balance of the loan from Wide Open F to the Ps, before 31 March 2001.*
>
> *My information is that the figure quoted on the 14/9/00 was £53,306 and that a Tax Rebate of 25% i.e. £13,326 would be receivable by WOFL, Jan1 - 2012 but please check.*
>
> *The money introduced into WOFL would be used in July-Aug 2001, to purchase new works for the Golf Course (i.e. the Ps), on a commercial basis. We would reinvest the surplus funds in WOFL between 31 Mar 01 and Aug 2001 on the market."*

120. In June 2001, an application was made to register WOFL for VAT. That was refused on the basis that no relevant taxable supplies had been made by WOFL, but seeking third party evidence of an intention that it should do so.

121. By letter dated 14 August 2001, the accountants confirmed:

> "*I have spoken to Customs & Excise today who have agreed a 14 day extension on forwarding of evidence they require confirming that the Club House etc., are to be purchased by the company, then they will proceed with the registration."*

122. In September 2001, HMRC then confirmed to the Partnership that the sale of the Club House and the Barn by it would be exempt for VAT purposes. As the accountants then wrote to Father:

> *"I enclose herewith a letter from H M Customs & Excise and you will be pleased to note that they regard the sale of the properties to be exempt from VAT which means no VAT needs to be charged therefore there is no need to register Wide Open Finance Ltd unless you wish to."*

123. An early mention of what became the 2003 WOFL Transactions is mentioned in the note of or for the Partnership meeting held on March 1/2 2003 that I have referred to and which is cited at paragraph [154] of the First Judgment. The note refers to the Golf Course soaking up money/capital and a decline in farm profits with the result that "*we were undercapitalised and had a cash flow problem*" resulting in the taking out of various loans. One of these appears to have been a loan from the Agricultural Mortgage Corporation plc in May 1993 in a sum of over £161,000 for a 25 year term.

124. The note goes on to refer to a particular "*crisis with NWB*" (a reference to National Westminster Bank) in January/February 2002, resulting in a capital injection of £20,000 by each of Father and Mother personally and all drawings for any private purpose being stopped. The note goes on to refer to Philip having meanwhile been "*negotiating a deal with Hogg the Builder which we hoped would solve the problem*". Over the last 3 months that had been "*tied up and we have about £500,000 in cash, in WOFL*". The money, it was said, "*should put us back on an even keel; the purpose of this meeting is to consider what happens next*". The options included "*bowing out now*" and letting the Golf Course and possibly selling Spring Hill in addition, or continuing to run the business. As regards the £500,000, in the accounts of WOFL:

> *"…we are exploring ways to transfer it to the P[artnership]'s account. Ps would use it to reduce Bank o/d and loans and thus annual interest payments.*
>
> *a. Buy assets from Ps… Clubhouse*
>
> *Complete GC Workings*."

125. By letter dated 3 April 2003, the accountants Baron & Baron gave VAT advice about the "transfer of the Workings in Land and the Clubhouse". This is dealt with at paragraph [155] of the First Judgment. Point 9 of the letter records:

> "*I would need to seek clarification on the Workings in Land as they are not being transferred with the land. Normally you can opt to tax the land and any attached Workings in Land but workings in land only would require clarification from Customs & Excise*".

126. By letter dated 15 May 2003, Barron & Barron replied to a letter from Father about the intention to transfer as much cash as possible from WOFL to "*the family without paying any taxation if at all possible and towards that end it was agreed that the Workings in Land and the Club House would be sold to the company particularly, as based upon the figures presented to date, it would seem that little (if any) Capital Gains Tax would be payable*." The letter went on to consider the issue of VAT at length and whether WOFL should register for VAT and whether there should be an election for the property and working in land in the Partnership to be chargeable to VAT first. However, the writer had still to confirm the possibility of electing to charge VAT on the workings in land.

127. By letter dated 17 July 2003, HMRC wrote to the Partnership:

> "*I acknowledge receipt of your letter dated 14th July 2003, notifying your election to waive exemption with effect from 1st July 2003, in relation to the land I buildings named below: ·*
>
> *Buildings & Beneficial Workings*
> *· In Land at Wide Open Farm*
> *&*
> *Park Farm*
>
> *Skelton*
> *Yorkshire*
> *YO32 2RF*"

128. A further HMRC letter dated 30 July 2003 addressed to WOFL (referring to an accountants' letter dated 23 July 2003) was also sent which was in similar terms.

129. These letters confirm that an option to tax had been made by each of the Partnership and WOFL on (1) (as regards the Partnership) the 2003 "Assignments" to WOFL and (2) (as regards WOFL) the 2003 leasebacks by WOFL. These would otherwise have been exempt supplies of goods as being "*The grant, assignment or surrender of a major interest in land*" (see Valued Added Tax Act 1994 ("VATA"), Schedule 4, paragraph

4). A "major interest" in land means the fee simple or a tenancy for a term certain exceeding 21 years (see s96 VATA 1994).

130. Paragraph [169] of the First Judgment deals with a note dated 4 November 2006, taken by Suzie and dealing with the general position in relation to the farm, the Golf Course and the Partnership as explained by and discussed with Father. It contains reference to the 2003 WOFL Transactions and makes clear that there was a sale and lease back of the Golf Course but "*not the land*":

> "*Sale of golf course = not sale of underlying land*"

131. Mr Walker relies upon this note as negativing any contemporaneous intention in 1996 or 2003 that the sale of the Golf Course involved any transfer of any interest or at least strata of land. I consider that this document, after the event, is of no assistance. The "underlying land" could, in any event, be a reference to the land "under" the Golf course which seems to have been treated as the "workings" or to draw the distinction Mr Walker relies upon between land and improvements. At best, for Mr Walker, it is ambiguous but as it happens I consider that it rather reflects Mr Peters' analysis.

132. The period 2011 to 2014 is dealt with at paragraphs [192]-[206] of the First Judgment. At this time there were various discussions and negotiations about Suzie's position and about changing the relevant family legal structures in place. Certain of these matters are relied upon by Mr Walker in the context of the meaning and effect of the WOFL Transactions. The key points are:

(1) Towards the end of 2011, there was a proposal to sell a building plot at Spring Hill Farm in which one or more of the 1997 Trusts was interested. The sale was said to be needed to generate cash given the overall financial position. In what seems to have been a tax driven exercise, Father proposed that the monies should ultimately end up in WOFL. As put in a letter from Father to Mr Knowles dated 20 November 2011, there would be a "rollover of the sale proceeds into the family owned golf course by purchasing a business asset currently owned by Wide Open Finance Ltd ("WOFL") (whose shares are owned entirely by the family· including all of the beneficiaries of the Trust in equal measure). The monies from the sale of the plot therefore will end up in the bank account of WOFL." This proposal, says Mr Peters, was a close re-run of what had happened in 1996/2003 as a contemporaneous note, which I now turn to, confirms.

(2) In a further undated note, email or letter to Mr Knowles, apparently reacting to an e-mail from Ms Rickatson of 13 December 2011 (the latter having been appointed by Suzie as referred to in paragraph [196] of the First Judgment), the position was explained as follows:

> "*3. The sale of the building plot is to release cash, to alleviate the pressure being exerted by the bank on our overdraft facility.*
> *4. The proceeds of the sale are not for distribution to anyone during my and Jean's lifetime. They are to be used for the benefit of the business.*
> *5. To obtain roll-over relief the monies must be used to buy another business asset (simply paying off partnership debt does not attract roll-over relief). Rather than buying another asset we don't need, it is proposed to*

> *buy an asset from Wide Open Finance Ltd as set out in the note of 20th November; this is a similar mechanism to the one we used with the previous plots*."

(2) Ms Rickatson was subsequently sent deeds relating to the then WOFL Transactions. In an email dated 15 December 2011 to Mr Knowles she started substantively by saying:

> "*I accept and appreciate (and always have)the point about roll-over relief. However it is clear to me that there will undoubtedly be pressure on the partnership overdraft given the level of losses that are accruing so if the funds are used to keep the bank at bay they will not be available to buy an asset from Wide Open Finance nor to pay Suzie's CGT bill. Are the assets within WOFL worth anything anyway as they are (I understand) by and large affixed to land not owned by WOFL - altho' there is a parcel of land owned as well?).*"

(3) Mr Walker places emphasis on the comment about WOFL and says it was "never contradicted". This is not the same as it being agreed with and it is quite clear that shortly thereafter Suzie personally withdrew opposition to the relevant sale and in fact decided to relinquish all rights to any benefit from any Procter assets or Trusts." (see First Judgment paragraph [198]). In the circumstances it is not surprising that there was no engagement in what was in the context a peripheral matter and not even an issue at the time. I find this communication is of no assistance to me in determining the effect of the WOFL Transactions.

(4) Paragraph [200] of the First Judgment deals with an email dated 28 May 2012 from Philip to Mr Knowles requesting Mr Knowles to draw up a draft conveyance "*to transfer the Clubhouse building from* [WOFL] *to the* [Partnership]."

133. By notice dated 25 March 2013 and signed by Mother as company secretary, notice was given of a board meeting on 1 April 2013 "*to consider and approve the sale of the Golf Club house upon land situated at Skelton Lane, Wigginton, York*."

134. As referred to in paragraphs [202]-[203] of the First Judgment, the "Workings in Land" the subject of the First WOFL assignment were re-assigned to the Partners in 2013. There may be a question whether the entirety of those Workings in Land were so re-assigned or just a building. There is in evidence a board minute of WOFL of 1 April 2013 recording the approval of the relevant 2013 WOFL Re-Assignment.

135. A letter dated 2 April 2013 from Smiths Chartered Surveyors, having referred to its valuation and report of the Golf Clubhouse gave their opinion that the rental value attributable to the Golf Clubhouse was £8,000 per annum. This, however, appears to have been a valuation of the building only with vacant possession and not (even) the (immediately) surrounding land. The Valuation Report of 2 April 2013 placed a vacant possession valuation on the building (but not the immediately surrounding land) at £120,000.

136. Mr Walker also relies upon a letter dated 23 April 2015 from the Brothers' solicitors and says that it asserted that "the Works" were never attached to the land and were never intended to be (land). This letter has to be read in context.

137. The context of the letter of 23 April 2015, is that it formed part of the correspondence between solicitors following service of a letter of claim by Suzie's solicitors.

138. The letter of claim was dated December 2014. It focussed on the family trusts and what it said were defects in their management and failures by the trustees to consider exercising powers of appointment and the like and the absence of proper accounts. The relief intimated as being that which would be sought, apart from a change in the identity of the trustees including accounts and inquiries. The Golf Course and the WOFL transaction were not as such mentioned.

139. The substantive reply dated 3 February 2015 (at that stage on behalf of Philip only), referred to the Golf Course as follows:

> "*The partnership runs the farm and the golf course on the 1975 Trust land. (NB: three acres of land under the golf course is in The Glebe Field (No.151), which is contained within the 1st 1997 Settlement).*"

The implication is that a distinction was being drawn between the Golf Course and land under the Golf Course but the paragraph was, in any event, simply setting out what land was within the 1975 Trust.

140. By letter dated 26 February 2015, Suzie's solicitors, having considered the WOFL Transaction documents in more detail, set out their reasoning underlying their conclusion that the Partnership had no right to occupy the Golf Course.

141. There was then a delay in providing a substantive response while the issue of the appointment of the Trust Corporation as a trustee of the 1975 Trust was taken forward.

142. The letter dated 23 April 2015, on which Mr Walker relies, was then sent. The relevant passages are as follows:

> "*The deed to which you refer did not simply purport to confirm that the workings in land belonged to the partnership, it did so unequivocally. The deed's aim was to solidify and reflect the actuality of the situation; it being clearly stated that it was "for the avoidance of doubt".*
>
> *We are instructed that "the Improvements" you refer to had never attached to the land and were never intended to be.*"

143. As I read it, the letter was not primarily identifying that the workings in land belonged to the Partnership rather than being annexed to and being owned by the freeholders of the land, as part of that land. In any event, these letters are setting out the parties' cases at the time and I do not gain any assistance from them on the issues that I have to decide.

144. The 2017 WOFL Re-assignment is a Deed whereby Philip and Jamie assign back to WOFL the "workings in land" there described. I am told that both the 2013 WOFL Re-Assignment and the 2017 WOFL Re-Assignment were intended to cover the entirety of the subject matter of the First 2003 Deed of Assignment. I make no determinations in this respect but note that whereas it is asserted and accepted by Mr Walker that the First 2003 Lease (and therefore it follows the 2003 Deed of Assignment) relate to a small area of land edged in red on the plan and immediately surrounding relevant buildings

and not just one or more buildings, the plans forming part of the 2013 and 2017 Re-assignments appear to outline in red only the Club House Building. The point is now academic because, on any view, the entire plot shown on the 2003 Deed of Assignment is purportedly "assigned" (or "re-assigned") to WOFL

(e) The construction of contractual/property documents

145. It was agreed between Mr Peters and Mr Walker that one of the fundamental issues is one of construction of the relevant documents effecting the WOFL transactions. I did not understand the general principles of law to be in issue.

146. I was referred expressly to the familiar passages from the judgments/speeches in *Wood v Capita Insurance Services Limited* [2017] AC 1173 at [10] (regarding the objective meaning of the language, construing the contract as a whole in the factual context know to the parties at the time but excluding evidence of prior negotiations) and *Arnold v Britton* [2015] AC 1619 at [15] (concerning focussing on the meaning of the words in their documentary, and commercial context, assessed in the light of (i) the natural and ordinary meaning of the words, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and document, (iv) the facts and circumstances known or assumed by the parties at the time of execution and (v) commercial common sense but (vi) disregarding subjective evidence of any party's intentions). I was also referred, in general terms, to the general raft of recent cases usually relied upon in this context such as *Marley v Rawlings* [2015] AC 129; *M&S v BNP Paribas* [2015] 3 WLR 1843; *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900; *Chartbrook v Persimmon* [2009] 1 AC 1101*; Attorney General of Belize v Belize Telecom* [2009] 1 WLR 1988 and *ICS v West Bromwich Building Society* [1998] 1 WLR 896.

147. As I have said in giving judgment in another case:

> "*It is possible to cite in extenso from a number of speeches in the House of Lords and judgments of the Supreme Court. In this case, the essential principles were not in dispute and it seems to me that the most convenient course is to set out the convenient summary contained in the judgment of Jacob J in Global Display Solutions Limited v NCR Financial Solutions Group Limited [2021] EWHC 1119 (Comm).*[6] *The key is that the overall process is a unitary exercise involving an iterative process which involves not just a consideration of the words of a contract but a consideration of the same against the relevant background knowledge and the commercial consequences of competing constructions. However, in general, the parties' negotiations are inadmissible as an aid to construction of an agreement*."

