

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 24/05/2013

Before :

MR JUSTICE MORGAN

Between :

(1) ALFRED GEORGE CREASEY
(2) ANTHONY PETER HOLMES

Claimants

- and -

(1) JUNE SOLE
(2) PAMELA HACKETT
(3) GEORGE JENKINS
(4) RONALD JENKINS
(5) RICHARD JENKINS
(6) MICHAEL JENKINS

Defendants

Mr Richard Wallington (instructed by **Roach Pittis Solicitors**) for the **Claimants**
The six Defendants appeared in person

Hearing dates: 30th April, 1st, 2nd, 3rd, 7th, 8th and 9th May 2013

Judgment

Mr Justice Morgan :

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The parties

1. This dispute is between six brothers and sisters. They are the children, now adults, of Kenneth (known as Ken) and Constance (known as Connie) Jenkins. Ken and Connie Jenkins were farmers in the Isle of Wight. Ken Jenkins also ran a haulage business. Ken Jenkins, to whom I will hereafter refer as “the father”, was born on 8th February 1921, made a will on 27th February 1974 and died on 21st October 1995. Connie Jenkins, to whom I will hereafter refer as “the mother”, was born on 5th May 1922, made various wills, the last of which was dated 5th November 2004, and died on 15th January 2005.
2. The six children are June (born 7th March 1946), Pamela (born 6th October 1947), George (born 16th July 1949), Ronald (born 19th December 1950), Richard (born 7th November 1954) and Michael (born 18th January 1958).
3. The Claimants are the executors of the mother's will. The mother had been the sole executrix of the father's will so that the Claimants are also now the

executors, by representation, of the father's will. The Defendants are the six children to whom I have referred above. The Claimants are represented by Mr Richard Wallington. The six Defendants all appeared in person and each took an active part in the trial.

The land

4. The principal area of land which is relevant in this case consists of the land and buildings known as East Ashey Manor Farm, Ashey Down, Ashey, Ryde, Isle of Wight. I will refer to this area of land, which is the main area of the farm, as "Ashey". The father and the mother bought this land jointly in 1969 when the land extended to some 210 acres. It is agreed that they held the land for themselves as tenants in common in equity. After 1969 some small areas of Ashey were sold off. At all material times, the land at Ashey included the following principal parts which are relevant to the dispute in this case. First of all, there was the Manor House which is a Grade II listed building. It was surrounded by a garden and nearby was an orchard and a duck pond. Secondly, there was a range of farm buildings and yards. Thirdly, to the north across East Ashey Lane, was a field called the sandpit field. Fourthly, near to the Manor house were fields called Sweet Briar field and the Park. Fifthly, there were fields which for most of the material time were let to a Mr Bevis. In around 1993, Mr Bevis gave up one of the fields called the Butt. Sixthly, to the south of Mr Bevis's fields was a large area of down land known as Ashey Down or the Down. Seventhly, to the east of the Down was a field called the Long Field.
5. The father and the mother owned other land. They owned land at Landguard, Sandown, which appears to have been in the Jenkins family for some time. At the material times, the father and the mother owned the land at Landguard jointly, holding for themselves as tenants in common in equity. The land at Landguard extends to some 77 acres and there is a dispute as to a part of it, namely, a field known as Old Clover, extending to some 12.43 acres. Beside Old Clover, there had been a barn which burnt down a number of times, most recently in October 2005 and it has not since then been rebuilt. There is no longer a dispute as to the ownership of, or rights in, the site of the former barn.
6. In 1968, the father and the mother bought land at Brading Marshes, extending to some 37 acres, which they owned jointly, holding for themselves as tenants in common in equity. There is no dispute as to the ownership of, or rights in, this land.
7. At some point, the father alone acquired a further area of land at Brading, known as Wrax Marshes extending to some 26 acres. There is a dispute in relation to this land.
8. Also at some point, the father and the mother bought land to the north of the sandpit field at Ashey, known as the Duver. They held that land for themselves as tenants in common. The land they acquired included a house and garden but this was sold off in around 1988. The remaining land at the Duver extends to some 14 acres. There is no dispute as to the ownership of, or rights in, the Duver.

9. On 13th June 2000, which was after the death of the father, the mother acquired an area of land on the south east side of Ashey Waterworks. There is a pond on this land.

The father's will in outline

10. The father's last will was made on 27th February 1974. Later in this judgment, I will set out in full the provisions which fall to be construed. However, in summary at his point, his will relevantly made a gift of his interest in what he described as East Ashey Farm extending to approximately 210 acres (being the land that he and the mother had jointly acquired in 1969) to such child or children of his who could satisfy a particular condition at the date of the death of the survivor of the father and the mother. The father died in 1995 and the mother died in 2005 so that the question arises whether the condition referred to in the father's will was satisfied by a child of his in 2005, some 30 or more years after the will was made. Michael says that he satisfied the condition on the mother's death in 2005 so that he inherited his father's half share in that land at that time. That claim is disputed.

The mother's will in outline

11. Also on 27th February 1974, the mother made a will which was in essentially the same terms as the father's will of that date and contained a mirror provision (dealing with her half share in East Ashey Farm) to that contained in the father's will, as described above. In 1993, she made a new will which divided up her share of the land at Ashey so that, in particular, some of her share of that farm land was left to Michael and some was left to Richard. In 2000, she made a further will which again left some of her share of the farm land at Ashey to Michael and some to Richard. By her last will made on 5th November 2004, she made a gift of her share of the Manor House, and separate gifts of her share of what were called "Michael's Land" and "Richard's Land". The interpretation of these various gifts is in dispute.

Further facts

12. I will now refer to some further matters of fact which are relevant to this dispute. The evidence in this case covered a lengthy period. I was given detailed evidence as to the work done by the four sons from time to time on the land which was owned by their parents. It is relevant to refer to the involvement of the four sons in the period up to the time when the father made his will in February 1974. Prior to 1972, George carried on his own farming enterprise on part of the land owned by his parents. He did not pay his parents for his use of their land. He did some work in relation to his parents' farming enterprise and he was paid for doing so. From around 1970, and subject to interruptions, Ronald worked for his parents in relation to their farming enterprise. There was a dispute as to whether he ceased working for his parents in February 1974 or at a later point in 1974. It is not necessary to resolve that dispute. Richard worked for his parents in relation to their farming enterprise from 1971 and, subject to interruptions, he continued working for them until 1979. Michael started working for his parents in relation to their farming enterprise in 1974, around the time when Ronald stopped working for

them. Michael was paid for this work. Michael continued working in this way until 1983 when, following a disagreement with his parents, he left the farm. During this period, Michael also kept his own animals on his parents' land.

13. It is important to consider more thoroughly what happened in and after 1983 in relation to Michael. Michael contends that his agricultural work after 1983 is relevant in more than one way. First, he contends that this work qualifies him to inherit under a particular clause of the father's will. Secondly, he says that he has acquired a tenancy of an extensive area of the land and that such tenancy has security of tenure under the Agricultural Holdings Act 1986. Thirdly, he says that his belief as to what he would inherit at some point, together with a statement made to him in 1992, together with his agricultural work results in him having the benefit of a proprietary estoppel which entitles him to inherit a substantial area of agricultural land. Finally, he relies upon certain of the provisions of the Trusts of Land and the Appointment of Trustees Act 1996 coupled with the fact that he has been, and is, in occupation of certain land so as to produce the result that he ought to be allowed to continue in occupation of that land.
14. In the Autumn of 1983, Michael and his parents discussed an arrangement under which Michael would carry on his own farming enterprise on a part of his parents' land and he would effectively be a manager of his parents' farming enterprise carried out on their land. There was the possibility of an alternative arrangement involving Ronald but that was not pursued. By April 1984, the discussions between Michael and his parents had obviously led to them entering into an arrangement because, from April 1984, Michael prepared accounts showing himself as carrying on a farming enterprise as a sole trader and from that date, his parents continued to prepare accounts showing themselves as farming in partnership with each other (but not in partnership with Michael). Under the arrangement, Michael was entitled to use the Down and the Long Field for his animals. He was also entitled to use the farm buildings at Ashey. Michael was not required to pay his parents any money for his use of these fields and the farm buildings. Instead, he took on the running of his parents' farming enterprise which from time to time involved the use of land at Ashey together with the other land which they owned. In 1984, Michael had some 40 cattle of his own and his parents gave him another 20 cattle. His parents also gave him some machinery, including a tractor and a trailer. In or around 1984, Michael became registered with a separate holding number with the Ministry of Agriculture in relation to a certain area of land at Ashey and that land was removed from the area in respect of which his parents were registered with the Ministry. I understand that area in question in 1984 corresponded to the fields known as the Down and the Long Field. Later in this judgment, I will consider a disputed issue as to whether, under this arrangement made in 1984, Michael had an exclusive right of occupation of any part of his parents' land.
15. In 1986, Michael married. Up until then, and indeed thereafter until December 1986, he lived at the Manor House. In his evidence, he referred to his understanding that when he married his parents would provide him with a house. He referred to the fact that his parents had provided Richard with a

house, Sweet Briar Cottage, in April 1983 following Richard's marriage. In 1985, Michael's parents had bought Ashey Lodge, which was in bad condition. Michael and his parents renovated the property and the works appear to have been very extensive. Michael's parents had to obtain planning permission for the work and the local planning authority granted consent subject to a condition which imposed an agricultural tie. I was not shown the precise terms of the agricultural tie but it was referred to as a condition which meant that the property could only be occupied by a person employed in, or engaged in, agriculture. Michael and his wife moved into the Lodge in December 1986 and have lived there ever since. The property was not transferred to Michael until later (on 7th April 1992) but the question of the transfer of the property does not appear to have come up again until 1992. Michael told me that he was not aware of the existence of the agricultural tie until 1992.

16. In 1990, Michael's father agreed that, in addition to Michael's use of some land at East Ashey Manor Farm, Michael could keep his animals on Wrax Marshes, which was owned by the father. In his evidence, Michael stated that the arrangement in relation to the land at Wrax Marshes was the same as that which related to his use of the land at Ashey. He explained that the addition of land in 1990 was attributable to the fact that his workload in relation to his parents' farming enterprise had increased around that time.
17. Prior to 1991, a field at Landguard, known as Old Clover, was occupied by a tenant of Michael's parents. The tenant gave up that field in 1991. Michael's parents agreed that Michael could use this field for growing hay. Michael explained that he was already storing feed in the barn which was beside this field and it would be convenient for him to cut the hay in the field and store it in that barn. Michael said that he agreed to pay a "rent" of £600 for that field in 1990. In 1991, Michael's parents agreed with him that he could use the field without paying for it; he would, of course, continue to run their farming enterprise for them.
18. In 1991, Michael took on Simon Gray as his employee to help him with his work.
19. In 1992, Michael's parents appear to have taken the initiative to transfer title to the Lodge to Michael. There does not appear to have been any specific request from Michael that they should do this. The transfer was dated 7th April 1992. Michael was given the paperwork showing that the title to the Lodge had been transferred to him. Amongst the papers were documents which revealed the existence of the agricultural tie on the Lodge. Michael then became aware of the agricultural tie for the first time. Michael also told me that he became aware at that time that he needed his parents' permission to sell the Lodge. So far as I can tell, Michael did not need their permission to sell the Lodge. What seems to have led Michael to give this evidence was that the registered title to the Lodge shows the presence of a restriction dating from 1985. It seems likely that that restriction was placed on the title when it was vested in Michael's parents jointly. When title was transferred to Michael alone, the restriction would appear to have become irrelevant and should have been removed. Because there was no real substance in the suggestion that

Michael needed his parent's consent to sell the Lodge, I question whether Michael really did think that in 1992. It may be that this possible point has occurred to him later in the context of this dispute. He did not give evidence that he raised this point with his parents during the discussion he had with them, to which I will now refer.