148. Turning to the judgment of Jacob J in the *Global Display* case the key passage

is set out in paragraphs [316] to [321]:

> *"[316] The basic legal principles as to the interpretation of contracts were not in dispute. They are conveniently summarised in the judgment of Popplewell J.*

[6] Permission to appeal against the decision made by the Judge on the construction of the relevant agreement was refused. An appeal succeeded on a separate point regarding an award of exemplary damages: [2021] EWCA Civ.1399.

in Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd [2018] EWCL 163 (Comm), which is quoted in Chitty on Contracts 33rd edition paragraph 13-047:

> *"The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."*

[317] This summary is a synthesis of the principles that have been authoritatively stated in a trilogy of Supreme Court decisions in the past 10 years: Rainy Sky SA v Kookmin Bank [2011] UKSC 50; Arnold v Britton [2015] UKSC 36; Wood v Capita Insurance Services Ltd. [2017] UKSC 24.

[318] In Rainy Sky, Lord Clarke described the exercise of construction as being essentially a "unitary exercise" in which the court must consider the language used and ascertain what a reasonable person, with the relevant background knowledge, would have understood the parties to mean. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Where the parties have used unambiguous language, the court must apply it: Rainy Sky paragraphs [23] and [25].

[319] Whilst this unitary exercise of interpreting the contract requires the court to consider the commercial consequences of competing constructions, commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an unwise party, or to penalise an astute party. This is clear from the judgment of Lord Neuberger in Arnold v Britton [and

what] *he said at paragraphs [15] – [22]. At paragraph [20], Lord Neuberger said:*

> *"Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party".*

[320] In Wood v Capita, Lord Hodge set out the applicable principles following Rainy Sky and Arnold v Britton as follows:

> *"[10] The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In Prenn v Simmonds [1971] 1 WLR 1381, 1383H1385D and in Reardon Smith Line Ltd v Yngvar HansenTangen (trading as HE Hansen – Tangen) [1998] 1 WRL 896, 912-913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing, "A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision" (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.*
>
> *[11] Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the Rainy Sky case [2011] 1 WLR 2900, para 21f. In the Arnold case [2015] AC 1619 all of the judgments confirmed the approach in the Rainy Sky case: Lord Neuberger of Abbotsbury PSC, paras 13-14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the Rainy Sky case, para 26, citing Mance LJ in Gan Insurance*

> *Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.*
>
> *[12] This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*
>
> *[13] Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in Sigma Finance Corpn [2010] 1 ALL ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of the disputed provisions."*
>
> *[321] There is discussion in the case-law as to the circumstances in which consideration of the factual matrix or context may lead to an interpretation of words which is not, according to conventional usage, an "available" meaning of the words or syntax which the parties had actually used, and the correction of an obvious drafting mistake by interpretation. I consider that argument in context below*."

149. Later in his judgment, Jacob J returned to the issue referred to in his paragraph [321]. He considered the argument in context but cited the following:

> "*[353]…..In that regard* [that is a conclusion that a submission addressed to him sought to place a meaning upon words used in the relevant agreement that the words could not bear], *Lewison: The Interpretation of Contracts 7th edition, paragraphs 3.167 – 3.168, states:*
>
> > *"Fourth, reliance on background must be tempered by loyalty to the contractual text. It is not permissible to construct from the background a meaning that the words of the contract will not legitimately bear.*
> >
> > *Fifth, the background should not be used to create an ambiguity where none exists. The court must be careful to ensure that the background is used to elucidate the contract, and not to contradict it".*
>
> *[354] NCR referred to the seminal judgment of Lord Hoffmann in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896. He stated, as his fourth proposition, that the relevant background "may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax."*

(f) The taxation background in this case

150. I have accepted that the background to the WOFL Transactions as a whole was one where Father, in particular, was seeking to take the advantage of roll-over relief. However, as I read the correspondence this was something that only really started to be investigated in 2003 and it was the accountants that identified a potential taxation issue arising from a difference between "workings in land" and the land to which they were attached.

151. In this respect, Mr Peters referred me to sections 152 and 155 of the Taxation of Chargeable Gains Act 1992, then in force, and the relevant classes of assets that WOFL would be looking to purchase (using the proceeds of the sale of the development land plots), in order to qualify for rollover relief (Head A of Class 1):

> "*CLASS 1*
>
> *…..*
>
> *Head A*
>
> 1. *Any building or part of a building and any permanent or semi-permanent structure in the nature of a building, occupied (as well as used) only for the purposes of the trade.*
>
> 2. *Any land occupied (as well as used) only for the purposes of the trade"*

152. As regards the VAT position (in relation to which an election was made to opt out of the exempt VAT chargeable status of the transaction), it appears that the relevant 2003

deeds were executed against a background where they were intended to take effect as transfers of a "major interest in land", within the meaning of VATA 1984, in relation to which an option to tax had been exercised.

153. I am not however satisfied that plans in these respects were sufficiently clearly formulated in or by 1996.

(g) The 1996 Deed

154. Mr Peters submits that in law his position is vindicated by the 2003 deeds combined with the application of the doctrine of estoppel by deed and that the status and effect of the 1996 Deed is not crucial to his case. Accordingly, I deal with it fairly shortly.

155. The first recital refers to the Owners (Father, Mother and Philip, then being the trustees of the relevant Will Trust) being "Seised" of the property shown edged red on the annexed plan (the "Red Land").

156. The second recital is as follows:

> "*The Partners have constructed a golf course upon the Red Land with the knowledge and consent of the Owners incorporating the creation of tees greens lakes reservoirs bunkers and other general landscaping work including tree planting the construction and/or creation of a two storey club house of brick and tile construction adjacent to Wide Open Farmhouse and comprising club room office ladies and gentlemen's changing and toilet facilities on the ground floor and a bar lounge and dining room on the first floor the conversion of an adjacent brick and tile range to professional shop and workshop and beer cellar the creation of adjacent putting green pathways pond and car park together with access road with passing places and entranceway to Moorlands Road with cattle grid and stone gate posts and all other similar things (hereinafter called "the Works").*

157. The third recital is that:

> "*The Partners are entitled to the value of the works as is acknowledged by the Owners and the parties hereto have agreed to enter into this Deed in order to document the position*".

158. As I have already said, the operative part of the 1996 Deed is short. It is that:

> "*for the avoidance of doubt the Owners hereby acknowledge and confirm with the Partners that the Partners are entitled to the full value of the Works in the Red Land*".

159. In my judgment, this Deed did not purport to transfer or convey anything. Further, it did not clearly state that the surface of the land area in question or even the improvements were themselves owned by the Partners. The words are that the Partners are entitled to "value". Of course, it is unclear whether at this time anyone had identified that the Partnership had a tenancy. However, it has subsequently been found that it did have the benefit of the 1994 Tenancy. As such it would, in effect, have been

entitled to the value of these works (or, possibly, to remove buildings) one way or another under the AHA provisions that I have outlined earlier in this judgment. The acknowledgment that this Deed provides seems to me to provide a basis for the Partnership accounts which showed such "value" of the works as a capital item. Some of these works were apparently carried out at a time prior to 1994 when there was another tenancy/ies in place. The statutory procedure for transferring the relevant rights to the tenants of the 1994 Tenancy were probably not followed even if such tenants were thought to be tenants. Be that as it may, on any basis the Deed puts beyond doubt that the partners were entitled to the full value of the works.

160. I reject Mr Peters' submissions as set out below.

(1) Mr Peters submits that as a matter of language an entitlement to "full" value is synonymous with ownership and no-one else having any "interest" in them. I disagree as a matter of language (or indeed as a matter of law). As regards the law, an agricultural tenant under the AHA 1984 may be entitled to the value of "improvements" at the end of the tenancy but that does not mean that it owns the improvements or the surface of the land on which they exist.

(2) Mr Peters submits that ownership was necessary for the overall legal and commercial strategy (and tax saving strategy) that I have found only began to emerge some years later. I do not consider that that later emergent strategy can properly be a background contextual matters informing the purpose and effect of the 1996 Deed.

(3) Mr Peters submits that the construction of the 1996 Deed that he propounds is consistent with the steps later taken in 2003. I accept the consistency but note the important addition of the words in the 2003 Deeds that the Partners were owners of the works as well as being entitled to their full value. I do not think much assistance can be gained, in his case, from events in 2003 as to what construction should be placed upon the 1996 Deed (see generally *Lewison on The Interpretation of Contracts* paragraphs 3.183-3.196).

(4) Mr Peters submits that the parties thereafter proceeded on the common understanding that the Golf Works amounted to stratified land in the ownership of the Partnership. He relies particularly on the VAT related documents that I have referred to. This seems to me a repeat of the submission that I have already dealt with. In short, these matters only arose some years after 1996.

161. Although I accept Mr Walker's case regarding the construction and effect of the 1996 Deed, I do not accept all of his submissions, many of which are repeated as regards the 2003 WOFL documentation.

(h) The 2003 WOFL Deeds

162. It follows from my determination of the meaning and effect of the 1996 Deed that there is no evidence that title to anything (other than a right to value) had been transferred to the Partners to enable them to pass freehold title to a stratified part of the relevant land area to WOFL to enable it to lease the same back to the Partnership.

163. In those circumstances, Mr Peters relies on the doctrines of estoppel by deed and estoppel by grant. Mr Walker accepts, in effect, that the 2003 Leases are effective by way of estoppel, but denies that any estoppel operates as regards the freehold title to any land.

164. Each of the 2003 Leases is made between WOFL as "the landlord" and Father, Philip, Suzie, and James as partners. The leases are for 25 years at a rent. There are detailed covenants (including covenants by the tenant to insure, paint and repair and not to alienate). There is a clause referring to a relevant order of the York County Court authorising the parties to exclude the relevant protections afforded to business tenants under Part II of the 1954 Landlord and Tenant Act 1954 and then excluding the same. The detail in the lease is extensive. Each lease exceeds 26 pages. I was not taken through the Leases on a clause by clause basis and it was not suggested that any difference in terms between them was of any significance to the issues that I haver to determine.

165. The demised premises are described in area terms by reference to a plan and description. "The demised premises" are defined as being:

> "the property described in the First Schedule hereto and each and every part thereof together with the appurtenances thereto belonging together with all additions alterations and improvements thereto which may be carried out during the term and shall also include all Landlord's fixtures and fittings from time to time in and about the same."

166. As regards the First Schedule, the provisions are as follows:

Lease	Date	Schedule 1
First	01.10.03	The golf clubhouse and ancillary buildings which are erected upon the land situate at Skelton Lane [ ] shown edged red on the plan annexed hereto
Second	31.10.03	The beneficial workings in land at Skelton Lane [ ] shown edged red on the plan annexed hereto
Third	25.11.03	The beneficial workings in land at Skelton Lane [ ] shown edged red on the plan annexed hereto

167. Mr Walker accepts (as did Mr Peters) that:-

(1) The First Lease, properly construed, is a lease of the surface of the land shown edged red on the plan and not simply a lease of the buildings shown within that area.

(2) The Second and Third Leases are leases of the surfaces of the lands shown edged red so far as those surfaces can be said to comprise the Golf Course (i.e. they are not leases of land underneath the Golf Course). Further, the leases are not simply leases of areas where significant works can be identified (such as landscaping including (for example) the construction of bunkers or fairways) but include the entire surface areas of the land area in question.

(3) The First Lease is a lease of the surface of the land comprising the golf course, not a lease of the land underneath the golf course.

(4) There was no detailed discussion of the depth of the stratum of soil purportedly leased by the Leases. I should make clear that I do not consider that there is legal uncertainty in this respect, such as to make the Lease invalid for uncertainty. There may be factual uncertainty but that is capable of resolution by the court if and when an issue arises.

(5) These leases are effective by estoppel as between WOFL and the then named partners.

(6) The tenancies are held on trust for the Partnership.

(7) By survivorship, the tenancies by estoppel operate in favour of Philip, Suzie and Jamie, holding on trust for the Partnership.

For convenience, I distinguish the surface of the land which forms the Golf Course and is let under the relevant lease as being the "Golf Course Strata" to distinguish it from the land under the Golf Course which is not the subject of the 2003 WOFL Leases.

168. I agree with the positions on construction taken by the parties as outlined in the immediately preceding paragraph of this judgment.

169. I also agree with the parties that the effect of the Leases is that both WOFL and the individual named tenants (and their successors and privies) are estopped against the others from asserting a lack of title in WOFL. This form of estoppel operates from the fact of the purported grant and acceptance of the same rather than from the related doctrine of estoppel by deed (see discussion regarding these different doctrines of Millett LJ, as he then was, in *First National Bank Plc. v. Thompson* [1996] Ch. 231).

170. The doctrine of estoppel by grant is long established in the landlord and tenant field. In the *First National Bank* case, Millett LJ cites the leading case of *Cuthbertson v. Irving* (1859) 4 H. & N. 742. Martin B., giving the judgment of the court, said, at pp. 754-755:

> *"There are some points in the law relating to estoppels which seem clear. First, when a lessor without any legal estate or title demises to another, the parties themselves are estopped from disputing the validity of the lease on that ground; in other words a tenant cannot deny his landlord's title, nor can the lessor dispute the validity of the lease."*

171. It was also accepted that the estoppel operates notwithstanding the system of land registration and the non-registration of each of the Leases.

172. It was also accepted that the estoppel by grant in relation to the Leases bound the named tenants not just in their capacity as tenants but also in their capacity as holders of freehold title to Plot 2333 (the Second 2003 Lease) and the Glebe Field Sliver (the Third 2003 Lease). I did not hear argument on this issue and have formed no view as to the correctness of the concession made by Mr Walker in this respect (see, for a possible contrary view: *Metters v Brown* (1863) 1 H & C 686 at 693, following *Doe d Hornby v Glenn* (1834) 1 Ad & El 49 and Halsbury's Laws paragraph 323 Vol 47).

173. The question of estoppel by grant in this context assumes, against Mr Peters, that WOFL did not otherwise have title to the land to grant the leases in question. I return to this issue later in this judgment.

174. Where the parties part company is on the issue of whether the only relevant estoppel that operates is that by grant between the landlord and tenant (as submitted by Mr Walker) or whether there is also an estoppel operating in relation to freehold title to the Golf Course Strata of land leased under the Leases (as submitted by Mr Peters). One difference in effect between these two positions arises when the 2003 Leases come to an end as regards the land held by Philip as trustee of Grandfather's will trusts and in which the 1975 Trust has a beneficial interest. In respect of that land, on the former scenario, on expiry of the 2003 Leases, title to the entire freehold land (all strata) will remain with (currently) the trustees of Grandfather's will trust. On the latter scenario, title to the freehold stratum the subject of the Leases will remain with WOFL (subject to the 2013 transaction) and title to the land beneath that stratum will remain vested in (currently) the trustees of Grandfather's will trusts. A similar point arises regarding Plot 2333 and the Glebe Field Sliver.

175. Before turning to the application of the doctrine of estoppel by deed it is necessary for me to construe the 2003 Deeds of Assignment.

176. The 2003 Deeds of Assignment are made between Father, Philip, Suzie and Jamie as the "Assignors", WOFL (as assignee) and Father, Mother and Philip as "the Landowners". They are in similar form.

177. The first recital is that the Assignors "are the owners of and are beneficially entitled to the full value of the [land described as subsequently the subject of the relevant 2003 Lease and defined as "the Workings in Land")].

178. The second recital is that the Assignors have agreed with the Assignee for the assignment to it of the Workings in Land.

179. The three operative clauses are:

    (a) In consideration of a stated consideration (receipt of which is acknowledged), the Assignors hereby assign unto the Assignee the Workings in Land to hold the same unto the Assignee (Clause 1).