20. In his witness statement, Michael said that he was unhappy when he discovered the existence of the agricultural tie on the Lodge. He considered that he would not be able to sell the Lodge for the value it would have had, absent the tie. He referred to the fact that properties which his parents had given to his siblings were free of such a tie. He had in mind, in particular, Sweet Briar Cottage which had been given to Richard. In his witness statement, he said that he went to see his father and he told him why he was unhappy. His father told him not to worry about it: "as Ashey would be mine when they go". Michael considered that this meant that he could always comply with the tie and he had not lost out to his siblings. He also explained that it was clear to him from this conversation that his father meant that he would inherit Ashey "or a good proportion of it" after his parents died. He said that he did not expect to inherit all of Ashey as he understood Richard would inherit a small part. He did not explain in his witness statement why he considered Richard would inherit a part of Ashey, unless it is explained by his more general evidence that he expected that his parents would want to leave the farm to such of the sons who were involved in farming and perhaps he considered that Richard would qualify in that way. He then explained that in view of "the assurances" he was given by his parents, he was not concerned about the agricultural tie.
21. In his oral evidence, Michael gave further information about the discussion with his father in 1992. He said that before this discussion and indeed at all times until his father died on 21st October 1995, Michael did not know anything about any will which might have been made by his father. He told me that he would never ask his parents what they were going to do with their property. When he saw the paperwork relating to the Lodge in 1992 and he noticed the agricultural tie he was very angry. He "stormed down" to the Manor House and he had "a blazing row" with his father. He told his father that he could not sell the Lodge for its full value absent the tie and that the Lodge was worth less than other properties given to his siblings. His father asked him to calm down and Michael stormed out of the Manor House. He then thought about what he had said to his parents and he went back to see them. His father calmed him down and said words to the effect of: "you are getting the farm anyway". His mother does not appear to have said anything directly relevant although she heard what was being said. Michael told me that after 1992, he thought that he would inherit all of the land at Ashey including the Manor House. Between 1992 and 1995, he did not know that the land at Ashey was owned jointly by his father and his mother. As to when he thought he would inherit Ashey, he said that he thought it would happen "one day". He did not raise the subject again with his father before he died in October 1995.
22. Prior to 1993, a field at East Ashey Manor Farm, known as the Butt, was occupied by Mr Bevis, a tenant of Michael's parents. Mr Bevis then vacated

and Michael's parents agreed that Michael could use that field for his farming enterprise. In his evidence, Michael stated that the arrangement in relation to the Butt was the same as for the other fields he used. He explained his parents' decision to permit him to use the Butt by referring to the additional work he was doing and the additional expenses he was incurring in relation to running his parents' farming enterprise.

23. In 1993, the mother made a new will which divided up the land at Ashey so that, in particular, some of that farm land was left to Michael and some was left to Richard.
24. In 1994, Michael purchased more farm machinery. He was assisted in doing this by the receipt of a government subsidy awarded to him based on the returns he had made to the Ministry.
25. I heard considerable evidence as to whether Michael was exclusively in occupation of the fields where he now asserts that he has an agricultural tenancy protected by the Agricultural Holdings Act 1986. The relevant period is from the inception of the arrangement in 1984 to 1st September 1995 when the relevant provisions of the 1986 Act were replaced by the Agricultural Tenancies Act 1995. The fields in question were either used for keeping animals or for making hay. As to their use for keeping animals, the Down and the Long Field were used both for keeping animals owned by Michael and also for keeping animals owned by his parents. In some years, a hay crop was taken from part of the Down and from the Long Field. In some years, Michael's father and some or all of his brothers assisted in getting in the hay crop. The hay was used to feed both Michael's animals and his parents' animals. The use of the buildings at Ashey was shared by Michael and his parents. Other family members also made some use of those buildings. As to Wrax Marshes, Michael's evidence was that he was the only person who made any use of this land. He said that he kept only his own animals there. As to the land at Landguard, Michael does not claim that he was the only person who used the barn beside Old Clover. He described the use of the barn as being "communal". However, he says that the Barn was not part of the exclusive arrangement which he had made with his parents. His evidence was that he was the only one who made any use of the land at Landguard. He generally took a hay crop from Landguard although it is less clear which animals were fed with that hay. In 1994 or 1995, he made silage with the grass at Landguard. The field known as the Butt was used both for keeping animals owned by Michael and also for keeping animals owned by his parents.
26. In his evidence, Michael stressed that he made all the decisions in relation to his management of his parents' farming enterprise although he also stated that he worked very closely with his parents. He and his parents shared facilities, machinery, equipment and feed for the animals. Until 1987, they shared the purchase of diesel for the farm machinery and since 1987, Michael paid for this diesel. His parents insured at their expense the jointly used farm buildings (save in relation to the barn at Landguard from 1987 to 1995, where Michael paid for the insurance). Michael insured his own machinery and his parents insured their machinery.

27. The father died on 21st October 1995. The mother was the sole survivor of the executors named in the will and she duly obtained probate of the will as the sole executrix. Following the father's death, the solicitors who had acted for him and for the mother read the will to the family. At this point, Michael knew that (with the exception of Wrax Marshes), the land had been owned jointly by the father and the mother. He knew that his mother was given a life interest in the half share owned by the father's estate. He knew of the existence of clause 5(b)(i) of the will and that subject to the operation of that clause, he knew that the father's interest in the land was split six ways. Michael said that he was upset when he found out the terms of his father's will. He did not raise with his brothers and sisters or indeed anyone else the conversation he had had with his father in 1992. He did not then suggest to anyone that his father had made him a promise which was inconsistent with the will or that such a promise would prevail over the terms of the will. He suggested to me that this was because the other members of the family tended to talk down to him. He did not want to ask his mother what his future was. He said to me: "It was never my place to ask what my inheritance was." Although he did not ask his mother about his position at this time, after the solicitors had written to the members of the family explaining the terms of the father's will, his mother volunteered the statement that she did not ever want to talk about the effect of the father's will.
28. Following the father's death, Michael retained a copy of the father's will. He read it from time to time in the first year after his father's death and then he put the will away and he said that he put the matter out of his mind. He obviously thought about whether he qualified under clause 5(b)(i) of that will. He asked a friend whom he did not identify as to whether he was "employed" so as to qualify. The answer he was given suggested that as he acted for his parents in a managerial capacity he may be able to say that he was "employed". He told me that he believed that he did qualify under clause 5(b)(i).
29. Following the father's death, the solicitors acting in relation to the father's estate, Roach Pittis, received advice from Mr Creasey's firm on various matters. In particular, Mr Creasey gave detailed advice in a letter dated 28th November 1995. Part of the letter dealt with the position of the mother in relation to her farming operations. The letter suggested that the arrangement between Michael and his mother might be re-organised. A copy of the letter was sent to the mother. Michael gave evidence that his mother discussed the advice with him. They considered ways of putting the arrangement on a more formal footing but no change were made. I was not given any specific reason for the mother's decision not to change the arrangement.
30. In 1996, Michael bought further machinery which he then owned. He and his mother jointly purchased a further tractor. In the summer of 1996, Michael started up an agricultural contracting business. His customers included his brother George and two neighbouring farmers.
31. Over the years, both Michael and his parents sent returns to the Ministry in relation to various grants and subsidies, in particular under the IACS scheme. For this purpose, Michael's return referred to his holding number and listed a

number of areas of land which he said that he farmed. His parents' return referred to their holding number and listed the areas of land which they said that they farmed.

32. If one took the Ministry returns at face value, they would suggest that the farming enterprises run by Michael and by his parents were separate enterprises which were carried out on separate areas of land. However, that suggestion did not match the actual position, which I have described above. Michael was cross-examined about the contents of the Ministry returns. He explained that he and his parents approached the matter on the basis that the relevant grants and subsidies required a farmer to submit a return which showed both the number of acres used and the number of animals using those acres. In order to maximise the amount of the grant or subsidy, it was important to get the balance of acres versus animals right. Accordingly, Michael and his parents controlled the number of animals which they kept by reference to the number of acres which they wished to include in their separate returns. I do not suggest that this approach was inappropriate so far as the claims to subsidy were concerned. However, I do not consider that the contents of these returns is conclusive as to the arrangement which Michael had made with his parents. I will have to take this matter into account when I consider whether the arrangement gave Michael an exclusive right to occupation of a specified area of land.
33. Michael also produced two agricultural census returns which had been completed by his mother in 1998 and 1999. In both of these returns, his mother gave an acreage in the box entitled "other tenancy". Michael stated that the land used by him was the land the subject of this "other tenancy". That seems to be the case. As with the case of the Ministry returns, I will have to take this matter into account when I consider whether the arrangement gave Michael an exclusive right to occupation of a specified area of land.
34. In his witness statement, Michael referred to the fact that he had considered pursuing other opportunities at Asheys, such as a snail farm and fisheries, but these did not come to anything, for various reasons.
35. Michael also referred in his witness statement to certain works which had been carried out to the buildings at Asheys. As will be seen later in this judgment, it may be relevant for certain purposes to differentiate between work done between 1984 and 1992, work done between 1992 and 1995 and work done after 1995. Michael's list of work does not always give the date when the work was done. It seems likely that some of the work was done between 1992 and 1995. Michael's evidence was that, in relation to some of the listed work, he helped his father or contractors. It is not clear whether he says, in relation to other work, that he alone did the work.
36. The mother made a revised will in 2000. In 2004, she was diagnosed with a terminal illness. She made a further will on 5th November 2004 while she was in hospital. She died on 15th January 2005. The Claimants are her executors and they became the executors by representation of the father's will. Following the mother's death, Michael asked the executors what they wanted him to do in relation to the farming. They told him to carry on as before.

37. Following the mother's death, the executors wrote to the six children, on 25th January 2005, explaining the executors' view as to how the will operated. This was followed up by a meeting between the executors and the children on 5th February 2005. From the time of that meeting, it was apparent that there might be difficulties caused by Michael disputing whether he qualified under clause 5(b)(i) of the father's will and as to the definition of Michael's Land in the mother's will.
38. I understand that the parties have attempted to settle all outstanding issues by mediation, in 2008 and again in 2012, but in the event there was no concluded settlement agreement. Although some of the documents relating to the mediation were in the bundles prepared for the trial I have deliberately not considered them. In the absence of an agreed settlement, the parties' rights now depend upon the court's determination of the matters in dispute.