    (b) The Land Owners hereby consent to the assignment herein and acknowledge that the Assignors prior to the assignment herein were the owners of and were entitled to the full value of the Workings in Land which are now so vested in the Assignee (Clause 2).

(c) A certification that the transaction effected by the Deed does not form a part of a larger transaction or series of transactions in respect of which the amount or value or aggregate amount of value of the consideration exceeds £250,000 (clause 3). This last clause is somewhat surprising but I need not comment further.

180. In contrast to the 1996 Deed, the 2003 Deed records in the first recital, not just an entitlement to the full value of the Workings in Land but that ownership of the Workings in Land is vested in the Assignors and such ownership (as well as entitlement to full value) is what is transferred by the Deed.

181. In my judgment it is clear that in construing the 2003 Deeds of Assignment I should look at the contemporaneously executed 2003 Leases. It being accepted that those Leases have to be construed as granting a legal lease of a stratum of the relevant land areas, it follows that the references to what is owned and "assigned" by the 2003 Deeds of Assignment must also be legal title to the relevant stratum of the relevant land areas and that this is clearly the intention behind the 2003 Deeds of Assignment. This follows both as a matter of contextual construction (construing the 2003 Deeds of Assignment and the Leases together) and as a matter of considering the matter from the perspective of the background factual context where the transaction were structured so as to fit within the capital tax and VAT tax regimes as land transactions by way of a sale of freehold and lease back.

182. I reject the submissions of Mr Walker that the 2003 Deeds of Assignment should not be construed as reciting that the relevant stratum of land was hitherto vested in the Assignors or that they should be construed as saying that what was vested was some interest other than a legal interest or that (as a matter of construction) the Deed is to be construed as a conveyance of such legal interest in the freehold. In this respect Mr Walker makes a number of points.

183. First, Mr Walker submits that the relevant wording indicated an entitlement to full value of the relevant identified workings but not to the workings. However that seems to me to ignore the words that the assignors are "the owners of" the relevant workings. He submits that the description of what is owned and transferred is not in terms of a stratum of land or indeed any land. That however ignores the use of the same words in Schedule 1 of the Leases and the acceptance that the Leases do purport to grant a lease of a stratum of the identified area of land. Finally, in this context he says that the 2003 Deeds of Assignments must be read with the 1996 Deed which only record an entitlement to a value not to land. However, that ignores the facts that the 2003 Deeds are to be read with the Leases, the different factual context in 2003 and the addition in the 2003 Deeds in express terms of the concept of ownership rather than just entitlement to value.

184. Secondly, and with reference to the second recital, Mr Walker submits that the purpose is stated as being the assignment of Workings in Land which, he says, were defined as "value". However, the Workings in Land are not defined in the 2003 deeds as value but as physical characteristics and, as said, taken with the Leases they must be taken to encompass a stratum of the land (i.e. the land which comprises the Golf Course but not the land below that stratum). He also submits that, had a conveyance of a stratum of land been intended, the concept of "conveyance" rather than "assign" would have been

used, the terms "vendors" and "purchasers" been used rather than "assignors" and "assignee" and that a stratum of land could have been more easily defined. The tax legislation however refers to assignments of land and I do not consider that the words "conveyance" over "assignment" or "assignor/ee" rather than "vendors" or "purchasers" is a key point.

185. The fact that the stratum of land could have been better defined, in my view, adds little. If on its true construction the position is clear, the fact other words might have been used does not add anything. In this respect I was referred to the difficulties in general of deploying an argument when construing a document that "If X had been intended then clear words could have been used" (see Lewison on The Interpretation of Contracts, 7th Edn paragraphs 2.113-2.116 and the citation of Lord Neuberger MR (as he then was) in *Re Sigma Corporation* [2008] EWCA Civ 1303; [2009] BCC 399 at [101] (the case was subsequently appealed to the Supreme Court):

> *" "I do not think it is normally convincing to argue that, if the parties had meant a phrase to have a particular effect, they would have made the point in different or clearer terms. That is a game which all parties can normally play on issues of interpretation. Save in relatively rare circumstances (e.g. where the document concerned contains a provision elsewhere in different words which has the effect contended for by one of the parties), it does not take matters further.""*

186. His third point is that since the named Partners did not have freehold title, operational clause 1 of the 2003 Deed of Assignment could not pass any legal estate. I accept this, subject to the question of the operation of the doctrine of estoppel. It does not however deal with the question of construction.

187. His fourth point is that the Landowner's consent recognises a transfer of value only. As I have said I am against him on this point. I accept that it is possible to see their acknowledgement and consent as consistent with the construction that the freehold to the Golf Course stratum remained vested in the Land Owners as freehold owners. However, in my view, their description and joinder is just as possible as (a) recognising that they are Landowners of the land underneath the Golf Course stratum and (b) joining them in to ensure there is no question but that all relevant potential parties are bound. This is not really a construction issue however.

188. Finally, he asserts that the conveyances are void by reason of lack of registration. However, that is a matter that needs reconsideration in the light of the operation of the doctrine of estoppel.

189. I turn therefore to the operation of the doctrine of estoppel. As regards this, Mr Walker accepted in his original skeleton argument that the claimant (on indeed anyone else) could only be estopped from denying what the 2003 Deeds of Assignments mean on their true construction. I have dealt with the question of construction. In oral submission he also suggested that it was not possible for freehold title by estoppel to arise under the doctrine of estoppel by deed. I do not accept this point. In his further written submissions on this point his argument was further developed to deal with the topics of estoppel by deed and estoppel by grant.

190. As regards estoppel by deed, I accept Mr Walker's submission that the estoppel can only arise from an unambiguous representation contained in the relevant 2003 Deed of

Assignment. This is often described as a requirement that the statement in the Deed be 'certain to every intent' without any ambiguity As regards this, I have construed the 2003 Deeds of Assignment and found that, taken with the Leases, they are unambiguous in reciting that the freehold title to the relevant surface of the area of land identified was vested in the "Assignors". On this basis the case relied upon by Mr Walker, *Heath v Crealock* (1874) L.R. 10 Ch.App. 22 is not in point.

191. In *Heath v Crealock*, Heath and a solicitor, Crealock, were trustees of a fund from which they advanced funds to Stephens on a mortgage by him (by way of conveyance) of a freehold property in Wales of which Stephens was the owner in fee simple. Stephens later wished to sell three portions of the land. Crealock falsely represented to Stephens that Heath was unavailable either to join in reconveyances of the land to Stephens to enable Stephens in turn to convey the freeholds on completion of the sales or to join in the conveyances to the purchasers. Stephens and Crealock agreed that the sales would go ahead without mention of the mortgage. Regular conveyances to the purchasers were prepared, one of them containing this recital, and the two others containing similar recitals:-

> "*Whereas the said* Thomas King Stephens *is seised or otherwise well and sufficiently entitled for an estate of inheritance in fee simple in possession, free from all incumbrances except as hereinafter mentioned of or to the messuage or tenement, lands and hereditaments hereinafter particularly described or referred to and intended to be hereby conveyed with their appurtenances: And whereas the said* Thomas King Stephens *hath contracted with the said* James Beavan *for the absolute sale to him of the said messuage or tenements, lands and hereditaments hereinafter particularly described or referred to and intended to be hereby conveyed with their appurtenances and the inheritance thereof in fee simple in possession."*

192. It was argued that the conveyances gave rise to an estoppel, by reference to the recital I have cited, and that the effect of such estoppel was to prevent a challenge to the freehold title of Stephens to convey the parcels of land and that such estoppel was later "fed" when there was a reconveyance of title back to Stephens some time later. The context was that it was said, by certain of the purchasers, that they were purchasers of value of the legal estate without notice of any equities and that their title to the parcels was secure. Lord Cairns LC explained the position as follows:

> "*That they were purchasers without notice is, I think, admitted on all hands; but it remains to be ascertained what it is of which they were purchasers. Now, on that head it was contended, in the first place, that they had obtained a legal estate, and, of course, if they are purchasers for value without notice, and if they have obtained a legal estate, the clear rule of a Court of Equity would apply, namely, that their legal estate could not be taken away from them. But the way in which it was said they had obtained a legal estate was this: It was said that at the time* Stephens *conveyed to them upon the occasion of their purchases, he had no legal estate, but that he afterwards, by virtue of the reconveyance to him, obtained a legal estate; that by the first conveyance he was estopped, and that the estoppel created by the first conveyance was, to use the technical expression applied to such cases, fed by the estate which* Stephens *acquired under the reconveyance, and that thus the legal estate became complete.*

> *Now, in my opinion, that argument was founded altogether on a fallacy. There is no estoppel whatever in this case. The conveyances to the purchasers were innocent. They were ordinary conveyances by grant; the operative words of which, as is well known, would create no estoppel; and the estoppel, if it arose at all, would arise by virtue of the first recital in the conveyance. The recital was in substance the ordinary one in such cases. It recited that* Stephens *was seised or otherwise well and sufficiently entitled to the property in question, free from incumbrances. If the recital had been a recital simply that* Stephens *was seised, there might have been an estoppel, but the recital is one out of which no estoppel can arise, because it is not precise or unambiguous. It is a recital which, in substance, amounts to a statement that he had an estate either at law or in equity, and the fact that it states that the estate, whatever it was, was free from incumbrances, creates no estoppel for the purpose of making the legal estate pass. There is, therefore, no estoppel operating so as to convey the legal estate to the purchasers.*
> *What, then, is it which the purchasers are purchasers of? They are purchasers of the equity of redemption, which* Stephens *had to convey to them, and which he did convey to them by the purchase deeds*."

193. Here I have found that, properly construed, there is no uncertainty in the recital and accordingly estoppel by deed will apply. The parties are estopped from denying that the Assignors (that is the relevant Partners) were legal owners of the freehold Golf Course Strata of land that (as I have held on a true construction of the Deeds) were thereby conveyed to WOFL by the three 2003 Deeds of Assignment.

194. Further, in my judgment, that estoppel binds all the parties to the 2003 Deeds of Assignment. The general rule (see Halsbury's Laws Volume 12 paragraph 1011) is:

> " *If upon the true construction of the deed the statement is that of both or all the parties, the estoppel is binding on each party; if otherwise, it is binding only on the party making it*".

It seems to me clear that in this case that the relevant recital is one made by all the parties. Further, it seems to me that the "Land Owners" were in any event also bound by virtue of clause 2 of the operative part of the Deed.

195. It follows from the concession that individuals are bound in whatever capacity they are parties, that the estoppel by deed regarding the assignors under the 2003 Deeds of Assignment having title to the relevant surface of the areas of land will be one that binds also the (former) freehold owners of the surface area as well as the freehold owners of Plot 2333 and the Glebe Field Sliver.

196. There would also appear to be an estoppel by way of grant as between WOFL and the relevant Partners. I have not heard argument as to whether that would however bind the "Landowners" who do not, on the face of it, appear to receive or accept or make any grant under the 2003 Deeds of Assignment, but that appears to be academic in the light of (a) my finding that they are bound as to the title of the Assignors to convey, both by reason of estoppel by deed and clause 2 of the Operative parts of the Deed and (b) my finding that the 2003 Deeds of Assignment operate as a conveyance of the

Assignors' legal (and beneficial) interest in the relevant Golf Course Strata of land to WOFL.

197. The next issue is the interaction between the 1994 Tenancy and the tenancies created by the 2003 Leases. As regards this, Mr Walker submits that the 2003 leases create immediate leases in the relevant land and that the 1994 Tenancy, so far as it is of the Golf Course Strata of land the subject of the leases, then became a lease of the reversion. Mr Peters submits to the contrary.

198. Mr Walker submits that the 2003 Leases were clearly intended to grant the right to immediate possession and says that by agreement or estoppel the relevant parties (WOFL and the partners) thereby agreed that the 1994 Tenancy of those strata became leases of the reversion.

199. Mr Peters, however, submits that both the 1994 Tenancy and the 2003 Leases on their face gave the right to immediate possession and that the terms of the 2003 Leases cannot be relied upon as indicating the answer to the issue.

200. On this issue I prefer the submissions of Mr Peters. It seems to me that the position is summed up clearly in *Hill & Redman's Law of Landlord and Tenant* at paragraph [146] (footnotes removed):

> "*After a lease has been granted, another lease of the same premises is sometimes granted, the term being either concurrent with or subsequent to that of the existing lease. A concurrent lease, provided it is made by deed, operates as a lease of the reversion upon the existing term. If the concurrent term is equal to or exceeds the residue of the existing term, the concurrent lessee is entitled to the rent for the whole of such residue, and afterwards to possession for the remainder (if any) of his own term. The concurrent lessee is also entitled to sue for service charge contributions. If the concurrent term expires during the existing term, the concurrent lessee is entitled to the rent during his own term. In effect, the lessee under the concurrent lease is inserted between the lessor and the lessee under the existing lease, so that the lessee under the existing lease the position of an underlessee. The rule of law that a legal term may be created to take effect in reversion expectant on a longer term is confirmed by statute.*"

201. *Woodfall: Landlord and Tenant* is to similar effect at paragraph 6.018.

202. The above position covers the position where the concurrent lease (here each of the 2003 Leases) is made by Deed. However, in this case although the 2003 Leases are deeds they take effect by way of estoppel, I have not been addressed as to whether they are treated as deeds for the purposes of the rule about concurrent leases or whether the same effect is achieved by estoppel. Further and in any event, *Hill & Redman* suggests that:

> "*it would seem probable that if the concurrent lessee enters at the expiration of the existing term, the lessor will be estopped from denying the lessee's title to the remainder of the lease*".

203. The next issue is one of merger.

204. As regards the 1996 Deed I have held that it dealt only with an entitlement to value and not with freehold interests in strata of the land. No question of merger of title arises.

205. As regards the 2003 Deeds of Assignment, I have held that they did give rise to an estoppel that the freehold to the Golf Course Strata of land in the surface areas described in the 2003 Deeds of Assignment was vested in "the Assignors". I do not consider that merger of the 1994 Tenancy with that freehold took place. That is because:

(a) The 1994 Tenancy the subject of the Court of Appeal declaration only applies to the land which was beneficially owned (as to one-half) by the 1975 Trust. The Golf Course Strata includes land outside the beneficial ownership of the 1975 Trust (viz Plot 2333 and the Glebe Field Sliver).

(b) The reversion to the 1994 Tenancy included not just the freehold of the Golf Course Strata but the freehold of the land under the Golf Course Strata and the wider area of land (outside the Golf Course) the subject of the 1994 Tenancy.

(c) In equity, the matter is one largely of intention, the 1994 Tenancy has been treated as ongoing throughout and rent has been paid under it. The 2003 WOFL transactions were plainly intended to take effect without merger.

206. In my view there is no question of the 1994 Tenancy and the 2003 Leases merging in 2003. That is because:

(a) The tenants of the 1994 Tenancy were probably different to those under the 2003 Leases. The tenants under the 2003 Leases were Father and the three Siblings. The tenants under the 1994 Tenancy have been held now to be the three Siblings (by survivorship), holding on trust for the Partnership. It is unclear whether Father and/or Mother was a tenant in 1994. (On the face of things the number of tenants could not have exceeded four: see s34(2) Trustee Act 1925). It seems likely Mother was one of the tenants under the 1994 Tenancy, being one of the senior partners. She only died in June 2013. At the time of the grant of the 2003 Leases, she would have remained one of the lessees under the 1994 Tenancy.