The father's will in more detail

39. Clause 5 of the father's will provided as follows:

"5. Subject thereto and subject to the payment of my just debts funeral and testamentary expenses I GIVE DEVISE AND BEQUEATH the whole of the remainder of my Estate whatsoever unto my Trustees upon trust to sell call in and convert into money all such parts thereof as shall not consist of money with power in their absolute discretion to postpone such sale calling in and conversion and to stand possessed of the proceeds of such sale calling in and conversion and my ready money and all parts of my Estate for the time being unconverted (hereinafter called "my residuary Estate") upon the following trusts namely:

Upon trust to invest the same and to pay the income arising from such investments and such part of my Estate as shall remain unconverted to my wife the said Constance Isobel Ellen Jenkins for her life

From and after the death of my said wife Upon trust

(i) Upon trust as to East Ashey Farm of approximately Two Hundred and Ten acres as purchased by me and my wife from the late Mr H. J Warne or any interest I may have therein together with such interest as I have at the date of my death in the farming undertaking carried out thereon and any live or dead stock growing crops or other asset or part of my farming business carried out thereon To Hold the same for any child or children of mine (if more than one equally between them) who may be working either as employee or partner fulltime in

such business at the date of the death of myself or my wife (whichever shall last happen) and Provided that such child or children shall survive the survivor of myself and my wife by not less than one calendar month (Provided that any child who is under-going agricultural training and who has worked fulltime on such farm of mine shall be treated as if he were an employee notwithstanding that because of such training he may not be actually working on such farm at the date of the death of myself and my wife as aforesaid)

(ii) Upon trust to hold the remainder of my freehold or leasehold premises or any interest I may have therein and to divide the same equally between such of my children as shall survive me and attain the age of Twenty one years and who shall not have benefited from the gift concerning East Ashey farm mentioned in sub-clause (i) of this clause of this my Will but Subject to the following conditions namely:

As soon as conveniently may be after my death each of such freehold or leasehold properties shall be individually valued on a vacant possession basis by a Valuer to be appointed by my Executors and Trustees and on receipt of such valuations such properties shall first be offered for purchase to any child or children of mine who shall under the provisions of this my Will have inherited East Ashey Farm as aforesaid and if any such child or children within three months of such offer to them notify my Executors and Trustees in writing of their wish to purchase all or any such individually valued properties then my Trustees shall sell the same to such child or children at such valuation Provided Further that if any such child or children shall not exercise such option within such period then such premises shall be offered for purchase to each of my sons in turn in order of age and if any such son shall notify my Trustees in writing within one month of such offer of his wish to purchase the whole or any such properties then the same shall be sold by my Trustees at such valuation to him

To avoid misunderstanding it is my intention that the proceeds of any such sale under one of the options hereinbefore mentioned shall be divisible equally between such of my children as shall survive me and attain the age of Twenty one years as have not benefited from the gift of East Ashey Farm aforesaid

(iii) Upon trust to hold the remainder of my residuary Estate and East Ashey Farm if the same shall not have

vested in accordance with the provisions of sub-clause (i) of this clause of this my Will unto and equally between such of my children as shall survive me and attain the age of Twenty one years.”

40. The central issue which arises in relation to the father’s will is as to the interpretation and application of clause 5(b)(i) to the facts of this case. In particular, did Michael qualify for the gift made under clause 5(b)(i)?
41. In general terms, the father’s will speaks from his death on 21st October 1995. Clause 5(a) of the will gave to the mother a life interest. Clause 5(b) is expressed to take effect from and after the mother’s death, which occurred on 15th January 2005. Clause 5(b)(i) refers to East Asheby Farm and defines this land by reference to the land acquired by the father and the mother in 1969. The sub-clause then refers to the father’s interest as at the date of his death in “the farming undertaking carried out thereon”. Then the sub-clause refers to live or dead stock, growing crops and other assets “or part of my farming business carried out thereon”. Having referred to those specific assets, the sub-clause then seeks to identify the beneficiary or beneficiaries, if any, who are to take under clause 5(b)(i). Any such beneficiary must be a child of the father:

“... who may be working either as employee or partner fulltime in such business at the date of the death of myself or my wife (whichever shall last happen) ... ”.

The sub-clause then extends the concept of “employee” to a case of a person who is undergoing agricultural training in certain circumstances and, in that context, refers to a person who “may not be actually working on such farm”.

42. Michael contends that he qualified under clause 5(b)(i). He says, correctly, that the relevant date for assessing whether he qualified was 15th January 2005. He says that he was then working full time on the land defined in the sub-clause. He says that the purpose of the sub-clause was to identify the child or children who were deriving their livelihood from farming on the land defined and, on that basis, he came within the sub-clause.
43. Michael’s argument faces some immediate difficulties which at first blush would appear to be fatal to his contention. As at 15th January 2005, he was not a partner with anyone; he was a sole trader running his own business. In particular, he was not in partnership with his mother who was also a sole trader. Michael says that he was an employee of his mother as he was the manager of her business. I think it is very doubtful if he was his mother’s employee. Assuming that the relationship with his mother was a contractual one, I would regard him as providing services under a contract which was not a contract of employment. In any case, even if he were an employee, as a manager, in his mother’s business, he was not working as an employee “fulltime” as required by the sub-clause, because most of his time was taken up with running his separate business.
44. There is also the difficulty that it is difficult to say that he was working “in such business”, whatever precisely that phrase means. The sub-clause appears

to refer to the business of the father at the date of the father's death. At that date, there were two businesses. One belonged to Michael and the other belonged to his parents. It is open to argument whether the mother's business at the date of her death is "such business" for the purposes of the sub-clause. It might be said that it is "such business" as the business had formerly been the business of both parents and after father's death, the business was run by the mother alone. The will appeared to contemplate, technically, that the joint business would survive with the mother continuing to own a half share and the other half belonging to the father's estate, subject to a life interest in favour of the mother. I understand that matters were not handled precisely that way and the mother proceeded to buy out the half share of the father's estate in the business. Nonetheless, the court might have been able to construe the reference to "such business" to extend to the mother's business immediately before her death. However, I do not see how the court could hold that Michael's separate business is within the words "such business".

45. The words "employee" and "partner" are legal terms with a fairly clear meaning describing legal concepts. The strictness of the meaning of "employee" and of the reference to "working ... fulltime" is only emphasised by the proviso which refers to the case of a person undergoing agricultural training. I do not see it as appropriate to read the word "employee" in a broad way or to read the word "partner" so as to extend to a sole trader in a different business to that apparently described by the sub-clause.
46. Michael suggested that the statement (whatever precisely it was) made by his father in the course of the argument in 1992 showed that the father interpreted the will he had made in 1974 so that Michael qualified under clause 5(b)(i). I will consider later in this judgment the effect if any of that statement as giving rise to a proprietary estoppel in favour of Michael. However, I do not consider that such a statement is of any assistance when construing the will. Even if evidence of the fathers' intention when making the will would be admissible under section 21 of the Administration of Justice Act 1982, I cannot regard the statement made in 1992 (whatever precisely it was) as representing evidence, even indirectly, of his intention in 1974. Michael does not say that the discussion in 1992 contained any reference to the existence of a will or to the terms of a will. Further, the father had no warning of the argument which took place in 1992 so that he might have taken the precaution of getting out his will and reminding himself of what it said and then remembering what his intention had been some 18 years earlier.
47. Michael can say that if his father had thought about his will shortly before he died in 1995 and he had then reflected on the arrangement then in force as to the farming of the land and if he had reviewed the overall purpose of the original clause 5(b)(i), he might have reflected that clause 5(b)(i) was expressed in too technical and too limited language and that it would be better to use language which referred to any child who was earning his livelihood from farming Asheys. Whether that comment is true or not, the fact is that the father's will was expressed in language he had chosen some 21 years before his death when the arrangements for farming the land were different and he never did change that language to reflect the different circumstances of 1995.

48. My conclusion is that Michael does not qualify under clause 5(b)(i) of the father's will. It is not suggested that anyone else qualifies under that sub-clause.
49. The result of the above is that the land which is identified as East Ashey Farm in clause 5(b)(i) falls to be dealt with under clause 5(b)(iii) pursuant to which it vests in the six children equally.
50. Clause 5(b)(ii) of the father's will takes effect in relation to the "remainder of my freehold or leasehold premises or any interest I may have therein". In view of the provisions of clause 5(b)(i) and 5(b)(iii), the "remainder" does not include the land which is identified under clause 5(b)(i) and which is disposed of under clause 5(b)(iii).
51. Under clause 5(b)(ii) the land which is the subject of that sub-clause is divided between the six children apart from any who are disqualified under clause 5(b)(ii) by reason of having inherited under clause 5(b)(i). On the facts of this case, no one is disqualified in this way.
52. Clause 5(b)(ii) of the father's will is subject to a condition which refers to land being offered for purchase to any child who shall have inherited "East Ashey Farm as aforesaid". I note the words "as aforesaid". Those words may be a reference to a person inheriting under clause 5(b)(i) or they may simply be a reference to the earlier more detailed definition of East Ashey Farm. The former reading would not include the possibility of all six children inheriting East Ashey Farm under clause 5(b)(iii). Conversely, if the condition in clause 5(b)(ii) did apply to the six children who inherited East Ashey Farm under clause 5(b)(iii), the result would be that the same six children would be obliged to offer the land which is the subject of clause 5(b)(ii) to themselves. That does not seem to be a sensible result. I consider that the reference in clause 5(b)(ii) to an offer being made to a person who inherits East Ashey Farm is a reference to a person, if any, who inherited East Ashey Farm under clause 5(b)(i). In the events which have happened, no child has inherited East Ashey Farm under clause 5(b)(i) and so there is no one to whom an offer for purchase has to be made under the condition to clause 5(b)(ii). The condition is subject to a proviso which applies: "if any such child or children shall not exercise such option". As there is no option to purchase to be made available to any child, then it is not possible to say that the proviso of non-exercise of such an option is satisfied and, accordingly, the requirement that the land be offered in turn to the sons in order of age does not arise.
53. The result under the father's will is that Michael will inherit 1/12 (i.e. 1/6 of the father's half share) of the entirety of the farm at Ashey, including the Manor House and the farm buildings, 1/12 of the Duver, 1/12 of the land at Brading Marshes, 1/12 of the land at Landguard and 1/6 of Wrax Marshes.

The mother's will in more detail

54. Clause 6 of the mother's will provided as follows:

“6. My trustees shall hold my residuary estate upon the following trusts:

6.1 Such interest as I may have at the date of my death in East Ashey Manor Farmhouse and its immediate garden (but not the orchard and duck pond adjacent thereto) the extent of such garden and the extent of its rights of way and service easements to be specified at the discretion of my Trustees in order to render the said Manor House readily useable and saleable as to one equal half share (conditional upon her signing the options as defined by clause 10 hereof) for my daughter Pamela Dorothy Joan Hackett, as to one equal tenth share (conditional upon him signing the Options as defined by clause 10 hereof) for my said son George Victor Kenneth Jenkins, as to one equal tenth share (conditional upon him signing the Options as defined by clause 10 hereof) for my son Ronald Neil Jenkins, as to one equal tenth share (conditional upon her signing the Options as defined by clause 10 hereof) for my daughter June Ellen Jenkins (also known as June Ellen Denham but referred to herein as June Ellen Jenkins) as to one equal tenth share (conditional upon him signing the Option in favour of Michael Gilbert Jenkins defined in clause 10 hereof) for my son Richard Gordon Jenkins and as to the remaining one equal tenth share (conditional upon him signing the option in favour of Richard Gordon Jenkins defined in clause 10 hereof) for my son Michael Gilbert Jenkins and for the purpose of interpretation of this clause I declare that the reference to signing the Options (as defined in Clause 10 hereof) shall be interpreted to mean the signature of Option documentation prepared by my Trustees or their Solicitors and in terminology acceptable to my Trustees within nine calendar months of the date of my death PROVIDED THAT if any of them my six children shall fail to sign the Options or either of them then his share in my interest in the said property East Ashey Manor Farmhouse shall not pass to such child of mine but instead shall be held in Trust for my said sons Michael Gilbert Jenkins and Richard Gordon Jenkins in equal shares absolutely

6.2 Such interest as I may have at the date of my death Michael's Land (as defined in clause 10 hereof) for my said son Michael Gilbert Jenkins absolutely

6.3 Such interest as I may have at the date of my death Richard's Land as defined by clause 10 hereof) for my said son Richard Gordon Jenkins absolutely

6.4 The remainder of my residuary estate including such interests as I may have in land situate at Landguard Shanklin and land at Brading Marshes for my said daughter June Ellen Jenkins and my said sons George Victor Kenneth Jenkins, Ronald Neil Jenkins, Richard Gordon Jenkins and Michael Gordon Jenkins in equal shares absolutely conditional upon their respectively surviving me

6.5 Provided nevertheless that if any of the trusts hereinbefore declared shall fail the same shall accrue to and devolve to the survivors of my six children as named in this clause 6”

55. Clause 10 of mother’s will provided as follows:

“10.1 In this Will the following words or expressions shall be interpreted in accordance with the provisions of this clause viz:

10.1.1 “Michael’s Land” means land at Ashey Down East Ashey Manor Farm Ryde Isle of Wight being land either upon the Down or situate to the west of the road leading to the waterworks including the road itself and the orchard and duck pond together with such part of the farm buildings and yards at East Ashey Manor Farm (together with all easements and appropriate to serve the same to be specified by my Trustees at their discretion in order to render the same useable and saleable) as my Trustees shall consider at their entire discretion to represent a half-share in value or such other share as they shall in their discretion think fit

10.1.2 “Richard’s Land” means the remaining land at East Ashey Manor Farm not devised in accordance with clauses 6.1 and 6.2 of my Will including the kitchen garden and fishponds at East Ashey Manor Farm and such interest in the farm buildings and yards at East Ashey Manor Farm (together with easements appropriate to serve the same to be specified by my Trustees at their discretion in order to render the same useable and saleable) as my Trustees shall consider at their entire discretion to represent a half-share in value or such other share as they shall in their discretion think fit

10.1.3 The Options means options to sell the interests of my Children in Michael’s Land and Richard’s Land owned by any of my children arising out of the estate of my late husband Kenneth Gordon Jenkins at a price to be fixed by reference to an assumption that Michael’s

Land is valued in its entirety at a figure of Two Hundred and One Thousand Pounds and Richard's Land at a figure of One Hundred and Twenty Thousand Pounds so that (by way of example only) the value of one-twelfth interest in Michael's Land shall be fixed at Sixteen Thousand and Seven Hundred and Fifty Pounds and a one-twelfth interest in Richard's Land at Ten Thousand Pounds

Such options expressed in the case of Michael's Land to be in favour of my said son Michael Gilbert Jenkins and in the case of Richard's Land in favour of my said son Richard Gordon Jenkins with the Options strictly personal respectively to my said sons Michael Gilbert Jenkins and Richard Gordon Jenkins and to be capable of exercise at any time within three years of the date of my death (time to be of the essence)

10.2 For the avoidance of any doubt the interpretation of the expressions "Michael's Land" and "Richard's Land" and the terminology of the documentation constituting the Options shall be fixed by reference to this clause 10 but in the interpretation thereof of my Trustees whose decision shall be final"

The Manor Farmhouse

56. Clause 6.1 refers to East Ashey Manor Farmhouse. There is no dispute as to the building in question. Clause 6.1 also refers to "its immediate garden". There could be room for argument as to the extent of that land. However, clause 6.1 provides that the extent of such garden is to be specified at the discretion of the trustees and, further, that they are to specify the immediate garden in such a way as to render the Manor House readily useable and saleable. There is no dispute as to validity of that direction. It is therefore for the trustees and not for the court to determine the extent of the immediate garden of the Manor House. Some time ago, the trustees had set out their provisional views on this question. However, it is accepted that they have not made a final determination of the matter. Accordingly, such a determination remains to be made and it is to be expected that the trustees will make an appropriate determination following the resolution of the many other questions considered in this judgment.
57. In a similar way, the trustees are given the power to specify the rights of way and service easements which should be appurtenant to the Manor House. As before, they are to exercise their power in this respect to render the Manor House readily useable and saleable. The trustees have not yet made a final determination of that matter and, again, it is to be expected that they will do so in the near future following judgment.
58. Clause 6.1 also refers to the orchard and duck pond. It is common ground that there is an orchard and duck pond adjacent to the Manor House or its

immediate garden. There might be a question as to where the land described as the orchard and duck pond ends and the immediate garden of the Manor House begins. I consider that that question will be answered when the trustees exercise their power to specify the extent of the immediate garden of the Manor House.

59. The next question which needs to be discussed in relation to clause 6.1 relates to the terms dealing with the granting of options. Under clause 6.1 the gifts of a share in the Manor House and its immediate garden are conditional on the donee "signing the Options". This phrase is explained by further wording in clause 6.1 and by clause 10.1.3. As it happens, the terms of the options do not give rise to any question of interpretation of clauses 6 or 10. The trustees did prepare and approve appropriate documentation. Some of the donees granted the options in the required forms and others did not. There might have been a point about whether the options were granted within the relevant time limit. Clause 6.1 itself stated that the options were to be granted within nine calendar months of the death of the mother. No options were granted within that period. However, before the expiry of that nine month period all of the beneficiaries agreed to extend the relevant period. Some were prepared to extend it for a longer period and some for a shorter period. However, all were prepared to extend it for an agreed minimum period. In the events which have happened, which I need not describe, the period ended on 30th September 2006. On 26th September 2006, Pamela granted the appropriate options in favour of Richard and Michael. On 29th September 2006, Richard granted an appropriate option in favour of Michael. These steps meant that the conditional gifts in clause 6.1 in relation to Pamela and Richard became unconditional. None of the other donees mentioned in clause 6.1 granted any option prior to the deadline of 30th September 2006.
60. Mr Wallington raised the question whether the time for granting options so as to satisfy the conditions in clause 6.1 was still open, possibly on the ground that there was a lack of clarity as to what options were to be granted until some or other of the issues between the parties were resolved by this litigation. I do not take that view. I have held that the terms of clause 5(b)(i) of the father's will did not result in any part of East Ashey Manor Farm being given to Michael, or anyone else. Although that matter might have been unsettled until this litigation is finally resolved, once that matter is determined then the position is that the result arrived at by the court always was the result. Therefore all of the persons who had to grant options to comply with the conditions in clause 6.1 of the mother's will were always in a position to do so. The time for their doing so is not extended by the period which it takes for the interpretation and the application of clause 5(b)(i) of the father's will to be resolved. It follows that June, George, Ronald and Michael did not comply with the conditions attached to the gifts in clause 6.1 of the mother's will. The foregoing means that the conditional gifts to Pamela (1/2) and to Richard (1/10) in clause 6.1 of the mother's will have become unconditional and take effect accordingly. The other conditional gifts to June (1/10), George (1/10), Ronald (1/10) and to Michael (1/10) do not take effect and instead a gift of 4/10 is made to Richard and Michael in equal shares.

61. So far as the executors are concerned, the rights and obligations under the options which have been granted are a matter for the parties to those options. I understand that in relation to such of the options which have been exercised, there has not been completion of a transfer of the interest the subject of the option. The resulting legal position is a matter for the parties to the relevant options.

Michael's Land

62. By clause 6.2 of the mother's will, her interest in "Michael's Land" was given to Michael. Michael's Land is defined in clause 10.1 of the will. There was considerable dispute as to what land came within that definition. Before discussing the detailed matters arising, I need to consider first the impact of clause 10.2 of the will.
63. Clause 10.2 provides that, for the avoidance of any doubt, the interpretation of the expression "Michael's Land" is to be fixed by reference to the definition in clause 10.1.1 of the will "but in the interpretation thereof of my Trustees whose decision shall be final". Does that wording give the trustees power to resolve any question of interpretation of the definition? If so, does the conferment of that power on the trustees deprive the court of jurisdiction to construe the definition? If so, is the provision purporting to confer such power on the trustees void as being contrary to public policy as an attempt to oust the jurisdiction of the court? If that were the correct conclusion, then it would follow that the court had, after all, power to construe the definition. If the trustees have the power to impose their decision as to the interpretation of the definition on the parties, does the court nonetheless have a concurrent jurisdiction to interpret the definition? In any case, if the trustees have an exclusive power to interpret the definition, is it open to all the parties to agree that the court should nonetheless perform the exercise in lieu of the trustees doing so? Even if the beneficiaries did not all agree to this, is it open to the trustees to ask the court to give them directions on relevant matters or even for the trustees to surrender their power or their discretion to the court? If the trustees wish to surrender their power or their discretion to the court, is the court obliged to accept the surrender and if it is not obliged should it nonetheless accept the surrender of the power or the discretion?
64. If all of the above questions needed to be resolved, then it would be necessary to discuss the legal position in some detail. Most of these questions were argued by Mr Wallington on behalf of the executors but as the Defendants were in person, they understandably were not in a position to deal with the detail of the legal argument.
65. Mr Wallington argued on the strength of the decisions in Massy v Rogers (1883) 11 LR Ir 409, In re Raven [1915] 1 Ch 673 and In re Wynn [1952] Ch 271 that the relevant part of clause 10.2 dealing with the interpretation of the definition of "Michael's Land" (and the definition of "Richard's Land") was void as contrary to public policy, as an attempt to oust the jurisdiction of the court. He therefore submitted that the court, and only the court, had jurisdiction to determine any question arising as to the interpretation or application of those definitions. In the course of argument, I drew attention to

what had been said about those cases by Lord Denning MR in In re Tuck's Settlement Trusts [1978] Ch 49 at 60-61. Mr Wallington invited me to hold that the authority of the earlier decisions was not affected by those remarks, on a number of grounds. First, it was said that Lord Denning was the only member of the Court of Appeal who made these comments. Secondly, Lord Denning was wrong to suggest that the authority of the earlier decisions was in any way affected by the decision of the House of Lords in Dundee General Hospitals Board of Management v Walker [1952] 1 All ER 896 as the relevant provision in that case did not oust the jurisdiction of the court and was different in character from the provision considered in the earlier cases and also different in character from clause 10.2 in the present case.