(b) The reversion to the 1994 Tenancy was split as between the strata of land the subject of the 2003 (concurrent) Leases as to which, by estoppel, WOFL was the landlord and freehold owner and the land under such strata as well as the remaining land falling within the 1994 Tenancy. Although the reversion to the 1994 Tenancy itself was split that would not have resulted in a split in the tenancy itself.

(c) The 1994 Tenancy and the 2003 Leases were treated as continuing post 2003 and the WOFL Transactions were premised on the basis that there was no merger so that an intention that they should not merge seems fairly clear.

(i) The WOFL Transactions and the position after 2003

207. By the 2013 WOFL Re-assignment, dated 2 April 2013, a further deed of assignment was entered into by WOFL (as "Assignor"), Father, Philip and Jamie (as Assignees)

and Father, Mother and Philip as "Land owners". That Deed took a similar form to the 2003 Deeds of Assignments.

(a) The first recital was that the Assignor was owner of and entitled to the full value of the Golf Club House and adjacent ancillary building on the land at Skelton Lane (defined as the "Workings in Land").

(b) The second recital was that the Assignor had agreed with the Assignees for the assignment to them of the Workings in Land (as so defined).

(c) The first operative clause provides for the assignment of the workings in Land to the Assignees for the stated consideration of £120,000 plus VAT of £24,000.

(d) The second operative clause sets out that the Landowners consent to the assignment and acknowledge the ownership of the Assignor of the Workings in Land now vested in the Assignees.

208. My conclusions regarding the effect of the 2013 WOFL Re-Assignment, follow on from my earlier conclusions and give rise to the same estoppel as arises under the 2003 Deeds of Assignment (but as regards the relevant terms of the 2013 Assignment). The effect of the 2013 WOFL Re-Assignment would have been to assign legal (subject to registration) and beneficial title to the relevant Golf Course Strata to Father, Philip and Jamie on trust for the Partnership. In my judgment no merger would have occurred for the same or analogous reasons as to why merger did not occur in 2003.

209. By the 2017 WOFL Re-Assignment the relevant Golf Course Strata was transferred back to WOFL by the surviving legal partners, Philip and Jamie. Although the narrative description of the "Workings" being transferred is slightly different (in not including a reference to the "adjoining building"), the plan is fairly clear and appears to mirror that attached to the 2013 WOFL Re-assignment. I note also that the question of whether the 2013 WOFL Re-Assignment did or not transfer just a building or also the immediately surrounding plan (marked, for example, as including a pond) becomes academic. Title by estoppel (and/or, as regards Philip as Trustee of Grandfather's will trusts, by contract under clause 2 of the operative part of the relevant deeds) is now vested in WOFL as regards all the Golf Course Strata the subject of the 2003 Deeds of Assignment. In the case of the land immediately surrounding the Club House this is either because it was not transferred to the then Partners in 2013 or it has since been transferred back in 2017.

Main Issue 3: The retirement of Suzie from the Partnership in 2010

210. The issue is whether on retirement Suzie is entitled to have her Partnership share purchased by her Brothers. In this respect, whatever the answer to that question, it is agreed that the only outstanding matter is the 1994 Tenancy held by the Court of Appeal to be vested in the names of Suzie and the Brothers on trust for the Partnership. If Suzie is entitled to the purchase of her Partnership share then no value has yet been ascribed to her (or her share) as regards the 1994 Tenancy. Any question of valuation will be the subject of further evidence, however there are also some valuation issues that are raised.

211. This entire issue is complicated by the impact of the NtoQ Proceedings. In those proceedings Suzie asserts that, if the notice to quit was effective to end the 1994

Tenancy held for the Partnership and if the Brothers are successful in establishing a claim against her for breach of duty in serving the notice to quit, then they are estopped from asserting that the 1994 Tenancy had any value and that they (or he Partnership) suffered any loss. Mr Walker confirmed that only if Suzie is found liable to pay the Brothers damages/equitable compensation does she pursue her claim (in effect) to a one quarter share in the Tenancy as at the date of her retirement from the Partnership.

212. I deal with this estoppel issue when considering the NtoQ Proceedings.

213. I therefore deal with Suzie's claim at this stage, in case it arises, and return to it in light of my conclusions as to the effect of the relevant notice to quit.

The Partnership Deed

214. The original Partnership Deed is dated 1 October 1980 and made between Father, Mother (together defined as the "Senior Partners"), Philip and Suzie (the "1980 Partnership Deed").

215. Jamie joined the Partnership as from 5 April 1986 by a further Deed dated 20 August 1987. The latter Deed varied the entitlement and liabilities of the Partners inter se (as hitherto set out in Clause 6 of the 1980 Partnership Deed) so that the profits and losses of the Partnership (including profits and losses of a capital nature) were to

> "*belong to and be borne by the Partners in the following proportions:*
> *Father 1/4*
> *Mother 1/4*
> *Philip 1/6*
> *Suzie 1/6*
> *Jamie 1/6"*

216. For present purposes the main provisions of the 1980 Partnership Deed which are relevant are as follows:

> "*3 . SUBJECT to the provisions for dissolution hereinafter contained the partnership shall continue until determined pursuant to the provisions hereof notwithstanding the death of any individual partner*
>
> *....*
>
> *5. THE capital of-the partnership shall consist of the value of the live and dead stock farm machinery and other assets of the business heretofore carried on by Mr. Procter on Mr. Procter's lands after deduction of the liabilities of the business· formerly carried on by Mr.· Procter which liabilities shall be borne and paid by the present partnership*
>
> *...*

7. THE partners shall be entitled to withdraw such sums on account of their respective shares of profit and in respect of the balances standing to their credit on current account as the Senior Partners shall from time to time jointly agree

……

14. (1) THE partnership shall he dissolved on the expiry of six months' notice of dissolution given in writing by the Senior Partners or the survivor of them to the remaining partners

(2) In each of the undermentioned cases the partnership shall be dissolved as regards the partner in question (so he shall be deemed to have retired) but not otherwise:-

(i) on the giving of one month's notice by the Senior Partners or the survivor of them that the partner in question's conduct is in the opinion of the person or-persons giving such notice calculated to prejudicially affect the carrying on of the business of the partnership

(ii) on the giving of one month's notice by the Senior Partners or the survivor of them that the partner in question is in wilful or persistent breach of the terms of the partnership (whether express or implied)

(iii) If the partner in question becomes bankrupt and the Senior Partners give one month' s notice that as a result thereof he should retire

(iv) On the death of the partner in question

(3) If a partner is deemed to retire by reason of any of the matters referred to in sub-clause 12(2) hereof other than by reason of his or her death he or she shall receive the following (in the remainder of this clause referred to as a "partnership share"):-

(i) The amount standing to the credit of his or her capital account at the date of the retirement

(ii) The amount standing to his or her credit on his or her current account

(iii) The share of the profits of the partnership that he or she would have received if he or she had remained a partner until the end of the accounting period in which the retirement occurred"

The Relevant Facts

217. Mother retired from the Partnership in April 1997. The Partnership Accounts for the year ended 5 April 1998 onwards reflect that retirement in the Appropriation Account by adjusting the shares of the Partners in the Loss/profit for that year to one quarter

each (Mother's quarter share in effect being distributed to the three Siblings as to one twelfth each so that with the one-sixth they already had, their shares each goes up to one quarter).

218. The 1997 Partnership Accounts show Mother as receiving her profit share for that year (which was credited to her capital account), a drawing of just over £4,100 from her capital account and the balance of her capital account being transferred to loan account. Thereafter, her capital account stood at a zero balance.

219. As a general matter, the manner in which the "Capital accounts" of the Partners operated was as follows. The combined capital accounts of the Partnership at the year end were shown in the balance sheet and, together with any loan account of a Partner, reflected the net assets/liabilities of the Partnership also as shown in the Partnership balance sheet. The capital accounts were not therefore the usual form of capital account that is traditional in the context of a partnership. A distribution of the capital account (or a call to repay any negative element) would therefore amount to a distribution of a proportionate share of the net assets/liabilities of the Partnership shown in the balance sheet. The balance sheet might not however include all assets and liabilities of the Partnership and those included might not be included at their actual market value as at the balance sheet date but instead reflect eg. the historic cost of an asset.

220. One of the points relied upon by Mr Peters is the manner in which Mother's retirement was dealt with. He says that she did not receive, as is claimed by Suzie on her own retirement, payment of a share of the then net assets of the Partnership (with the same being valued at the date of retirement and assets and liabilities not on the balance sheet also being brought into account). Rather, as shown by the accounts, Mother received payment of her capital account (which also included that year's proportionate share of profits). Her loan or current account was left outstanding but her entitlement to the same was recognised in the accounts.

221. Mr Peters submitted that what Mother received was the same as that provided for under clause 14(3) and that as regards Mother the parties conducted themselves and proceeded on the basis that that reflected Mother's (and indeed, in the case of any other voluntary retirement, any other Partner's) legal entitlement. I reject the submission that I can be satisfied that the treatment of Mother's retirement demonstrates that the parties had reached an agreement or consensus which had the effect of varying/adding to the 1980 Partnership Deed relevant provisions. Quite simply, I have evidence, from the accounts, about what happened when Mother retired but not why it happened. It is likely that Mother simply accepted what Father determined at the time. The parts of Philip's witness statement that were put forward by the Brothers as evidence to be relied upon at the current hearing before me, in accordance with my order, do not contain any relevant evidence supporting any such consensus or agreement. Indeed, in his witness statement, Philip asserted that his Mother retired from the Partnership in 2013 on her death.

222. By letter dated 8 July 2010, Suzie confirmed her retirement from the Partnership "with immediate effect".

The Issues: (a) a share?

223. Some time was spent before me on the issue of whether or not Suzie's resignation was one that was agreed to by the family. However, whether or not Suzie was entitled to resign/retire, and whether or not others wanted her to resign/retire or to continue as partner, it is quite clear that, at least ultimately, all the then Partners agreed to Suzie retiring from the Partnership and ceasing to be a partner as from 8 July 2010.

224. In circumstances where Suzie's retirement was ultimately agreed to, I do not need to consider whether the Partnership was one at will or whether under the Partnership Agreement she otherwise had a right to retire (i.e. without agreement), though these issues were canvassed before me.

225. More time was spent on the issue of whether or not Suzie's retirement brought about a dissolution of the Partnership, "technical" or otherwise. The submissions in this respect seemed to me ultimately to turn on semantics. The key question seemed to me to be what the effects of such resignation were rather than the descriptive term used to describe them. In this respect I was referred to the case of *HLB Kidsons v Lloyd's Underwriters Subscribing Policy No. 621/PK1D00101 & Ors [2008] EWHC (Comm) 2415.* There on a retirement it was common ground that a partnership had been dissolved but the question was the effect of such dissolution on the partners inter se and the authority of a partner holding a specific role either to act in a certain manner in the "winding up" of the old partnership or under the terms of the new partnership Deed. That case confirms my view that in this case there was a dissolution, albeit one that Lindley characterises, as descriptive term of convenience, a "technical" dissolution: meaning one that does not result in a full winding up, involving a sale of all the assets of the dissolved partnership, a settling of partnership debts from the proceeds and the distribution of any balance to the ex-partners in accordance with their entitlements. Rather, the agreement was that the non-retiring partners (Father and the Brothers) would continue in partnership, taking over the former partnership's assets and liabilities.

226. As I understood it, everyone was agreed that after Suzie's retirement and with effect from 8 July 2010 a partnership between the remaining partners (Father and the Brothers) continued, taking on the assets and liabilities of the Partnership as at 8 July 2010 and that, at least between the Partners as they were immediately prior to Suzie's retirement, she was not responsible for Partnership debts incurred after that date.

227. The key question is what, if any, recompense she was entitled to from the continuing partners or liability she was under to the continuing partners.

228. As regards this key issue, it was agreed that the starting point is the 1980 Partnership Agreement (as varied).

229. In his skeleton argument, Mr Peters asserted (or at least appeared to assert), amongst other things, that Suzie's entitlement on retirement was provided for by clause 14(3) of the 1980 Partnership Agreement ("Clause 14(3)"). That clause, however, only deals with the position where a partner retires in certain defined circumstances, primarily being situations where the partner is forced to retire because of their (mis)conduct or financial position (bankruptcy) and a relevant notice is given to them. Clause 14(3) does not, as such, cover the situation of a voluntary retirement as in the case of Suzie's. As I understood his oral submissions, Mr Peters accepted that this was the case.

230. Similarly, I reject Mr Peters' submission that there is some implied term, implied on the facts of this case, that Suzie's entitlement on a voluntary entitlement was as set out in clause 14(3).

231. I have earlier in this judgment rejected Mr Peter's alternative submission that the 1980 Partnership Deed was varied or amended by conduct by reference to what Mother took when she retired some years earlier such that (in effect) clause 14(3) applied even to a voluntary retirement. As regards this, I accept that conduct is capable of varying a partnership agreement and that even one episode of conduct may do so (see e.g. *Peat v Smith* (1889) 5 TLR 306, to which I was referred). However, I do not accept that this happened, in this case, on Mother's retirement. As I have said, I have no evidence going beyond the terms upon which Mother retired, rather than evidence about the circumstances of such retirement and the reaching of the agreed terms and so have insufficient evidence to be satisfied that the terms agreed were agreed as applying to all retirements or whether it was simply a one-off agreement with no further ramifications.

232. I also reject Mr Peter's submission, set out in his Skeleton argument, that the manner of treatment of Suzie's retirement by her and her Brothers at and after her resignation also had the effect of limiting her entitlement to what is set out in clause 14(3). Quite simply, there is no evidence of any relevant conduct which would have had that legal effect. I did not understand him to pursue this point in oral submissions.

233. I did not understand Mr Peters to assert that an estoppel issue, raised by the list of issues, adds anything to his claim. As I understand it, that estoppel claimraised by the statements of case was based on there being a mutual understanding or agreement limiting a retiring partner to what Mother received on her retirement. I have found there was no such mutual understanding or agreement.

234. In my judgment, the question is what as a matter of general law a retiring partner will be entitled to on retirement in circumstances when the partnership is not the subject of a full winding up on such retirement but the non-retiring partners continue in partnership and effectively take over the partnership assets, liabilities and business.

235. In my judgment the answer to that question is fairly plain.

236. On what Lindley & Banks on Partnership refers to as a full (as opposed to a "technical") dissolution, when the Partnership's affairs are subject to a winding up process, a partner's entitlement in line with s39 Partnership Act 1890 is as follows:

> *"On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm"*

237. The relevant accounting process is laid down by s44 Partnership Act 1890:

> "***44. Rule for distribution of assets on final settlement of accounts.***
>
> *In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:*
>
> *(a) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits:*
>
> *(b) The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:*
>
> *1.In paying the debts and liabilities of the firm to persons who are not partners therein:*
>
> *2.In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital:*
>
> *3.In paying to each partner rateably what is due from the firm to him in respect of capital:*
>
> *4.The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.*

238. In Lindley & Banks on Partnership, paragraph 19-11 deals with the entitlement on retirement (where there is no contrary agreement):

> "*In the absence of any express provision in the partnership agreement or in an ad hoc agreement between the partners, the entitlement of the deceased or outgoing partner in respect of his share will, in the normal way, strictly be represented by his proportionate share in the net proceeds remaining after all the partnership assets have been sold and the partnership debts and liabilities paid and discharged. However, where there is an implied recognition on the part of the outgoing partner that the other partners will continue the business, those other partners will be treated as entitled to acquire his share at a valuation and the court will direct the necessary accounts and inquiries for that purpose."*

239. *Partnership Law* by Blackett-Ord and Haren is to similar effect at paragraph 18.34:

> *"If a partner has left the firm but the firm continues without winding up, the implication is that he has retired and that there will be no sale of the partnership assets but he will be paid out at a valuation".*

240. The matter is clearly dealt with by the decision in *Sobell v Boston* [1975] 1 WLR 1587, cited by both textbooks in support of the passages that I have cited.

241. That case concerned a claim by a partner asking for a declaration that the partnership as between him and the defendants had been dissolved, for an account of sums due in respect of his share in the capital and profits, and for an order for the sale of the assets and goodwill of the business. He also claimed that he was entitled to the appointment

of a receiver and manager on the ground that the defendants had been carrying on the business on their own account and using his share therein. On an interim application for the appointment of such receiver and manager, the application was refused.

242. The first issue was what had been agreed when the partner left the partnership and the remaining partners continued in partnership. As Goff J put it:

> "*The alternatives are either that it worked a general dissolution* [involving a sale of the assets including goodwill, which would include the right for the purchaser to use the firm name[7]] *as the plaintiff contends, or that the plaintiff thereby retired leaving the partnership subsisting between the other three."*

243. Having found on the facts that (as in the case before me) the case was one of retirement rather than a full dissolution and winding up, Goff J next considered what the consequences were given that there was no agreement dealing with the financial consequences of the retirement. In this respect he went on to say:

> "*…once given that it is found that a partner has retired, I do not see how as a general rule he can be entitled to a sale which is inconsistent with retirement, involving as that does the other partners taking over the business for themselves, and which, so far as goodwill is concerned, would give him not that which he ought to have, a share of the goodwill as it was when he retired, but something different, a share of the goodwill as at a fortuitous date, the date of the sale. In my judgment, what he is entitled to is the value of his share at the date of his retirement, including, of course, the then goodwill, the ascertainment of which must at all events normally be a matter of inquiry, accounting and valuation, not sale. Once that conclusion is reached then sections 42 and 43 of the Partnership Act 1890 do apply, and whatever is due to the plaintiff, whether under section 42 or on the general account, is a debt due to him from the continuing partners. Accordingly he is merely an unsecured creditor and has no right to interfere or to ask the court to interfere in his debtors' business or to ask that it be saved for him to have recourse thereto to satisfy his demand; and I must, as I do, accept the defendants' submission that the appointment of a receiver and manager is not an appropriate remedy at all*."

244. I need not discuss the jurisprudential basis of the result but it appears to me that it is based upon an implied contract or implied contractual term.

245. As all other relevant liabilities and assets have been dealt with, it follows that on the face of it Suzie is entitled to be bought out by the ongoing Partnership of a one quarter of the value of the 1994 Tenancy owned by the Partnership and valued as at 8 July 2010. The Partnership accounts have no bearing on what value to place on the 1994 Tenancy (indeed, the 1994 Tenancy is not included as an asset within the balance sheet). In my judgment, market value is the appropriate value to be applied, but I will hear further argument if that is not agreed, if and when considering the terms of instruction of any expert.

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[7] As described elsewhere by Goff J in the judgment.

246. I should add that my conclusions in this respect have been fortified by the judgments in *Ham v Ham* [2013] EWCA Civ 1301 to which I was referred. There the key question was the interpretation of a Partnership Deed. The relevant partner was entitled to be paid his "share" but, as Briggs LJ (as he then was) made clear the issue of construction was one of "share of what"? Here there is no such issue of construction, prima facie the share is in the partnership assets (after liabilities have been taken into account to be met out of such assets). In fact liabilities have been dealt with so it is just the share of the relevant remaining asset to be dealt with, the 1994 Tenancy. However, the reasoning in the case supports the view that this is correct (see eg. Lewison LJ at paragraph [35]) and much of Briggs LJ's judgment explains in greater detail why reference to the ordinary partnership Accounts (as opposed to dissolution accounts) will be inappropriate in valuing a share of all the Partnership Assets (because e.g. assets may be left off the balance sheet and in cases where assets are listed on the balance sheet at cost (with or without depreciation)).

(b) valuation Issues: assignability

247. The first question is whether, for these purposes, the 1994 Tenancy should be valued on the basis that it is assignable or not. Suzie asserts that it should be valued as if non assignable, the Brothers that it should be valued on the basis that it is assignable.

248. In 2015, Jamie, as tenant, purported to serve notice on Philip, as landlord under section 6 of the AHA 1986 requiring the terms of the 1994 Tenancy to be reduced into an agreement in writing embodying the relevant tenancy terms. The notice required the written tenancy to provide for the matters in Schedule 1 of the AHA 1986.

249. The consequent written memorandum of agreement included a tenant's covenant against alienation as provided for by AHA 1986 Schedule 1 paragraph 9. The agreement was made between Philip as the trustee of Grandfather's will and Philip and Jamie as tenants and was dated 21 July 2015.

250. It is common ground that the written memorandum has no effect: the s6 notice was not given by, or with the authority of, all three tenants and Suzie did not join in the memorandum of agreement.

251. The position at the moment is that the agreement being wholly oral, there is no expressly agreed covenant against alienation. Mr Walker submits that the court should direct any expert valuation of the 1994 Tenancy to be conducted on the basis there is in place a covenant against alienation in the form of that set out in the Memorandum of Contract. He submits that the court should adopt this approach because:

(a) Suzie is one of the three tenants and would not alienate, as that would further prejudice the value of the freehold reversion and so the interests of the 1975 and First 1997 Trusts.

(b) Any landlord would be concerned to prevent alienation and can do so by serving a notice under s6 AHA 1986, which has the effect under s6(5) of preventing alienation until the written terms are determined by arbitration or agreement.

(c) In determining the terms, paragraph 9 of Schedule 1 will become one of the terms.

252. In my judgment, the above matters are ones that an expert valuer can be directed to take into account to the extent that first, the court, and secondly, he or she considers proper. It does not seem to me that the expert should be directed that the 1994 Tenancy cannot be or will not be alienated. Further, I should note that I doubt that that consideration of Suzie's personal intentions, at least as expressed by Mr Walker above, is relevant in any event. The 1994 Tenancy may be one of which she is a joint tenant but she holds as trustee for the Partnership in which she now has no interest and would, it seems to me, and at least as a matter of generality, be required to act in the best interests of the Partnership and not be entitled to act in her own self interest. That, however, is a matter that can be considered further if expert evidence becomes necessary.

253. I should add that, on this issue, neither Counsel referred me in terms to the Order of DJ Goldberg dated 18 September 2017 (the "Expert Directions Order") giving directions for expert valuation evidence, in effect of the 1994 Tenancy (among other valuations). In that order, the 1994 Tenancy was to be valued as at (as one date) the date of Suzie's resignation on the basis of an open market valuation of a freely assignable original (i.e. not successor) tenancy of the relevant agricultural land occupied by the Partnership. Although being a case management order it can always be reviewed I am pleased that my conclusion as to assignability does not have the effect of varying DJ Goldberg's order in this respect without me understanding why it is right that the matter should be reopened.

(c) valuation issues: fixtures and improvements

254. The second issue is the extent to which Tenant's fixtures and improvements should be left out of account when valuing the 1994 Tenancy, especially in the context of there being a right to what I have described as being, in effect, rent reviews under the AHA 1996 when such rent reviews would leave out of account certain tenant's fixtures and improvements as provided for by s12 and Schedule 2 AHA 1996.

255. It is agreed that in carrying out a valuation of the tenancy it should be assumed that certain matters carried out after the commencement of the 1994 Tenancy by the Partnership should be left out of account when considering the rent that might be achieved in the future under the 1994 Tenancy (and on the assumption that the tenant will remove them/get landlord's compensation for them at the end of any tenancy). The issue is as regards improvements, fixtures and buildings said to have been carried out before the commencement of the 1994 Tenancy on 28 June 1994.

256. Although the Expert Directions Order provided that the Expert was to value (in effect) the 1994 Tenancy on the bases of (1) excluding all tenant's Improvements and fixtures and (2) excluding only tenant's improvements and fixtures effected after 28 June 1994. Mr Walker now challenges whether certain of the items relating to the building of Moor Park Farmhouse could in fact at any time have amounted to tenant's fixtures: he says that the farmhouse was built a time when there was no tenancy and so the improvements/building/fixtures would simply have become part of the freehold. This however is not pleaded.

257. The amended pleadings on this issue are as follows.

258. Suzie's re-amended particulars of claim assert that pre 28 June 1994 improvements should be excluded in determining rent achievable on a rent assessment when valuing the 1994 Tenancy because:

(a) paragraph 2(2)(b) of Schedule 2 AHA 1996 limits the tenant's improvements to be excluded as those which have been executed wholly or partly at the expense of "the tenant".

(b) The tenant's fixtures to be excluded are those "provided by the tenant".

(c) In either case "the tenant" is the tenant under the tenancy in question not any previous tenant (s96(1)).

259. The Brothers' defence and counterclaim is to the effect that what is left out of account in calculating rent on a review is relevant improvements effected before as well as after 28 June 1994, this is because (it is said) :-

(a) "it was mutually understood and agreed and all parties proceeded on the basis that all such items had been acquired by the Partnership prior to that date, and continued, following the creation of the 1994 Tenancy, to be regarded and treated as tenant's items, belonging to the partners in the Partnership, for all such purposes." (see Amended Points of Defence and Counterclaim dated 23 November 2021, paragraph 33).

(b) As the items were thus tenant's fixtures and/or buildings within s10 AHA 1996, they fall to be disregarded when assessing rent as they are not part of the "holding" for those purposes.

260. In Suzie's reply, it is denied that there was any such agreement and it is asserted that Suzie is embarrassed by want of particulars. Further, it is said there cannot have been any agreement that the items would become tenant's fixtures under the 1994 Tenancy because the possible existence of the 1994 Tenancy only came to the Brother's minds in 2015 and the Court has held that it was inferred from conduct rather than resulting from an express agreement, oral or written.

261. In his skeleton argument, in support of the alleged agreement regarding fixtures and buildings, Mr Peters referred to the Partnership Accounts for the years ended 5 April 1995 and 5 April 2009 as recording pre-1994 improvements as belonging to the Partnership.

262. As regards the 1995 Partnership Accounts the notes to the balance sheet show fixed assets of £642,272 with a breakdown in Note 1 listing a number of items carried forward from the April 1994 year end (that is before the 1994 Tenancy commenced in June of that year) but with no great detail (such as "Fixtures and Plant" or "Farm Improvements Scheme", "Rural Workshop Development", "Park farmhouse improvement", "Estate Office" and some of which are related to the Golf Course).

263. In the 2009 Partnership Accounts, the tangible fixed assets are listed under 4 generic headings of which only "Farm Estate and Buildings" and "Land" are potentially relevant.

264. In the schedule put forward by the Brothers identifying the evidence that they rely upon the Brothers simply identified paragraph 812 of Philip's first witness statement which is to the following effect:

> *"Tenancy on the balance sheet*
> *812 I might add here that the tenancy was not included on the balance sheet as an asset of the Partnership. That, I have always understood, is commonplace. As have always understood it, accounts do not include tenancies protected under the agricultural holdings regime as assets on a balance sheet. The fact there was no reference to the tenancy in the accounts is not, therefore, something which I ever regarded as being an omission."*

265. The preceding paragraph is to the following effect:

> *"(11) Treatment of tenant's improvements after 1994*
> *811. In 1994, upon the surrender of the 1973/1978 tenancies in June of that year, there is no different treatment of tenant's improvements in the accounts of the Partnership. They remained assets of the Partnership, as they had been throughout. That did not occur to me as odd because I had regarded the Partnership as having tenanted rights from the commencement of its trading. However, I am equally clear that in 1994 the intention was to ensure that the Partnership's rights were protected as they would be by the surrender of the old tenancies, leaving the Partnership alone as the trading entity and tenant of the Farm and entitled to compensation if the tenancy ended."*

266. Even assuming that the reference in the relevant schedule identifying the evidence relied upon is a misprint for paragraph 811 (though I do not believe that Mr Peters suggested that it was), I do not consider that paragraph 811 is sufficiently clear to make out Mr Peters' case regarding an agreement and nor does it tie the fixture and fittings items in the Schedule given to the Expert (which identifies what the Brothers say are post 1994 fixtures and improvements carried out by the Partnership as tenant and pre-1994 fixtures and improvements which the Brothers say the Partnership "owned".

267. It is fair to say that earlier in Philip's witness statement there are references to the Partnership having a tenancy from 1980 (which case I rejected) and that the creation of that tenancy was consistent with the intention of Father to protect compensation for tenant's improvements. None of these passages were included in the Defendant's Schedule that I required to identify witness evidence in support of relevant issues, the relevant issue in this case being "Alleged Value of AHA Tenancy".

268. Mr Walker, as regards the inadequate nature of the Defence on this issue referred me to CPR PD 16 and the following paragraphs:

> *7.3 Where a claim is based upon a written agreement: (1) a copy of the contract or documents constituting the agreement should be attached to or served with the particulars of claim …*
> *7.4 Where a claim is based upon an oral agreement, the particulars of claim should set out the contractual words used and state by whom, to whom, when and where they were spoken.*

> *7.5 Where a claim is based upon an agreement by conduct, the particulars of claim must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done*."

269. The pleading fails to provide the particulars that there should have been or to provide the *"different version of events from that given by the claimant"* required by CPR r 16.5(2).

270. I am not satisfied on the evidence and pleadings as a whole that the factual basis for Mr Peters' case on pre 28 June 1994 improvements is made out. However, if I am wrong about this, and it is possible by a long process of analysis to construct a factual and legal case from Philip's witness statement I would, as a matter of case management, refuse to permit such case to be put. It was not put forward even in the (comparatively short section of) Mr Peters' skeleton argument and, most importantly, was not clearly identified by amended pleadings and schedule of passages of evidence that I had required to be prepared and served with a view to ensuring that the parties put forward in a clear form their entire legal and factual cases well before the resumed trial so that the other parties and the court could properly understand it and deal with it.

(d) Interest

271. I did not understand Mr Peters to resist interest pursuant to s42 Partnership Act 1890 at 5% on the value of Suzie's share which should have been paid when she retired and such seems to follow from the relevant extract from the judgment of Goff J in the *Sobell* case that I have already cited.

Main Issue 4: The Notice to Quit

272. I have explained the circumstances in which Suzie came to serve a notice to quit. It is accepted that the form and service of the notice to quit are valid.