66. I consider that there may be more in Lord Denning's remarks than Mr Wallington would accept. Since the decisions relied upon by Mr Wallington, the courts have become more familiar with clauses providing for matters in dispute to be determined by independent experts. Such experts can be given jurisdiction to decide both matters of fact and matters of law although it will commonly be the case that the court has a concurrent jurisdiction on matters of law. These considerations may affect the attitude of the court to a clause like clause 10.2. Indeed, it might be said that if it is permissible for the trustees to decide matters such as the extent of the immediate garden of the Manor House (see clause 6.1) and the extent of buildings and yards (see clauses 10.1.1 and 10.1.2) and the extent of easements to be granted, there is good sense in the trustees resolving what might turn out to be fairly minor points as to the precise boundaries of land described in the definitions of Michael's Land and Richard's Land.
67. In the event, I will not express a concluded view on the legal effect of clause 10.2 and all of the questions to which it might give rise. This is a case where the executors submit that they do not have the power to make a final determination as to the interpretation of the definitions and they wish the court in any event to decide all points arising as to the interpretation and application of those definitions. Further, the Defendants are all content for the court to determine those matters. Indeed, some of the Defendants are keen that the court and not the executors determine the matters arising. In my judgment, I have jurisdiction to determine the matters arising whether that is because the relevant part of clause 10.2 is void or because I have concurrent jurisdiction with the executors or because the executors are seeking the assistance of the court in the relevant respects or because the executors are surrendering their power or discretion to the court. I am prepared to decide the matters which arise as to the two definitions because I am satisfied that I have the material I need to do so. The position would be different if I were asked to decide questions as to how the buildings and yards should be split and what land should be regarded as the immediate garden of the Manor House; in those respects, I do not have the material I would need if I were required to decide such questions.
68. With that preamble, I can now address the questions as to the interpretation and application of the definition of Michael's Land. The first question is whether the Long Field is within that definition. I consider that it is not. I

consider that the Long Field is not part of the Down nor is “upon the Down” within the definition. On the evidence before me, what the mother meant by the Down or “upon the Down” was the large area which has always been known as the Down. That area did not include the Long Field. Although Michael argued that the Down included the Long Field, he repeatedly in the course of his general evidence when describing the fields at the farm and when describing the use made of the fields, referred to “the Down and the Long Field”. Further, I do not consider that the Long Field is to the west of the road leading to the waterworks. It is clear on the evidence where this road begins and ends. It begins at the highway, Asheby Road, and it ends at the waterworks. The Long Field is some way to the south of the road. It is not to the west of this road. It is nothing to the point that if one takes the point where the road enters the waterworks site and then projects a notional line from that point, then the Long Field will be to the left side of that notional line. Such a line is not the road in question. It was argued by Michael that his mother would surely have wanted him to have the Long Field. He submitted that since 1984 he farmed the Long Field and the Down together. He also referred to difficulties that could arise if the Down and the Long Field were in separate occupation. A bull on the Down might break through any barrier or hedging which existed between the Down and the Long Field to gain access to any cows which might be placed in the Long Field. As against those points, there is the consideration that the mother wished to leave land to Richard. On my interpretation of the will, she left the Long Field to Richard. I consider that it was perfectly rational for her to have dealt with her interest in the relevant land in that way. The fact is that she used language which on a fair interpretation against the background evidence as to how the fields were described by the mother and indeed by everyone in the family over a long period of time means that the Long Field is not within Michael’s Land.

69. The next matter which arises is as to the meaning of “the road itself”. There is no difficulty as to the length of the road. Nor is there any difficulty as to the western boundary of the road as this runs along land which is included in Michaels’ Land and so there will not be a legal boundary created by the mother’s will along the western boundary of the road. However, an issue does arise in relation to the eastern boundary of the road because the eastern boundary of “the road itself” will have legal significance.
70. The first matter which I need to address is whether the court should deal with this matter. In other circumstances, the parties might have been prepared for the executors to draw up any documents, which might be necessary to give effect to the mother’s will, in favour of Michael and Richard and to refer to “the road” using general words of description. With other parties, such documents would suffice and questions as to the exact boundary along the eastern edge of the road might never arise. After all, conveyancing practice even in relation to registered land typically involves descriptions which describe general boundaries which do not contain a more precise definition of the line of the boundary. However, in the present case, Michael in particular has shown a determination to ascertain where precisely the boundary along the eastern edge of the road would be. Further, he has persuaded the Master to order that this issue as to the boundary of the road should be determined by the

court. If I do not determine that issue at this trial, I can foresee a dispute between Michael and Richard and possibly further litigation. Accordingly, I will proceed to determine the issue.

71. I start by describing the physical layout along the eastern edge of the road. The road is surfaced with tarmacadam from the main highway all the way to the waterworks site. To the east of the surfaced road is a grass verge. In the verge there is a ditch at any rate for part of the length of the verge. To the east of the verge is a typical field hedge. On the other side the hedge there are fields and other areas of land.
72. The question then arises as to how much of the land I have described above was encompassed in the words: “the road itself”. If those words were used in a conveyancing document, what would they be reasonably understood to describe to someone who knew the physical circumstances at the date of the mother’s death?
73. The words plainly include all of the surfaced area of the road. Do they include the verge? Do they include any part of the hedge? I have considered whether there is anything in any general rule of law or in any authority which assists with the answers to these questions. The hedge and ditch presumption does not help as I am not construing a conveyance which pre-dates the creation of the hedge and ditch. The cases about construing a conveyance which refers to an Ordnance Survey map do not directly help because the mother’s will does not refer to the Ordnance Survey map. Nonetheless, it is worth reflecting on what those cases decide. The transfer of Ashey to the parents in 1969 used a plan taken from the Ordnance Survey map and their registered title of Ashey used that plan. That plan shows that the road has its own OS number and its own acreage. The plan shows the presence of boundary features on both sides of the road. Those boundary features are field hedges. The Ordnance Survey mapping practice is to plot a physical boundary which is a hedge along the centre line of the hedge. The court can take judicial notice of this practice without having to receive specific evidence on the point: see Fisher v Winch [1939] 1 KB 666, Davey v Harrow Corporation [1958] 1 QB 60 and Harsten Developments Ltd v Bleaken [2012] EWHC 2704 (Ch). I have also considered the cases which discuss the width of a highway which runs between fences and hedges. The general rule is that the highway is not restricted to the surface of the road but extends to the verge between the fences or the hedges at any rate where the fences or the hedges were erected or planted to separate the road from the adjoining land. A modern statement of this principle is contained in Hale v Norfolk CC [2001] Ch 717. That line of authority is not of direct application in the present context as it is concerned to establish the extent of the land over which there is a public right of way and the land which a highway authority may be required to maintain. Nonetheless, that line of authority does show an established approach in relation to highways that the highway is often taken to include the verges of the highway.
74. I have considered whether the use of the word “itself” shows an intention to limit the extent of the relevant land to the surfaced area. I do not read that word as a word of limitation. I consider that the word was used in order to

explain that the road was included and not excluded. That takes me back to the general question: what is meant by “the road”.

75. I consider that in the circumstances of this case, the road should include the verges. The intention was to divide the land between Michael and Richard. Richard was to have land to the east of the road. It makes better sense for the eastern verge to go with the road rather than with the field to the east.
76. What then of the hedge along the eastern edge of the verge? In theory, there are three possible answers: the first is the western edge of the hedge; the second is the middle of the root line of the hedge; and the third is the eastern edge of the hedge. The hedge can be seen as being of use to the owners on both sides of it; that argues in favour of the hedge being shared. The difficulty with either of the answers which refer to the edge of the hedge is that the edge of the hedge will constantly change. One cannot have a legal boundary along a line which is liable to change in this way. Of course, it would be possible to draw a line which was, say, 2 feet from the centre of the hedge so that the growing hedge up to that line would be owned by a particular owner. That would mean that the adjoining owner could cut the hedge on his side back to that line. However, there are no words in the will which created a boundary in such a position. It might be said that there will be practical difficulties if neighbouring owners share the ownership of a hedge when the boundary is along the middle of the root line. What obligations precisely do they owe to each other? I do not intend to answer that question. The result of the authorities concerning the OS map and hedges, to which I referred above, is that legal boundaries have been created along the middle of the root line of hedges for decades, if not longer, and the law seems to have got by satisfactorily without giving an answer to this question. This is not the case in which to address it.
77. Based on the above considerations, my conclusion is that the reference in the will to “the road itself” would be reasonably understood as extending on the eastern side to the verge and one-half of the width of the hedge i.e up to the middle of the root line of the hedge.
78. There was a separate dispute about an area of land referred to as “the triangle”. I consider that this area is part of Michael’s land either because it is part of the expanded verge of the waterworks road or because it is part of the field which was known as the Down.
79. The definition of Michael’s Land refers to the orchard and the duck pond. It will be remembered that clause 6.1 of the will also referred to the orchard and the duck pond and in that context referred to them as being adjacent to the Manor House and its immediate garden. It is inherently likely that the orchard and duck pond referred to in clause 10.1.1 are the same areas of land as are referred to in clause 6.1. Further, the evidence shows that what the members of the family called the orchard and the duck pond were the orchard and duck pond adjacent to the Manor House and its garden. There was no evidence that anyone ever described the land near to the waterworks, which the mother acquired on 13th June 2000, as the orchard and the duck pond even though there was a pond upon that land, at any rate during wet periods of the year.

Further, the placing of the words “orchard and duck pond” next to a reference to the farm buildings in clause 10.1.1. is mildly suggestive that those words refer to the orchard and duck pond which are on the part of the farm near to the farm buildings. Further, the mother referred to the orchard and duck pond, in connection with a gift to Michael, in her earlier will dated 5th January 2000 which was before she acquired the other land near to the waterworks on 13th June 2000. Indeed, I consider that the suggestion that the reference in the will to the orchard and duck pond is a reference to this land acquired in 2000 is wholly contrived and with nothing to be said in support of it.

80. The definition of Michael’s Land refers to farm buildings and yards at East Ashey Manor Farm. The definition goes on to provide that the decision as to which farm buildings and which yards should go to Michael is for the trustees and the will contains directions as to how they go about making that determination. It follows that the allocation of farm buildings and yards to Michael is not for the court and indeed the court does not have the material which would enable it to take on and exercise the power which the will confers on the trustees. There was evidence as to the competing claims to an area called the Rickyard. That area is part of “the yards” which are to be dealt with by the trustees pursuant to this power of determination. The trustees have not made a final determination in relation to this matter and it is to be expected that they will do so following judgment. Similarly, the trustees are given powers to decide what easements are to be granted to be appurtenant to the land which is the subject of the definition of Michael’s Land.
81. So far I have construed the definition of Michael’s land without reference to the evidence I was given by Mr Holmes one of the executors who attended upon the mother on 4th November 2004 for the purpose of taking her instructions which led to her executing the will on the 5th November 2004. The evidence as to what the mother said she wanted and intended would not be admissible at common law for the purpose of construing the will. I am doubtful if that evidence of intention is admissible under section 21 of the Administration of Justice Act 1982. However, even if that evidence were admissible I doubt if I would get any real help from it. The only part of the evidence which might have a bearing on the issues which arise is the somewhat unclear evidence as to acreages of the land to be given to Michael and to Richard. That evidence is more consistent with the Long Field not being included in Michael’s Land. However, I have reached that conclusion as to the definition of Michael’s land without taking account of the unclear evidence as to intention. If I admitted that evidence under the 1982 Act, I would not reach any different conclusion on any point.