273. In my judgment there are five issues:

(a) Looked at from the landlord's perspective first, can one out of a number of joint tenants at law of a tenancy validly serve a notice to quit or is unanimity of the holders of the legal title required?

(b) Did Suzie owe fiduciary duties in connection with the tenancy as one of the trustees thereof for the Partnership and did such duties extend to the service by her of a notice to quit?

(c) If so, was service of such notice to quit a breach of fiduciary duty by Suzie?

(d) If so, can and should the court "undo" the service?

(e) If not, what damages or equitable compensation are the Brothers (as partners) entitled to and in particular, are the Brothers estopped from asserting that the tenancy had any value?

(1) Validity of notice to quit served by one only of a number of joint tenants of a tenancy

274. Mr Walker submits that case authority is clear and that a valid notice to quit can be served by one of two or more co-tenants in law and equity even though the legal owners hold as joint tenants on trust for themselves as co-owners in equity. Mr Peters takes the opposite position.

275. In my judgment, the answer to this question is that, absent anything to the contrary in the terms of a tenancy, one of a number of holders of the legal title to a tenancy may validly serve a notice to quit. The most recent authorities on the subject make clear that whereas all joint owners (at law) of a tenancy must act unanimously to carry out an effective positive act in relation to the tenancy (such as the exercise of a break clause, surrender of the term, exercise of an option to renew or apply from relief from forfeiture) this is not the case in relation to a notice to quit. The reason for this is that a periodic tenancy, and in particular a yearly tenancy, is an estate which only continues so long as it is the will of both parties that it should continue.

276. Where there is more than one tenant then all tenants must concur in the continuation of the tenancy. Although in form a notice to quit is a positive act, in substance it has been treated as a negative act. As was said by Lord Bridge in *Hammersmith LBC v Monk* [1992] 1 AC 478 at 490G to 491A:

> " *Finally, it is said that all positive dealings with a joint tenancy require the concurrence of all joint tenants if they are to be effective. Thus, a single joint tenant cannot exercise a break clause in a lease, surrender the term, make a disclaimer, exercise an option to renew the term or apply for relief from forfeiture. All these positive acts which joint tenants must concur in performing are said to afford analogies with the service of notice to determine a periodic tenancy which is likewise a positive act. But this is to confuse the form with the substance. The action of giving notice to determine a periodic tenancy is in form positive; but both on authority and on the principle so aptly summed up in the pithy Scottish phrase "tacit relocation" the substance of the matter is that it is by his omission to give notice of termination that each party signifies the necessary positive assent to the extension of the term for a further period. For all these reasons I agree with the Court of Appeal that unless the terms of the tenancy agreement otherwise provide, notice to quit given by one joint tenant without the concurrence of any other joint tenant is effective to determine a periodic tenancy."*

277. The concept of "tacit relocation" was explained by Lord President Clyde in *Smith v. Grayton Estates Ltd* 1960 S.C. 349 (and cited by Lord Bridge in his speech in the *Monk* case), the issue being whether a tenancy continuing from year to year after the expiry of a fixed term by virtue of the Agricultural Holdings (Scotland) Act 1949 was determined by notice given by one of two joint tenants. Lord Clyde said:

> "*Tacit relocation is not an indefinite prolongation of a lease. It is the prolongation each year of the tenancy for a further one year, if the actings of the parties to the lease show that they are consenting to this prolongation. For, as in all contracts, a tacit relocation or reletting must be based on consent. In the case*

of tacit relocation the law implies that consent if all the parties are silent on the matter. Hence, where there are joint tenants, tacit consent by both of them is necessary to secure the prolongation and to enable tacit relocation to operate. Silence by both is necessary to presume that both the tenants wish the tenancy to continue for another year. On the other hand, if both are not silent, and if one gives due notice of termination, the consent necessary for tacit relocation to operate is demonstrably not present, and tacit relocation will no operate beyond the date of termination in the notice"

278. To similar effect is the speech of Lord Browne-Wilkinson in the same case, who, at 492C-G, said:

> "*In property law, a transfer of land to two or more persons jointly operates so as to make them, vis a vis the outside world, one single owner. "Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner:" Megarry and Wade, The Law of Real Property, 5th ed. (1984), p. 417. The law would have developed consistently with this principle if it had been held that where a periodic tenancy has been granted by or to a number of persons jointly, the relevant "will" to discontinue the tenancy has to be the will of all the joint lessors or joint lessees who together constitute the owner of the reversion or the term as the case may be.*
>
> *At one stage the law seems to have flirted with adopting this approach. Thus in Doe d. Whayman v. Chaplin (1810) 3 Taunt. 120…..*
>
> *Despite this flirtation, the law was in my judgment determined in the opposite sense by Doe d. Aslin v. Summersett (1830) 1 B. & Ad. 135. The contractual, as opposed to the property, approach was adopted. Where there were joint lessors of a periodic tenancy, the continuing "will" had to be the will of all the lessors individually, not the conjoint will of all the lessors collectively. This decision created an exception to the principles of the law of joint ownership: see Megarry and Wade,5th ed., pp. 421-422."*

279. Lord Bridge considered the question of whether the interposition of a trust for sale into the picture in the case of co-owners in law and equity in some way changed the basic rule and considered that it did not. He left open the position where the legal owners were different to those beneficially entitled.

280. At 493C-D, Lord Browne-Wilkinson agreed with Lord Bridge that the same result applied, even where the tenants are trustees. In my view, his reasoning supports the view that as the matter is one of contract, the imposition of a trust will not change the validity of a notice to quit served by one of a number of persons in whom legal title is vested, whatever its terms (unless possibly, the trust is not one of co-ownership and trust obligations arise and the landlord is on notice of the point):

> "*As between the lessor and the lessees the nature of the contract of tenancy cannot have been altered by the fact that the lessees were trustees*."

(2) Fiduciary duties?

281. This sub-issue is the one which proved to be the largest battle ground. In this case, Mr Peters submits that Suzie was one of three trustees holding the 1994 Tenancy on trust

for the Partnership and owing the Partnership (and the individual partners) duties in respect of the trust property, including duties to act in the best interests of the Partnership and for no collateral purpose and to preserve the trust property and that such duties govern her action in serving a notice to quit. Mr Walker submits that no relevant fiduciary duties were owed regarding the service of a notice to quit, there was no relevant trust property to preserve and a trustee cannot be obliged to take on a further tenancy for a year. If he is incorrect on these points, then his alternative argument is that on the facts of this case no relevant duties arose (alternatively, there was no breach).

282. As regards notices to quit in the context of periodic tenancies, Mr Walker relied on comments in the *Monk* case and others like it, in support of the propositions that no fiduciary duties arose. Mr Peters sought to distinguish those cases on the basis that they dealt with true co-ownership cases rather than (as here) one where the trustee in question is that alone and not a co-owner in equity.

283. The question of whether or not a co-owner would be acting in breach of trust in serving a notice to quit to which his or her co-owner had not agreed was considered by Lord Browne-Wilkinson in the *Monk* case. He said:

> "*The tenancy came to an end when one of the lessees gave notice to quit. It may be that, as between the lessees, the giving of the notice to quit was a breach of trust, theoretically giving rise to a claim by the appellant against Mrs. Powell for breach of trust.*
>
> *Even this seems to me very dubious since the overreaching statutory trusts for sale imposed by the Law of Property Act 1925, do not normally alter the beneficial rights inter se of the concurrent owners: see re Warren [1932] 1 Ch. 42, 47, per Maugham J.; and Bull v. Bull [1955] 1 Q.B. 234. But even if, contrary to my view, the giving of the notice to quit by Mrs. Powell was a breach of trust by her, the notice to quit was not a nullity. It was effective as between the lessor and the lessees to terminate the tenancy. The fact that a trustee acts in breach of trust does not mean that he has no capacity to do the act he wrongly did. The breach of trust as between Mrs. Powell and the appellant could not affect the lessors unless some case could be mounted that the lessors were parties to the breach, a case which Mr. Reid, for the appellant, did not seek to advance*."

284. In my view, the key is that Lord Browne-Wilkinson was dealing with a co-ownership (at equity and law) case. The *Warren* case that he was referring to was one as to whether a gift in land had been adeemed (by reason of the intervention of the Law of Property Act 1925 and an amendment thereto which changed the nature of beneficial interests in land to interests under a trust for sale). In considering that issue, Maugham J made the point cited by Lord Browne-Wilkinson:

> "*The " statutory trusts" (the meaning of which expression is set out in s. 35 of the Law of Property Act, 1925) are shortly to sell and hold the net proceeds on such trusts as may be requisite for giving effect to the rights of the persons interested in the land…..it is enacted, in substitution for s. 26, sub-s. 3, of the Act of 1925, that "trustees for sale shall so far as practicable consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale and shall, so far as consistent with the general interest of the trust, give*

> *effect to the -wishes of such persons, or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that the provisions of this sub-section have been complied with." Having regard to the provisions of that sub-section, it is clear that trustees for sale would be acting wrongly, in general, in selling, if undivided beneficial owners required them not to sell. There is no doubt that, since the coming into force of the Law of Property Act, 1925, the position of undivided owners is different from what it was before. That Act, for the purpose of simplifying the law, has introduced provisions for undivided shares, and has made partition actions unnecessary and obsolete. But in substance the beneficial interests of the undivided owners in regard to enjoyment so long as the land remains unsold have not been altered, and it is true to say that the ordinary layman possessed of an undivided share in land would be quite unaware of any alteration in his rights as the result of the Act.".*

285. In the *Bull v Bull* case legal title to a house had been vested in a son, the Plaintiff, but the co-owners in equity were held to have been himself and his mother, the defendant (both had contributed to the purchase price and had intended to live there together). Both had lived in the house. After the plaintiff married, there was a falling out between mother and daughter-in-law (and son). The son served a notice to quit on the mother. It was held (citing the headnote to the law report) that:

> *"the mother was an equitable tenant in common with the son and that until the house was sold each of them was entitled, concurrently with the other, to possession of the premises, and that neither of them was entitled to turn the other out. Per curiam. The son, who as legal owner held the property on a statutory trust for sale, could not sell it without the consent of the mother because he was unable to give a valid receipt for the proceeds. To satisfy section 14 of the Trustee Act, 1925, he could, however, appoint another trustee and, if the mother unreasonably refused her consent, could apply to the court under section 30 of the Law of Property Act, 1925".*

286. Denning LJ (as he then was) put the matter as follows, relying also on the extract of the Maugham J judgment in the *Warren* case that I have cited earlier:

> *"The son is, of course, the legal owner of the house; but the mother and son are, I think, equitable tenants in common. Each is entitled in equity to an undivided share in the house, the share of each being in proportion to his or her respective contribution. The rights of equitable tenants in common as between themselves have never, so far as I know, been defined; but there is plenty of authority about the rights of legal owners in common. Each of them is entitled to the possession of the land and to the use and enjoyment of it in a proper manner. Neither can turn out the other; but if one of them should take more than his proper share the injured party can bring an action for an account. If one of them should go so far as to oust the other he is guilty of a trespass: see Jacobs v. Seward. Such being the rights of legal tenants in common, I think that the rights of equitable owners in common are the same, save only for such differences as are necessarily consequent on the interest being equitable and not legal. It is well known that equity follows the law; and it does so in these cases about tenants in common as in others*."

287. As I read it, Lord Browne-Wilkinson was saying that in the case of co-owners in equity, their rights remained as their rights as legal tenants: that is either could serve notice to quit indicating that they were not agreeable to a continuation of the periodic tenancy and that service of such a notice to quit was not a trustee function but reflective of their rights as co-owner and no fiduciary duty arose in that respect. In this case of course Suzie was not a co-owner but rather a trustee holding the land for the benefit of the Partnership.

288. *Crawley Borough Council v Ure* [1996] QB 13 was another case of co-ownership. A husband and wife had the benefit of a periodic tenancy granted by the plaintiff council. The wife served a notice to quit without consulting the husband. The periodic tenancy came to an end. The husband did not leave and possession proceedings were brought. By the time of the trial the husband accepted (or did not contest) that service of the notice to quit did not amount to a breach of trust. However, he said that there was a breach of trust by the wife in not consulting him first, as required by s26(3) Law of Property Act 1925, and that the council, who had advised and encouraged the wife to serve the notice to quit were parties to the breach of trust and should not have obtained an order for possession relying on their own wrong.

289. The argument for breach of trust was that s26(3) required trustees for sale to consult the beneficiaries in the exercise of their trusts and powers. Glidewell LJ reasoned that there was no breach of trust because service of a notice to quit was not an exercise of the trust or the trustee's powers because it was not a "positive act".

290. Hobhouse LJ, agreeing with Glidewell LJ, used the same reasoning but also pointed out:

> *"It must be observed that both Lord Browne-Wilkinson [1992] 1 A.C.478, 493 and Slade L.J., 89 L.G.R. 357, 373 in the Court of Appeal recognise the possibility that there might be a trust which would affect a joint tenant in this position. It would have to be a trust of a more specific character and both Lord Browne-Wilkinson and Slade L.J. clearly felt great difficulty about the possible existence of such a trust having regard to the expiring subject matter of the trust, and the role of the trustee for sale. However, any such trust as there visualised would probably have to be one which arose under the principles discussed in Jones v. Challenger [1961] 1 Q.B. 176, and as illustrated by Bull v. Bull [1955] 1 Q.B. 234 and* In re Evers' Trust *[1980] 1 W.L.R. 1327. In the present case no argument has been advanced based upon the existence of any such trust or trust obligation. The difficulties, factually, in the present case are obvious. They include the fact that the wife had left the property and ceased to live there or wish to live there some nine months before she served the notice. However, no such trust is relied upon. The only trust obligation that is put forward is that found in section 26(3) and that obligation, as I have held, does not apply to the service of the notice. Therefore, it follows that the husband fails on the first step in his argument and none of the further steps (which themselves are not without difficulty) need to be considered.*"

291. As I understand what Hobhouse LJ was saying it was that there might be a trust where the essential trust for sale was nevertheless subject to an underlying purpose which

would affect not just the exercise of the court's discretion in deciding whether to order a sale on application but also might give rise to duties in the case of a periodic tenancy preventing one co-owner from unilaterally serving a notice to quit.

(1) Thus, the headnote to the *Jones v Challenger* case records:

> " *that when property was required by husband and wife jointly for the purpose of providing a matrimonial home, neither party had a right to demand the sale of the property while that purpose still existed, for that might defeat the object behind the trust; but with the end of the marriage that purpose was dissolved and the duty to sell was restored*".