Richard’s Land

82. “Richard’s Land” is defined in clause 10.1.2 of the mother’s will. Once one has determined which land is included in the definition of Michael’s Land, there is no separate question as to Richard’s Land which remains to be determined.

The Agricultural Holdings Act 1986

83. Michael says that he has a tenancy from year to year of certain land and that his tenancy carries with it security of tenure under the Agricultural Holdings Act 1986. He does not assert that the arrangement which he made with his parents amounted to an express grant of a tenancy but he relies on the operation of section 2 of the 1986 Act which provides:

“2 Restriction on letting agricultural land for less than from year to year.

(1) An agreement to which this section applies shall take effect, with the necessary modifications, as if it were an agreement for the letting of land for a tenancy from year to year unless the agreement was approved by the Minister before it was entered into.

(2) Subject to subsection (3) below, this section applies to an agreement under which—

(a) any land is let to a person for use as agricultural land for an interest less than a tenancy from year to year, or

(b) a person is granted a licence to occupy land for use as agricultural land,

if the circumstances are such that if his interest were a tenancy from year to year he would in respect of that land be the tenant of an agricultural holding.

(3) ...

(4) ...”

84. Section 2(2) of the 1986 Act refers to the circumstances being such that a tenancy would be a tenancy of an agricultural holding. “Agricultural holding” is defined by section 1(1) of the 1986 Act, as follows:

“In this Act “agricultural holding” means the aggregate of the land (whether agricultural land or not) comprised in a contract of tenancy which is a contract for an agricultural tenancy, not being a contract under which the land is let to the tenant during his continuance in any office, appointment or employment held under the landlord.”

85. Section 2 is the subject of a substantial amount of authority, the effect of which is summarised in Woodfall on Landlord and Tenant, Looseleaf Edition, vol. 2 at paragraphs 21.020 and 21.022 as follows:

“21.020 The reference to “an agreement” is not to an agreement in the loose and popular sense but to a contract enforceable at law. In particular, there must be an intention to create legal relations and there must be

consideration moving from the grantee to the grantor. However, the section has been applied to informal agreements, to agreements between members of the same family, to agreements where the consideration was not in the form of rent or a licence fee, or, indeed, in monetary form, and to an arrangement under which a tenant allowed a family company to farm the land. ...

...

21.022 Because of the meaning of “agreement”, the licence must be a contractual licence. The licence must be a licence “to occupy” and to satisfy this requirement the right of occupation must be an exclusive right under which the grantee is entitled to prevent the grantor and any other person authorised by the grantor from making any use of the land. However, the grant of an exclusive right to occupy, which is subject to a reservation of a right of way in favour of the owner of the land, is a licence to occupy within the section. If a landowner enters into partnership with a farmer and the partnership farms the land, in the absence of express provisions to the contrary, the landowner partner occupies the land as owner and the farmer partner occupies the land as licensee of the landowner but without the right to exclude the landowner from the land; the farmer’s non-exclusive licence to occupy is not converted by S.2. A licence to occupy for a period greater, or less, than a year may be converted under S.2.”

86. In Bahamas International Trust Co Ltd v Threadgold [1974] 1 WLR 1514, it was stated by Lord Diplock, at 1527, in relation to the equivalent provision in the Agricultural Holdings Act 1948:

“To come within section 2 (1) of the Agricultural Holdings Act 1948 the licence granted under an agreement must be a “licence to *occupy* land for use as agricultural land.” To satisfy this requirement the right of occupation for agricultural purposes must be an exclusive right under which the grantee is entitled to prevent the grantor and any other person authorised by the grantor from making any use of the land, at any rate for agricultural purposes, during the period of the grant. The application of section 2 (1) of the Act to licences to occupy land for use as agricultural land was, in my view, correctly stated by Davies L.J. in Harrison-Broadley v Smith [1964] 1 WLR 456 , 470, where he said:

“... there cannot be such a licence without a right of exclusive occupation during the currency of the licence

in the licensee as against the licensor for that purpose.”
”

87. Section 4 of the Agricultural Tenancies Act 1995 provides that the 1986 Act does not apply to a tenancy (or to an agreement within section 2 of the 1986 Act) beginning on or after 1st September 1995. Accordingly, if Michael is to be able to rely on section 2 of the 1986 Act to convert a licence into a tenancy from year to year, he must show that he had a licence which qualified under section 2 of the 1986 Act prior to 1st September 1995.
88. The principal point which needs to be considered in relation to the potential application of section 2 of the 1986 Act is whether the arrangement which Michael made with his parents in relation to their land was one which conferred on Michael a right to occupy which was an exclusive right under which Michael was entitled to prevent his parents and any other person authorised by his parents from making any use of their land, at any rate for agricultural purposes.
89. The land which Michael contended was the subject of an exclusive licence, which was then upgraded under section 2 of the 1986 Act, was the Down, the Long Field, Wrax Marshes, Old Clover and the Butt. In the relevant period, Wrax Marshes was owned by the father and the other areas of land were owned by the parents as tenants in common in equal shares.
90. I have earlier set out the use which was made of the various fields. Based on those findings, I am not able to conclude that the arrangement between Michael and his parents conferred upon him an exclusive right to prevent his parents from making use of that land, at any rate for agricultural purposes. The parents did use a considerable part of that land for their own agricultural purposes. It is true that the parents’ farming enterprise was being run by Michael as a kind of manager of their enterprise. However, the use of the land for the purposes of their farming enterprise was, in law, use by the parents. They were not excluded from the land. There was nothing which gave Michael a right to exclude them from the land. It is true that as manager, Michael made the principal decisions on their behalf. It might have been possible to have drafted an agreement under which the parents granted to Michael a tenancy or an exclusive licence which entitled him to run his own enterprise and his parents’ enterprise, managed by him, on the land which was the subject of the agreement. It might also have been possible to provide expressly, that Michael’s parents were not entitled to go upon that land during the period of the agreement for any agricultural purpose. However, an agreement of that kind was not entered into. I consider that it is wholly unreal to analyse the arrangement made between Michael and his parents as one which conferred upon him a right to exclude them for agricultural purposes and under which he granted something in the nature of a sub-licence to them to allow them to have their animals on the land. Further, there was clear evidence of the father assisting with the hay on the Down and in the Long Field and it is unreal to analyse the arrangement as one where Michael as exclusive licensee of the land granted his father permission to come upon the land to assist with the hay, which was then available to be used to feed both Michael’s and his parents’ animals. There is also the question of the farm buildings at Ashy.

Michael accepts that these buildings were shared by himself and his parents. I consider it is unreal to hold that Michael had a right to exclusive occupation of the land and, ancillary thereto, a right to share the buildings. I consider that the proper analysis of the arrangements was that Michael had the right to share the use of the land and buildings so that they could be used for Michael's own enterprise and for his parents' enterprise.

91. When setting out my findings of fact earlier in this judgment, I referred to the fact that Michael had a separate holding number for the land which he used, that he made returns to the Ministry in relation to that holding number and that the mother completed an agricultural census referring to the land used by Michael as the subject of "other tenancy". These matters are plainly relevant to the question as to whether the arrangement involved the grant to Michael of a right of exclusive occupation of the land in question. However, they are not conclusive on that question. I consider that I have to take account of all the evidence but in particular the evidence as to what was in substance agreed between Michael and his parents as shown by the way in which the arrangement worked. I find that the arrangement did not confer on Michael an exclusive right of occupation, at any rate for agricultural purposes. I find that the statements made in the various Ministry returns were not legally accurate as to the arrangement between Michael and his parents and those statements were made so as to obtain the greatest possible entitlement to grants and subsidies under the various Ministry schemes.
92. I have considered whether it might be appropriate to distinguish between the various parcels of land the subject of an arrangement between Michael and his parents. The shared use of the land was clearest in relation to the Down, the Long Field and the Butt. Shared use was less clear on the facts in relation to Wrax Marshes and Old Clover. However, Michael has contended that the same arrangement applied in relation to all the areas of land in dispute. The consideration he gave for all the areas of land in dispute was the single consideration that he would manage his parents' farming enterprise. I consider that this is indeed the right approach. There was only one arrangement even though it extended over time to include Wrax Marshes in 1990, Old Clover in 1991 and the Butt in 1993. I do not regard the payment which Michael made for Old Clover in 1991 as altering this conclusion. Michael called the payment "rent". The payment may well not have had the character of rent. The payment may have been for the right to take the hay crop in 1991. In any case, the arrangement in 1991 was not repeated. By 1992, Old Clover appears to have included in the arrangement which had been made in 1984 for the other land. I would not therefore distinguish Old Clover from the other land in the appropriate legal analysis.
93. This conclusion means that the arrangement between Michael and his parents in relation to these areas of land did not confer upon him an exclusive right to occupy, at any rate for agricultural purposes. Accordingly, the arrangement was not upgraded into a tenancy from year to year under section 2 of the 1986 Act. This conclusion means that it is not necessary to consider whether the other use made of the land (for non-agricultural purposes) in particular the mother's daily walk over the Down and the Long Field would have prevented

Michael relying on section 2 of the 1986 Act. Equally, it is not necessary to consider whether the arrangement between Michael and his parents was contractual, whether it would be possible to make “the necessary modifications” contemplated by section 2 of the 1986 Act and whether the land in question was made available to Michael during his continuance in an office, appointment or employment held under the landlord.

Proprietary estoppel

94. Before addressing the matters which need to be considered under this heading I will attempt to set out what interests in land Michael will inherit under the combined effect of the two wills of his parents. I have already described how, under his father’s will, Michael will inherit 1/12 (i.e. 1/6 of the father’s half share) of the entirety of the farm at Asheys, including the Manor House and the farm buildings, 1/12 of the Duver, 1/12 of the land at Brading Marshes, 1/12 of the land at Landguard and 1/6 of Wrax Marshes. Under his mother’s will, Michael will inherit her one-half share of the land she defined as Michael’s land, as to which I have now made my findings; that land excludes the Long Field. As to the mother’s half share in the Manor House, the primary gifts to Pamela (1/2) and Richard (1/10) take effect and the primary gifts to June, Pamela, George and Michael do not take effect so that the gifts of 4/10 to those four pass to Richard and Michael jointly; the result is that Michael has 2/10 i.e. 1/5 of the mother’s half share in the Manor House, i.e. 1/10 of the Manor House. In addition, Michael inherits 1/5 of the mother’s half share in the land at Brading Marshes and at Landguard, i.e. 1/10 of that land.
95. Combining the gifts under the father’s and the mother’s will produces the following for Michael:
 - (1) Michael’s Land (i.e. excluding the Long Field) = $1/12 + \frac{1}{2} = 7/12$;
 - (2) Richard’s Land (i.e. including the Long Field and the Duver) = $1/12 + \text{NIL} = 1/12$;
 - (3) The Manor House = $1/12 + 1/10 = 11/60$;
 - (4) Brading Marshes = $1/12 + 1/10 = 11/60$;
 - (5) Landguard = $1/12 + 1/10 = 11/60$;
 - (6) Wrax Marshes = 1/6.
96. Although Michael appeared in person at the trial and had acted in person for some considerable time before the trial, his Defence and Counterclaim had been settled for him by solicitors and counsel. That pleading set out what it was that Michael contended should be awarded to him if the court upheld his claim to a proprietary estoppel. The pleading referred to “Michael’s Land” as defined in the mother’s will. The pleading contended for a meaning to be given to that definition which included the Long Field. Then the pleading contended that the minimum equity to give effect to Michael’s expectation and to do justice was an order under which Michael would be entitled outright to

his definition of “Michael’s Land”. It can be seen that Michael’s claim to what he calls “Michael’s Land (i.e. including the Long Field) is an improvement compared with the wills in relation to that land (the entirety of what I have defined as “Michael’s Land” instead of 7/12 of that land and the entirety of the Long Field instead of 1/12 of the Long Field) but Michael’s pleading does not say in terms that his claim to outright ownership of that land involves him giving up the other benefits he has under the two wills.

97. The main elements which require to be discussed in relation to a claim to the benefit of a proprietary estoppel were described by Lord Walker in Thorne v Major [2009] 1 WLR 776 at [29] as follows:

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

98. In the same case, Lord Scott added at [15]:

“Lord Walker, in para 29 of his opinion, identified the three main elements requisite for a claim based on proprietary estoppel as, first, a representation made or assurance given to the claimant; second, reliance by the claimant on the representation or assurance; and, third, some detriment incurred by the claimant as a consequence of that reliance. These elements would, I think, always be necessary but might, in a particular case, not be sufficient. Thus, for example, the representation or assurance would need to have been sufficiently clear and unequivocal; the reliance by the claimant would need to have been reasonable in all the circumstances; and the detriment would need to have been sufficiently substantial to justify the intervention of equity.”

99. Lord Walker in that case also pointed out (at [60]) the need for trial judges to subject the evidence in any particular case (whether as to assurances, as to reliance or as to detriment) to careful, and sometimes sceptical, scrutiny. This

comment is particularly important in a case, like the present, where there is only one witness who gives evidence in support of these three requirements and where the person or persons who allegedly made the assurances have died before the claim to a proprietary estoppel was ever put forward.

100. In Gillett v Holt [2001] Ch 210, Robert Walker LJ (as Lord Walker then was) said at 225C-D:

“But although the judgment is, for convenience, divided into several sections with headings which give a rough indication of the subject matter, it is important to note at the outset that the doctrine of proprietary estoppel cannot be treated as subdivided into three or four watertight compartments. Both sides are agreed on that, and in the course of the oral argument in this court it repeatedly became apparent that the quality of the relevant assurances may influence the issue of reliance, that reliance and detriment are often intertwined, and that whether there is a distinct need for a "mutual understanding" may depend on how the other elements are formulated and understood. Moreover the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round.”

101. Earlier in this judgment, I set out my principal findings in relation to the matters which are now material in relation to the claim to a proprietary estoppel. I now need to consider those matters and make further findings.
102. In his witness statement, Michael made a general comment (unrelated to what was said during the argument in 1992) about his expectations as to what his parents would want to happen to the farm when they died. He said that he thought that his parents would want such of the children with the necessary interest in the farm to take it over after the parents died. He did not say that this was based on anything that his parents had ever said to him. He did not know whether his parents had made wills and he only found out what was in his father's will after the father's death in October 1995. He told me that he did not feel it was appropriate to ask his parents what their intentions were.
103. Against that background, I will consider Michael's position from 1984, when he made the arrangement with his parents under which he was permitted to run his own enterprise on the farm, until the argument in 1992. During that period, Michael knew that he had the benefit of the arrangement he had made. I doubt if he considered whether he had legal security of tenure in relation to that arrangement and, if he had considered that, I do not think that he would have thought that he did have legal security of tenure. He would have appreciated that the arrangement would only continue for so long as both sides agreed to that. Michael might well have thought that his parents would want the farm to stay in the family. He might have wondered whether his parents would divide the farm six ways, or give different parts of the land to the different children or

even favour one or two of the children over the others. He might have thought that as the son who was actually farming the land it would be quite possible that he would be favoured. However, if Michael thought along those lines, I do not consider that any of that would give rise to a proprietary estoppel against one or both of his parents. They did nothing to acquiesce in or encourage those thoughts. There was nothing which would, in equity, affect their conscience and prevent them making their own decisions as to the dispositions to be made by their wills. This conclusion means that for some 8 years or so, from 1984 to 1992, Michael was prepared, even content, to carry on with the arrangement on the above basis. There was no evidence that he considered any alternative way of life or any alternative arrangement during that period. In 1986, he went to live in the Lodge. He expected that he would be given the Lodge. He did not seem to be concerned that title was not transferred to him until April 1992. The transfer of title happened at the initiative of his parents and not as a result of any request made by him.

104. That brings me to the argument in 1992. The argument was not about the arrangement which Michael had made in 1984 which had continued up to 1992 and then continued after 1992. The argument was about the value of the Lodge and the effect of the agricultural tie on its value. Michael was angry that the Lodge was worth less than Sweet Briar Cottage which had been given to Richard. The question as to the value of the Lodge appeared to be more important to Michael than anything else.
105. The argument which Michael had with his parents (his father in particular) in 1992 was not a promising occasion for a cool rational discussion about Michael's future at the farm. Michael was obviously extremely angry. He said things which he regretted. His father probably said something about Michael's future. Michael's evidence was that his father said that Ashley would be his when his parents died. Michael is the only witness in relation to this conversation. Obviously, his parents cannot give any evidence on the point. Further, Michael's assertion that there was some promise or assurance made to him in 1992 was not put forward during the lifetime of either of his parents so there was no opportunity in their lifetime to react to this suggestion. Michael did not give evidence that he ever told anyone about this promise or assurance. He did not say that he told his wife or any friend of his. He did not call his wife or any friend. I do not draw any adverse inference from the fact that no one else was called. Michael referred in passing in the course of his evidence to the fact that his wife was very upset about this dispute and it may be that he did not wish to put her through the stress of giving evidence at this trial. It may be that he did not tell any friend about the argument with his parents. He did not say anything about the argument to any of his siblings. It may be he felt that it was better not to raise the subject with them. He did not mention any promise or assurance after he became aware of the terms of his father's will. Nonetheless, the fact remains that he is the only witness on this point. I will consider the question of reliance and detriment in due course but this is not a case where it can be said that there was some subsequent conduct which can only be explained by the fact that a promise or an assurance was made and, in that way, the subsequent conduct is evidence of the promise or assurance as well as evidence of reliance or detriment. As pointed out by Lord

Walker in Thorner v Major, the court should show appropriate scepticism in relation to evidence as to the making of a promise or assurance. I am very doubtful whether the father said anything specific to the effect that Michael would inherit Ashley when the parents died. I accept it is likely that there was some reference of some kind to Michael's future on the farm but I find it difficult to identify what that reference precisely was. I do not go so far as to say that Michael gave me evidence which he knew to be untrue. I consider that in general terms he was an honest witness. However, when he was describing the arrangement he had made in relation to different parts of the farm he had a tendency to emphasise that the arrangement gave him exclusive occupation of the land when I consider that it is quite clear that the arrangement did not do so. I consider that Michael yielded to the temptation, both in relation to the question of exclusive occupation and in relation to the 1992 argument, to present his case in a way which would make it seem stronger than it really was.

106. Michael did not say that his mother said anything relevant to the present point during the argument in 1992. He only went so far as to say that she heard what was said by both Michael and his father.
107. Without being able to make a clear finding as to what was said in the course of the 1992 argument about Michael's future, I will consider the questions of reliance and detriment. The first point is that the period in which reliance and detriment needs to be considered is from the date of the argument in 1992 until Michael became aware of the terms of his father's will in October 1995. When Michael became aware of the terms of his father's will in 1995, he knew what his father had done. He knew the terms of clause 5(b)(i). I find that he must have appreciated that clause 5(b)(i) did not clearly provide for him to inherit Ashley after his mother's life interest. After 1995, Michael thought about the terms of the will on a number of occasions. He spoke to a friend about what the will might mean for Michael. He might well have hoped that he would qualify under clause 5(b)(i). I do not think that it can really be said that whatever the father had said during the argument in 1992 continued to play much, if any, part in Michael's thinking after October 1995.
108. The position therefore is that Michael farmed the land between 1984 and 1992 on the strength of the arrangement he had made with his parents and he was not influenced by any promise or assurance because during that period there was none. Further, from 1995 until his mother's death in January 2005, he farmed the land on the strength of the arrangement he had made with his parents and, possibly, in the hope that he would qualify under clause 5(b)(i) of his father's will and the further hope that his mother's will would contain a provision as favourable to him as clause 5(b)(i) was, or more favourable.
109. Without being able to make a finding as to what the father said to Michael in 1992, I find it difficult to know if Michael did place any reliance on what was said. I would question whether, in the absence of some clear and precise statement from the father, it would have been reasonable for Michael to have relied on what might have been said. Whatever statement was made, it was made in the course of a heated argument and Michael did not feel able to raise the subject with his father at any time afterwards.

110. The next question is whether Michael relied, to his detriment, between 1992 and October 1995, on whatever had been said to him by his father during the argument in 1992. During that period, he continued to farm in accordance with the arrangement made in 1984. In 1993, the arrangement was extended so that it applied to the Butt. In 1994, Michael used the money he received by way of government subsidy to buy machinery. I do not think that these decisions were specifically influenced by what had been said in 1992 nor were they detrimental to Michael.
111. In order to determine whether Michael acted to his detriment in reliance on some promise or assurance, it is necessary to consider what alternative course or courses might have been open to him. If the arrangement which he had with his parents was profitable to him but he gave up the opportunity of a more profitable alternative, then a decision, in reliance on a promise or assurance, to stay with the arrangement could be said to be detrimental to him. Conversely, if there was no better alternative available to Michael other than the arrangement which applied as between himself and his parents, then the continuation of that arrangement would not amount to a detriment to Michael and that would be so whether the arrangement was profitable or unprofitable. In the past, particularly in the case of a party who takes on or continues with an unfavourable arrangement, the courts have been prepared to take the view that the party must surely have had better opportunities, which he has foregone, to his detriment. Such an approach was adopted in the cases of Gillett v Holt [2001] Ch 210 (see at 235 A-B), Thorner v Major [2009] 1 WLR 776 (see at [4]) and Henry v Henry [2010] 1 All ER 988 (see at [61]). In Henry v Henry [2010] 1 All ER 988, the Privy Council said that it was appropriate to weigh the benefits which a party obtained by relying upon a promise or assurance against the disadvantages which resulted from such reliance.
112. Michael gave some evidence as to whether the arrangement which he made with his parents was beneficial to him. He said that the help he gave to his parents was over and above the value of the land he was using for his own farming enterprise. He said that he would have been financially better off and he would have had more time to spend with his family if he had worked for someone else. It was suggested to him in cross-examination by counsel for the executors that the value of the land to him was greater than the sum he could have charged for the labour he provided to his parents. He disagreed with that suggestion. The difficulty I have in judging this matter is that the rival cases are little more than assertion and counter assertion. I think that the benefit to Michael of rent free use of a substantial area of land was considerable. I can also see that Michael provided a considerable benefit to his parents in managing their farming enterprise for no charge. Whether one benefit exceeded the other by a measurable margin is almost impossible to judge on the material before me. However, I do know that Michael entered into and continued in the arrangement between 1984 and 1992 at a time when he had received no promise or assurance as to his future on the farm.
113. Michael referred to various building works carried out on his parents' land where he had either helped with the work or done the work himself. In so far