(2) Similarly, in *Re Evers Trust* the headnote to the case report records:

> "*that in exercising its discretion on an application under section 30 of the Law of Property Act 1925 the court had to have regard to the underlying purpose of the trust for sale and decide whether at the particular time and in the particular circumstances when the C application was made, it would be right, having regard to that underlying purpose, to order a sale; that in considering the circumstances of the purchase of the cottage, the inference was irresistible that the parties had purchased it as a family home for themselves and the three children for the indefinite future, and, since there was no evidence that the father had any need to realise his investment whereas the sale of the property would put the mother in a very difficult position, it D would be wrong to order a sale at the present time and in the existing circumstances."*

292. In this particular case Suzie was not a co-owner in equity, She was in the position of a trustee holding the property on trust for the Partnership and subject to quite different duties and obligations than a simple co-owner in equity. The co-ownership cases where there is said to be (in effect) a right to refuse to take a new tenancy at the end of the period of the current periodic tenancy does not apply where the person in question is not a co-owner in equity but only a trustee. The question is whether a trustee in the position of Suzie is, in effect, required to take a new tenancy and not simply indicate that she is unwilling to renew and bring about a further period of tenancy. In my judgment the answer is clearly in the affirmative. I see no reason why Suzie, in the position of a trustee as regards the periodic tenancy, should not owe fiduciary duties to act in the best interests of the Partnership, not to act for a collateral purpose (her own self interest), to preserve the trust property which is in effect a periodic tenancy with an ability to prolong the same by not carrying out the step of serving a notice to quit, and to avoid a conflict between self interest and duty.

293. Further, it seems to me that once it is accepted that the duties of the trustee in the particular case do encompass preserving the trust property with a duty to renew, then the service of a notice to quit is no longer simply an act which is outside the duties of the trustee, as is the case when the trustee is a co-owner with no trust duties in relation to renewing (or not refusing to renew) the tenancy. If a trustee of a periodic tenancy is, prima facie, obliged to renew it then the renewal of that tenancy does become a positive act by the trustee and, in my view, service of a notice to quit does too, for the purposes of characterising the step as being within the exercise of the trustee's powers. There

may well be cases where, on the particular facts, it is entirely proper and within a trustee's duties not to renew a periodic tenancy (e.g. the periodic tenancy has become onerous or, for example, rents have collapsed such that the existing rent is not commercial). The trustee might then consider serving a notice to quit, and that would surely be a positive act as trustee being an exercise of the powers of a trustee which the court could give directions upon?

294. The same general points appear to me to explain why the reasoning applying to co-owners who hold a periodic tenancy, that there is a no trust in relation to anything other than the existing tenancy and no trust property in relation to the tenancy that would come about if renewed, also does not apply to the situation before me. As regards this, in the *Monk* case, Lord Bridge said in terms:

> " *At any given moment the extent of the interest to which the trust relates extends no further than the end of the period of the tenancy which will next expire on a date for which it is still possible to give notice to quit*".

295. This statement by Lord Bridge is carefully worded to refer to the "extent of the interest to which the trust relates". As co-owners in equity of a periodic tenancy are under no duty to take a renewal and therefore under no duty not to serve a notice to quit, the extent of the interest to which the trust relates is limited to the current periodic tenancy. However, if there is a duty to take a renewal then the extent of the interest to which the trust relates extends beyond the current term of the existing periodic tenancy.

296. That such a duty applies to trustees is clear from cases as old as *Keech v Sandford (*1726) Sel. Cas. 61, which was described by Buckley J in *Re Biss* [1903] 2 Ch 40 as follows:

> *"It is, of course, very familiar law that if a trustee obtains a renewal of a lease of property vested in him as trustee, whether by virtue of a right of renewal or not, he must hold the new lease for the benefit of his cestui que trust. The leading authority upon that is Keech v. Sandford. The principle is that the trustee owes it to his cestui que trust to obtain a renewal, if he can do so, on beneficial terms, and that the Court will not allow him to obtain a renewal upon beneficial terms for himself when his duty is to get it for his cestui que trust."*

297. Although Buckley J was overruled on the facts as to whether a fiduciary duty arose on the particular facts of the case (way outside those of a trustee) the Court of Appeal in *Re Biss* agreed with his general statements of the law and Collins MR said that:

> " *While, therefore, I am bound to differ from the actual decision of the learned judge, I feel that I am giving effect to his own view."*

298. The starting point was that the trust duties of fiduciaries can extend beyond the terms of a current lease and encompass a lease which might come about on a renewal. As put by Collins MR:

> "*But the principle has been extended to cover other persons who are not primarily trustees at all; as, for instance, tenants for life towards those in remainder. The foundation of the presumption in their case is that they can take only what the will or settlement under which they make title gives them, and that a renewal must be looked on*

> *as an accretion to or graft upon the original term arising out of the goodwill or quasi-tenant right annexed thereto, and that their rights to such accretion are those which they have in the term, and no greater, and terminate with their own life*".

299. Interestingly, in reviewing the situations where duties regarding renewals may or may not arise, Collins MR specifically considered partners (where a fiduciary relationship will arise, even though in a loose sense the partners might be said to be co-owners) and ordinary co-owners:

> " *Tenants in common do not stand in a fiduciary relation to each other: Kennedy v. De Trafford [1897] A. C. 180; and one of two mortgagors, tenants in common, is not debarred from buying for himself the undivided equity of redemption in the whole*."

300. It can thus be seen that the comments in more recent cases about co-owners not owing duties regarding renewals and service of notices to quit are entirely in line with authority but they do not impinge on the situation of a trustee who is not a co-owner in equity or is a co-owner in equity such as a partner (or, possibly, where the co-ownership trust is not a bare trust for sale/trust of land but one where the purpose of the trust impacts upon the basic sale provision of the trust (eg. the purpose includes the provision of a home for members of the family).

301. I turn now to cases subsequent to the *Ure* case to which I was referred.

302. In *Cork v Cork* [1997] 1 EGLR 5, Knox J was faced with an interim application seeking an order that a co-tenant of an agricultural tenancy join in serving a counter notice to a notice to quit. All that he had to decide was that there was a prima facie case on the facts and law. The Plaintiff was met with an argument that the defendant as co-owner did not owe any duties to keep the tenancy alive and reliance on the *Monk* case. Knox J considered that there was an arguable case on the point. In my judgment his reasoning is persuasive and the reasoning that I would respectfully adopt.

303. First, relevantly, he drew a distinction between the consequences of certain actions once carried out and the separate question as to the position if the court was asked to intervene at an earlier stage and there were relevant trust considerations affecting the manner in which the trustees for sale should act:

> *"So the principles upon which the House of Lords decided the Hammersmith and Fulham Borough Council case were recognised in Featherstone v Staples and were not treated by Slade Ll as being inconsistent with the possibility of the court, in an appropriate case, directing one of two or more joint tenants at law, who were also trustees for sale, to serve a counternotice, if the equitable considerations under the trust for sale so dictated.*
> *On this application, which is an interlocutory one, at a fairly late hour of the day, I do not propose to enter into a lengthy debate on the extent to which the Hammersmith and Fulham Borough Council v Monk case is consistent with those three authorities in the Court of Appeal, which recognised the jurisdiction that I am being asked to*
> *exercise in this case. In my view, it is at least arguable that they can perfectly well coexist. It seems to me that the speech of Lord Browne-Wilkinson recognises explicitly in the Hammersmith and Fulham case the possibility of there being*

trust considerations existing which might in an appropriate case (and if the court had an opportunity of intervening at an early enough stage) have an effect upon the way in which the trustees for sale should be directed to behave. Monk's case was concerned with what the results of what one of the two trustees for sale had actually done vis a vis the landlord. That is a different situation, in my judgment, from what I am asked to look at, which is how the trustees for sale should be directed to behave vis a vis the landlord. So I see no incompatibility between those two lines of authority."

304. Secondly, he decided that it was at least arguable that on the facts before him there were such relevant trust considerations arising from an agreement as to the property in question:

"*in my judgment, what the court has to look at is whether there are equitable interests which operate to vary the prima facie position which certainly obtained in 1974, namely that either of the two (or any of the three, as it was in those days) joint tenants could serve a tenant's notice to quit at an appropriate time under the tenancy at law, and, had a notice under the relevant legislation been served by the landlord, could have declined to serve a counternotice.*
On that issue, are there any such equitable interests which arise, it seems to me that it is that a result was achieved, consequent upon the family discussions in 1991 and thereafter, leading up to the deed of retirement, which positively had the effect of an agreement that Mr Roger Cork should remain as the occupying farming tenant of
this farm."

305. In *Notting Hill Trust v Brackley* [2001] L&TR 34, the situation was again one of co-owners. The facts were described by Peter Gibson LJ as being "strikingly similar" to those in the *Ure* case. This time the trust was not a trust for sale under the Law of Property Act 1925 but a trust of land under the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA 1996"). The issue was whether there was a duty in a co-owner of land to consult before serving a notice to quit. It was argued that the service by one co-owner of such a notice was void or voidable and hence a possession order should not have been made. The Court held that the position was determined by the *Monk* case and that TOLATA did not change the position. It was common ground that:

"*… either of two joint tenants under a periodic tenancy may give a valid notice to quit to determine the tenancy and that the giving of a notice to quit by one joint tenant is not in itself a breach of trust."*.

306. Three issues were identified by Peter Gibson LJ, of which the court only dealt with the first one:

(1) Did the serving of such a notice to quit amount to the exercise of a function relating to land the subject of the trust within s11 of TOLATA 1996?

(2) If it did, was there a breach of trust in so doing?

(3) If so, was the landlord prevented from obtaining possession in reliance on a notice that he had procured from the trustee acting in breach of trust?

307. As regards the first question, Peter Gibson LJ considered that the matter was determined by the *Monk* case and there was no reason to treat TOLATA 1996 as changing the position reached in Monk in regard to the equivalent of s26(3) Law of Property Act 1925.

> "*In the light of th[e] reasoning [in Ure], which to my mind was in no way dependent upon the existence of the trust for sale imposed by the 1925 Act, the indication by one joint tenant by means of the notice to quit of his or her unwillingness that the joint tenancy should continue beyond the end of the period when the notice takes effect is not the exercise by the trustee as trustee of a power or duty of the trustees. It is no more than the exercise by the joint tenant of his or her right to withhold his or her consent to the continuation of the tenancy into a further period. That is not the exercise of a function of the trustees."*

That this was so depended, as we have seen, upon an analysis of what were the duties of co-owners (in law and equity).

308. Accordingly, I consider that Suzie as a trustee being one of the persons holding legal title to the 1994 Tenancy on trust for the Partnership prima facie owed fiduciary duties to the Partnership so far as she decided to, or not to, serve a notice to quit.

309. The next issue is whether there is anything in the facts of the case to change the analysis that would normally apply. In that respect, Mr Walker submits that (a) the understanding or agreement within the family was that legal structures should bend to the wishes of Father (or Father and Mother) and if necessary be set aside by agreement; (b) Father's final wish was that during the lifetime of himself and Mother they were to rely on the Partnership for their income but that after the parents' deaths all 3 of the Siblings should benefit equally "no matter what the deeds say" (see letter of 7 December 2011); (c) that the terms of the trust by which the 1994 Tenancy is held for the Partnership must allow division of the family assets in equal one third shares and to achieve that the Partnership must relinquish the 1994 Tenancy; (d) the Brothers are acting in breach of trust in retaining the 1994 Tenancy for the Partnership; and (e) service of the notice to quit by Suzie remedies the breach of trust by the Brothers and is not itself a breach of trust but rather a giving effect to the trust.

310. I do not accept this submission. The main reason is that I disagree with the submission that Father (or Father and Mother) had determined that the Siblings were to benefit equally. My overall conclusion on this issue was set out in paragraph [5] of the First Judgment:

> "*[5] …According to Suzie, the Parents' wishes were that the three Siblings should benefit equally and that powers of appointment and advancement under relevant family trusts should be exercised to that end. According to the Brothers, their Parents' settled intention was that the entirety of the Farm Inheritance should be kept intact. For what it is worth, my assessment of the evidence shows that the Parents had both aims in mind and, from time to time, changed their position as to which should give way to the other and when."*

311. Having been taken by Mr Walker though pages and pages of documents recording the changing intentions of Father over time, his attempts to resolve what would happen on his death and his failure to achieve agreement as to that, I remain of the view that I expressed in the First Judgment that no final position was reached and that it is simply not possible to conclude that Father's intention (whether or not communicated to the Siblings) was that the Partnership should terminate its interest in the 1994 Tenancy with a view to (among other things) the 1975 Trust having a half share interest in land without the encumbrance of a tenancy in favour of two out of three of its income beneficiaries and so that it would be possible to appoint capital to the three Siblings on a basis that did not leave the Brothers in a better position than Suzie because of their interest in the Partnership and the Partnership's interest in the 1994 Tenancy. Indeed, to some extent this is a variation of the arguments in another guise that Mr Walker sought to raise in submitting at the First Trial that there was no 1994 Tenancy.

312. Many of the documents that he relied upon are cited in the First Judgment. I do not consider that I need recite all those that are not referred to in the First Judgment but to which I was referred to in this renewed trial. In essence, they are further examples of the changing thoughts of Father but they demonstrate to my mind that the matter was simply unresolved at his death.

313. Further, the understanding or agreement that legal structures would if necessary give way to Father's (or Father's and Mother's) wishes at any time has to be understood in context. The legal structures were there and valid. They were only to be undone if Father so decided. He made no relevant decision (nor it follows one that was given effect to, in changing the terms or purpose of the trust on which the 1994 Tenancy was held). In paragraphs 93 and 95 of the First Judgment I said:

> "*[93]…. In my assessment, it is not accurate of Suzie to say that the Partnership was not intended to create any enforceable rights or obligations. Rather, the Partnership operated on the basis that the partners would not enforce their legal rights or obligations but rather they would act as requested, or required, by Father. Similarly, beneficial ownership of parcels of land within the Family Inheritance were passed by Father and/or Mother to the Siblings, either directly (as direct beneficial owners) or indirectly (through an interest in a Family Trust), but in each case, and notwithstanding the legal rights and obligations, the Siblings would permit Father to decide how the same or the income from them would be dealt with.*
>
> *……*
>
> *[95] I do not consider that the legal structures put in place were a "sham". Nor do I consider that there was no intention to create legal relations: indeed the structures were created specifically to create legal relations for tax planning reasons. However, those with legal rights were expected to bow to Father's wishes."*

314. At most it might be said that Father died with the hope and wish that the three Siblings would benefit equally but how that was to be achieved was a matter that was completely unresolved. In my judgment, this is not enough to change the underlying purpose of the

trust of the 1994 Tenancy to be one that on Father's death, the Tenancy should be brought to an end by non-renewal. Indeed, that would have potentially gone against Father's wish that the Farm continue to be farmed as a farm by the Partnership.

(3) A breach of trust?

315. Having identified the fiduciary duties that lay upon Suzie as one of the trustees of the 1994 Tenancy, the next issue I must deal with is the question of breach.

316. As regards this, I have to consider the further written and oral evidence of Suzie that was tendered. This evidence was primarily directed at the issue of whether the Brothers are estopped from asserting that the 1994 Tenancy has any value with the effect, submits Mr Walker, that, even if service of the notice to quit was a breach of trust there is no consequential compensation and no equitable damages to be paid by Susie. Nevertheless, the evidence is relevant to the question of breach of duty too.

317. My assessment of Suzie's further evidence was that it was honestly and frankly given. So far as is relevant for consideration of the issue of breach of trust I am completely satisfied:

(1) That Suzie was not acting bona fide in the best interests of the Partnership and its partners when serving the notice to quit. As she quite honestly said in cross-examination, it seemed to her that her Brothers had everything and that she had nothing and that what she was trying to do was to give effect to, or bring about a position where it was easier to give effect to, her parents' wishes as she saw them. Although she talked in terms of the result possibly benefitting her Brothers because the interests of all three Siblings under the 1975 Trust would be enhanced and that there were commercial advantages in ending the litigation, I do not consider that these were anything other than ex post facto rationalisations as to why she would characterise the notice to quit as not being wholly to the disadvantage of her Brothers. I am satisfied that she did not act thinking anything other than that the notice to quit would benefit her and disadvantage her Brothers in removing what she saw as the disparity in the respective positions of her Brothers and herself caused by the existence of the 1994 Tenancy.

(2) Secondly, I am satisfied that she was not acing with a view to the interests of the Trust but for a collateral purpose, namely to put herself in a better position under the overall family legal structures. In those circumstances, the interesting issues raised by Lords Sumption and Hodge as to the appropriate approach to cases where a fiduciary's decision is moved by various causes, some proper and some improper (see *Eclairs Group Limited v JKX Oil & Gas plc* [20] UKSC 71) do not arise.

(3) Thirdly, I am satisfied that the clear intention and effect was to destroy rather than preserve the Trust Property and that in acting as she did, Suzie was acting in a position where she was in a position of conflict between her duty to the Partnership to obtain an extension to the periodic 1994 AHA Tenancy and her self-interest in bringing it to an end with no renewal.

(4) Relief for breach of trust

318. It was submitted by Mr Peters that I could order Suzie to withdraw her notice to quit or alternatively that I could order her not to rely upon it.

319. The difficulty with the first point is that a notice to quit is not withdrawable. As I understood him, ultimately Mr Peters accepted the position as summarised, for example, in *Woodfall*:

> "*17.200…..Thus, once a valid notice to quit has been served, the tenancy will automatically come to an end on the expiry of the notice, even though the party giving it has purported to waive or withdraw it. The parties may, by a new contract, create a new tenancy which is what is sometimes meant by "waiving" a notice to quit, but the old tenancy no longer exists.*[1]"
>
> [1] *Tayleur v Wildin (1868) L.R. 3 Ex. 303; Clarke v Grant [1950] 1 K.B. 104. And see Smith's Leading Cases (13th ed.), Vol.2, p.124. For "waiver" of notice to quit see paras 17.264 and following*."

320. The difficulty with the second point is that preventing Suzie relying upon the notice to quit would not prevent it coming into effect and reliance being placed upon it e.g. as regards those with a different interest in the relevant land.

321. Mr Peters also suggested that I could and should order Suzie (and Philip and Jamie) (as tenants) to enter into a new tenancy that Philip, as trustee of Grandfather's Will Trust would grant. The difficulty with that is that it raises questions about the proper course to be taken by the trustee of the freehold reversion and whether Philip would be acting properly in so agreeing to the grant of a new tenancy. Further the WOFL transactions potentially raise a further level of complication.

322. However, it seems to me that the appropriate remedy is one of rescission. Rescission is a well known equitable remedy for breach of trust or fiduciary duty. Although typically applying to contracts it is clear that it can be a remedy to set aside other transactions. I see no reason why a transaction which amounts to a binding notice that a person is not agreeing to take on a new period of a periodic tenancy on renewal should not be the subject of rescission in an appropriate case. Here the landlord, Philip (as Trustee for Grandfather's will trust) was well aware of the circumstances that the notice to quit was served in breach of (several) fiduciary duties. There are no grounds put forward as a defence to rescission (such as, by way of example, impossibility of restitution in full to both parties).

323. Mr Walker submits, first, that there is no "transaction" to rescind. There is simply notice of an intention not to agree to a new period of the tenancy at the expiry of the current period. The notice is simply intimation of a withholding of consent to a transaction, not a transaction itself. In terms of rescission I do not accept that service of notice of an intention about consent to a new tenancy (which then binds and cannot be withdrawn) is not a transaction that can be the subject of an order for rescission.

324. Secondly, he repeats the arguments that service of such notice is not a positive act but a negative one and he relies upon what was said by Lord Hoffmann in *Harrow LBC v.*

Johnstone at 471A-B. The relevant passage from the speech of Lord Hoffmann continues beyond letter B on the page referred to and is as follows:

> "*The order made by Judge Krikler did not restrain the wife from serving a notice to quit upon the council. But since there is likely sooner or later (probably sooner) to be a case in which, at the time when the notice was served, an order to this effect had been or could have been made under one or other of the jurisdictions enumerated by my noble and learned friend, I would offer some observations on what the consequences would be.*
>
> *In my view, the existence of an injunction could not in itself vitiate the notice given by the wife. The principle laid down by this House in Hammersmith and Fulham London Borough Council v. Monk [1992] 1 A.C. 478 is that the term created by the grant of a periodic joint tenancy is defined by reference to the absence of a notice by the landlord or one or other of the joint tenants signifying that he is not willing that it should continue. If this negative condition is not satisfied, the term comes to an end. For my part, I do not see how the existence of an injunction against*
> *the wife <u>in proceedings to which the landlord was not a party and of which it had no knowledge</u> could enable a court to deem the negative condition to be satisfied."(*emphasis supplied)

325. In my judgment Lord Hoffmann was dealing with the validity and effect of a notice to quit and whether an injunction not to serve one would prevent its efficacy if served. I am dealing with a wholly different issue which is whether a notice which I accept had the effect of bringing the tenancy to an end can be set aside. Lord Hoffman seems to have envisaged that the position might in any event have been different in the factual situation he was considering had there been a difference in the facts so that the landlord was on notice of the injunction (and breach of it).

326. Mr Walker also suggests that the Court cannot deem the negative condition (an absence of an unwillingness to continue the tenancy) to be satisfied and that in some manner the court cannot force Suzie to join in a continuation of the tenancy. The answer is, in my view, that the court can require trustees to carry out their duties and, as I have held, one such duty lying on Suzie was an obligation to continue the tenancy (see discussion about *Re Biss* and *Keech v Sandford* earlier in this judgment).

327. Accordingly I will make an order for rescission and will consider further any ancillary or consequential orders that the parties may agree or propose.

(5) Damages and estoppel

328. In the light of my decision regarding rescission it seems unlikely that the issue of equitable damages or compensation arises. It is also unclear to me where that leaves Suzie with regard to her position regarding the assessment of the value of her partnership share on the winding up of the Partnership. However, for completeness, I deal with the issue briefly.

329. The case of Suzie is that the first two defendants' primary case has been pleaded as being, and remains, that the 1994 Tenancy has no value. She acted in reliance on that

position in serving her notice to quit. Accordingly, the Brothers are estopped from asserting that the 1994 Tenancy has any value.

330. The position on the statements of case is as follows.

331. The amended particulars of claim in the Main Proceedings asserted, as regards the 1994 Tenancy:

> *" 87J. The First Defendant, with the Second Defendant, has wrongly asserted that they hold the entirety of the 1975 Trust Land, including the residential properties Park Farm House, Moor Park and Wide Open Farm House, under a tenancy enjoying security of tenure under the AHA. In doing so, the First and Second Defendants, have sought to secure for themselves a very valuable interest, at the expense of the 1975 Trust and the Claimant. If successful, the First and Second Defendants' claims would seriously undermine the value of the relevant land, both as to its capital value and its potential to generate revenue, at the expense of the 1975 Trust and to the personal benefit of the First and Second Defendants."*

332. It is notable that this pleading forms part of the plea by Suzie that there was no 1994 Tenancy. Value was simply part of the background and reasoning as to why such a tenancy did not exist.

333. The response in the amended defence and counterclaim was:

> "*87J. Paragraph 87J wholly mischaracterises the issue of the AHA protected tenancy, and is denied. The First Defendant, with the Second Defendant, needed to understand how the 1975 Trust land (including Park Farm House, Moor Park and Wide Open Farm House) were held. They took advice from Peter Williams, an expert in this field. The thrust of his Advices, which have been disclosed, is that an AHA protected tenancy exists, reflecting the unbroken paying of rent by the Partnership for the land in question over the entire relevant period. The 1st and 2nd Defendants have neither sought to, nor secured for themselves a very valuable interest at the expense of the 1975 Trust or the Claimant. First, the interest has no value, because it is not capable of being assigned. Secondly it has not been secured at the expense of the 1975 Trust. Given that it has existed at all relevant times, the AHA protected tenancy is simply the legal consequence of the arrangements under which the land is held. Thirdly it has not been at the expense of the Claimant. The Claimant was until 2010 a partner and a tenant under the AHA protected tenancy. It is admitted that the existence of the AHA protected tenancy has an effect on the capital value of the land, but repeated that this is simply the legal effect of the statutory framework on arrangements entered into in Father and Mother's lifetimes*."

334. It is noticeable that the plea was not a bland plea of no value but of no value because the tenancy could not be assigned. Whether or not it could be assigned was of course an issue in the proceedings.

335. At paragraph 140 of the amended particulars of claim, the position regarding the liability of Suzie to pay the debit sum on her capital account to the Partnership was dealt with. Having denied any such liability, at paragraph 140.7 it was stated:

> *"140.7 If, which is denied, the Claimant did have any liability in respect of the closing balance on her capital account, that balance would need to be based upon a true valuation of the business and its assets rather than book values, and would need to include assets which have been treated by the Partnership as its assets despite not being recorded in the Partnership accounts – including assets such as Spring Hill House used as security for the Partnership's extensive borrowings. These assets would also have to include the 1994 Tenancy if, contrary to the Claimant's case, the same subsisted and enjoyed security of tenure under the AHA."*

336. The response in the amended defence and counterclaim was as follows:

> *"As to sub-paragraphs 6 and 7, it is denied that the Partnership accounts are inaccurate. In particular the Claimant's contention that Spring Hill Farm House is a Partnership asset is inconsistent with paragraphs 84.4 and 127 of the Particulars of Claim and is denied. Nor does the 1994 Tenancy have any value, since it is non-assignable."*

337. The case was therefore that the 1994 Tenancy has no value because it was non-assignable. However, assignability was an issue in the case and I have held that the tenancy is assignable. Therefore such representation as there was to the Brother's case on value does not apply in the circumstances.

338. Furthermore, I have difficulty in seeing how Suzie relied on any such representation in serving her notice to quit. Her evidence was clear. First, she was well aware and herself believed that the 1994 Tenancy did have a significant value. She was not therefore relying on the Tenancy in fact having no value. Secondly, she was well aware that the single joint expert had valued the 1994 Tenancy at a significant value (between £335,000 and £630,000 depending on various factors). Thirdly, she was aware that the Brothers clearly considered the 1994 Tenancy to have a value because they had fought so hard for the existence of the 1994 Tenancy. She was also aware that they were likely to assert it had a value if she attempted to end the periodic tenancy (or not renew it). Further she simply relied on some assertion by the Brothers of lack of value, she seems to have acted on legal advice/recollection in this respect, said she did not look back at (or apparently consider) the statements of case and did not indicate that she had understood the no value point was tied to a non assignability assertion. In cross-examination she was quite candid, the notice to quit was served on the basis that such service might result in an estoppel arising against the Brothers in terms of preventing them (by estoppel) from asserting a value for the 1994 Tenancy and not because she had any real belief that that was going to be their case or was their case by the time of the judgment in the Court of Appeal.

339. In all the circumstances, I do not consider that the Brothers are estopped from asserting that the 1994 Tenancy has a value. Were the notice to quit not to be rescinded and causal damages flowing from the breaches of fiduciary duty by Suzie that I have found to be established to be an issue then on the relevant inquiry the Brothers would not be estopped from asserting that the 1994 Tenancy had value.

Summary of conclusions by reference to the schedule of issues

340. In summarising my findings it may be helpful if I utilise the Schedule of Issues placed before me. The following is a summary only and should be read with the relevant parts of this judgment.

341. **The Partnership Account** As regards the Partnership account (or more accurately the buy out of Suzie's share in the Partnership on her retirement):

		Judgment
1.1	Was there was a dissolution of the Partnership upon C's retirement on 08/07/2010	Yes – but not a full winding up.
1.2	Did C thereupon become entitled to a ¼ share in the 2010 Partnership assets and liabilities ?	She became entitled for her Partnership share to be bought out, valued on the basis of a ¼ share of partnership assets and liabilities.
1.3	Upon the agreed taking of an account should C be credited with a ¼ share value of the 1994 Tenancy?	It is a valuation exercise rather than taking an account. Other liabilities and other assets having been dealt with by agreement, the only issue now is the ¼ value of the 1994 Tenancy for which Suzie should receive value.
1.4	Is C estopped from claiming such a ¼ share?	No.
1.5	Should the ¼ share be assessed at book value of £nil, or true value?	True value
1.6	What is the value of the ¼ share?	To be determined by valuation. Effect of determination that Brothers not estopped from asserting that the 1994 Tenancy has a value, but that they are not awarded damages for other reasons: to be determined.
1.7	Should the tenancy valuation ignore tenant's fixtures & improvements only post-1994, or should it also ignore	In the context of valuation of the 1994 Tenancy, for the

	tenant's fixtures and improvements pre-1994	purposes of determining likely assessed rent under AHA 1986 regime, only post-1994 tenant's fixtures and fittings should be ignored.
1.8	Should the tenancy valuation assume a covenant against alienation?	No (but certain factors may properly be taken into account)
1.9	Interest on any balancing payment to C.	Yes. 5%

342. **The WOFL Transactions and legal title to the land held by Grandfather's Will Trusts as trustees**: As regards the WOFL Transactions and the question of title to the land held by the trustees of Grandfather's will trusts as trustees:

		Judgment
2.1	What was the effect of the 1996 Declaration?	It recognised entitlement to value only and does not affect interests in land
2.2	What was the effect of the 2003 Assignments?	Assignment of freehold to Golf Course surface of land
2.3	What was the effect of the 2003 Leases?	Tenancies by estoppel of the Golf course surface of the land areas
2.4	In whom is vested the freehold of the land in which the 1975 Trust has a 50% beneficial interest?	Vested in D1
2.5	How did the 1996 Declaration interact with the 1994 Tenancy?	No interaction
2.6	How did the 2003 Assignments interact with the 1994 Tenancy?	A split in the reversion between the Golf Couse surface and the strata of land underneath the Golf Course surface

2.7	How did the 2003 Leases interact with the 1994 Tenancy?	The 2003 Leases are of the reversion to the 1994 Tenancy

343. As regards the NtoQ Proceedings:

		Judgment
3.1	Was C's service of the notice to quit a breach of trust or breach of fiduciary duty or contrary to public policy?	A number of breaches of fiduciary duty
3.2	If yes: (a) Was the notice to quit effective? (b) If so, (i) can and (ii) should the court intervene to prevent the notice to quit taking effect?	(a) Yes (b) (i) Yes, by an order for rescission (ii)Yes
3.3	If the NTQ was effective, but served in breach of trust or fiduciary duty, what loss have D1&2 suffered	In light of order for rescission, apparently none but there is no estoppel.

344. As this judgment is handed down remotely, there will need to be a hearing to deal with all matters consequential on this judgment including the form of order, costs, permission to appeal among, no doubt, other matters. I extend the time for filing a notice of appeal so that the 21 days period commences on the day that a final order is sealed, but the court may subsequently vary this period. I also adjourn the question of permission to appeal to such further hearing.