as the work was done between 1984 and 1992, the work was not done in reliance on any promise or assurance as there was none during that period. It follows that, during that period, Michael considered that the arrangement he had with his parents, the fact that he had the use of the buildings and his family relationship were sufficient reasons to do the work which he did. As regards the period after the father's death in October 1995, Michael did further work on the buildings. During that period also, I do not think that such work was done in reliance on any assurance or promise. As I have explained after becoming aware of the terms of the father's will, Michael was not placing any real reliance on what might have been said during the argument in 1992. I have held that it is likely that Michael did some work on buildings in the period 1992 to 1995 although his witness statement did not deal specifically with this period. However, I am not able to find that such work amounted to substantial detriment in reliance on whatever was said by the father during the argument in 1992. Michael's readiness to do whatever work he did in that period is readily explained by the reasons he did such work before 1992 and after 1995. As regards the significance of the family relationship in connection with this work, there was substantial evidence that the other sons also did substantial work on the buildings even though they were benefiting from such work to a much lesser extent (if at all) than Michael was.

114. My overall conclusion is that Michael has not established the necessary ingredients of a promise or an assurance, reasonable reliance and substantial detriment so as to raise an equity against his father to entitle him to a benefit greater than the benefit which he will take under the father's will. As regards the mother, the position is even more clear because she did not say anything relevant during the argument in 1992 and, in any event, she left to Michael her half share in the land defined in her will as "Michael's Land" and further interests in land in addition. The authorities stress that a claim to a proprietary estoppel must be looked at in the round. Standing back in this case, I conclude that Michael has not made out a case in equity which entitles him to inherit more than his parents' wills provide for him.

The Trusts of Land and Appointment of Trustees Act 1996

115. Immediately after the mother's death on 15th January 2005, the question naturally arose as to what was to happen in relation to the day to day farming of the land. The executors said to Michael that he should carry on as before. That dealt with the immediate position. I was told that the livestock which belonged to the mother were treated as given to Richard. Michael and Richard agreed that Michael would look after those animals for Richard in the same way as he had earlier looked after those animals for his mother.
116. Later, the executors wished to recover possession of Ashey and the other land so that they could administer the two wills. Michael asserted various claims to continue to occupy the land and this led to the executors on 14th August 2007 serving on Michael a notice to quit all of the land by 1st October 2007. Michael did not quit any of the land. Michael has contended that he was not obliged to quit the land because he had the various claims to it which I have so far addressed in this judgment. I have held against his claim that he qualified under clause 5(b)(i) of the father's will and against his claims to a tenancy

under the Agricultural Holdings Act 1986 and to a proprietary estoppel. In paragraph 95 above, I have defined the interests in land which Michael has inherited under the two wills.

117. Michael now says that he had, and continues to have, a right to occupy the land at Ashey, or a substantial part of it, and the land at Brading Marshes, Wrax Marshes and Landguard by reason of the interests in that land which he is to inherit. He relies upon the provisions of the Trusts of Land and Appointment of Trustees Act 1996 (“the 1996 Act”) for this purpose.
118. The provisions of the 1996 Act which are potentially relevant are those contained in sections 1, 12, 13, 18, 22 and 23. The relevant parts of those sections provide as follows:

“1 Meaning of “trust of land”

- (1) In this Act—
 - (a) “trust of land” means (subject to subsection (3)) any trust of property which consists of or includes land, and
 - (b) “trustees of land” means trustees of a trust of land.
- (2) The reference in subsection (1)(a) to a trust—
 - (a) is to any description of trust (whether express, implied, resulting or constructive), including a trust for sale and a bare trust, and
 - (b) includes a trust created, or arising, before the commencement of this Act.
- (3) ...

...

12 The right to occupy

- (1) A beneficiary who is beneficially entitled to an interest in possession in land subject to a trust of land is entitled by reason of his interest to occupy the land at any time if at that time—
 - (a) the purposes of the trust include making the land available for his occupation (or for the occupation of beneficiaries of a class of which he is a member or of beneficiaries in general), or
 - (b) the land is held by the trustees so as to be so available.

(2) Subsection (1) does not confer on a beneficiary a right to occupy land if it is either unavailable or unsuitable for occupation by him.

(3) This section is subject to section 13.

13 Exclusion and restriction of right to occupy

(1) Where two or more beneficiaries are (or apart from this subsection would be) entitled under section 12 to occupy land, the trustees of land may exclude or restrict the entitlement of any one or more (but not all) of them.

(2) Trustees may not under subsection (1)—

(a) unreasonably exclude any beneficiary's entitlement to occupy land, or

(b) restrict any such entitlement to an unreasonable extent.

(3) The trustees of land may from time to time impose reasonable conditions on any beneficiary in relation to his occupation of land by reason of his entitlement under section 12.

(4) The matters to which trustees are to have regard in exercising the powers conferred by this section include—

(a) the intentions of the person or persons (if any) who created the trust,

(b) the purposes for which the land is held, and

(c) the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under section 12.

(5) The conditions which may be imposed on a beneficiary under subsection (3) include, in particular, conditions requiring him—

(a) to pay any outgoings or expenses in respect of the land, or

(b) to assume any other obligation in relation to the land or to any activity which is or is proposed to be conducted there.

(6) Where the entitlement of any beneficiary to occupy land under section 12 has been excluded or restricted, the conditions which may be imposed on any other beneficiary under subsection (3) include, in particular, conditions requiring him to—

(a) make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted, or

(b) forgo any payment or other benefit to which he would otherwise be entitled under the trust so as to benefit that beneficiary.

(7) The powers conferred on trustees by this section may not be exercised—

(a) so as prevent any person who is in occupation of land (whether or not by reason of an entitlement under section 12) from continuing to occupy the land, or

(b) in a manner likely to result in any such person ceasing to occupy the land,

unless he consents or the court has given approval.

(8) The matters to which the court is to have regard in determining whether to give approval under subsection (7) include the matters mentioned in subsection (4)(a) to (c).

...

18 Application of Part to personal representatives

(1) The provisions of this Part relating to trustees, other than sections 10, 11 and 14, apply to personal representatives, but with appropriate modifications and without prejudice to the functions of personal representatives for the purposes of administration.

(2) The appropriate modifications include—

(a) the substitution of references to persons interested in the due administration of the estate for references to beneficiaries, and

(b) the substitution of references to the will for references to the disposition creating the trust.

(3) Section 3(1) does not apply to personal representatives if the death occurs before the commencement of this Act.

...

22 Meaning of “beneficiary”

(1) In this Act “beneficiary”, in relation to a trust, means any person who under the trust has an interest in property subject to the trust (including a person who has such an interest as a trustee or a personal representative).

(2) In this Act references to a beneficiary who is beneficially entitled do not include a beneficiary who has an interest in property subject to the trust only by reason of being a trustee or personal representative.

23 Other interpretation provisions

(1) In this Act “purchaser” has the same meaning as in Part I of the Law of Property Act 1925.

(2) Subject to that, where an expression used in this Act is given a meaning by the Law of Property Act 1925 it has the same meaning as in that Act unless the context otherwise requires.”

119. By section 25(2) of, and schedule 4 to, the 1996 Act, the definition of “land” in section 205(1)(ix) of the Law of Property Act 1925 was amended so that an undivided share in land was no longer excluded from the definition of “land”.
120. Michael contends that in relation to all of the land which he occupied after his mother’s death, he came within the provisions of section 12 of the 1996 Act; in particular, he says that:
 - (1) he was a beneficiary;
 - (2) who was beneficially entitled;
 - (3) to an interest in possession in land;
 - (4) subject to a trust of land; and
 - (5) the purposes of the relevant trust included making the land available for his occupation; or
 - (6) the land was held by the trustees so as to be so available.
121. For the purposes of applying section 12 to the facts of this case it is necessary to distinguish between the different legal positions in relation to the various parcels of land. The most straightforward parcel of land to discuss is Wrax

Marshes. Before his death in October 1995, this land was owned by the father alone. Thus on his death, the land vested in his executors (first the mother and now the Claimants) on the terms of the father's will. Wrax Marshes was held for the mother for life and thereafter for the six children equally. Whatever else might be argued about the application of section 12 in this case, it is quite clear that the purposes of the father's will did not include the purpose of making this land available for occupation by Michael: see section 12(1)(a). Under the will, the land needs to be sold so that the proceeds of sale may be divided between the six beneficiaries. Further, for the same reason, the land was not held so as to be available for occupation for Michael: section 12(1)(b); since 1st October 2007, the executors have made it clear that they require Michael to vacate Wrax Marshes. Further, from that date, Wrax Marshes was not available for Michael's occupation pursuant to section 12(2).

122. The analysis in relation to the remainder of the land is more complicated because the remainder of the land was originally held by the father and the mother as trustees for themselves in equal shares in equity. On the father's death, the legal title to the land vested in the mother alone. She held it on trust as to half for herself beneficially and as to half for the father's estate, in respect of which she had a life interest. After her death, the legal title vested in her executors who held the land as to one-half for the father's estate and as to one-half for the mother's estate. In this case, I consider that it is appropriate, for the purpose of applying section 12 to the 1996 Act, to distinguish between the main trust where the executors hold the land for the benefit of the two estates and then the two sub-trusts under which the executors hold an undivided share in land on the terms of the father's will and separately an undivided share on the terms of the mother's will.
123. It is appropriate to consider separately Richard's Land, Michael's Land and the other land in respect of which Michael asserts a right of occupation.
124. As regards Richard's Land, the father's undivided share in that land is held by the executors on a sub-trust for the six children equally and the mother's undivided share in that land is held by the executors on a sub-trust for Richard. Michael cannot show that section 12(1) is satisfied in relation to the main trust or either or the sub-trusts. I have already held that Richard's Land includes the Long Field.
125. As regards the land which is not Richard's land nor Michael's land, the father's undivided share in that land is held by the executors on a sub-trust for the six children equally and the mother's half share is held on a sub-trust for five of the children. Michael cannot show that section 12(1) is satisfied in relation to the main trust or either or the sub-trusts.
126. I next need to consider Michael's Land. Michael cannot show that section 12(1) is satisfied in relation to the main trust in relation to this land. As to the sub-trusts, Michael cannot show that section 12(1) is satisfied in relation to the sub-trust in relation to the father's half share. On the other hand, it can be argued that one of the purposes of the sub-trust in relation to mother's half share was to make this land available for Michael's occupation. I am not wholly persuaded that this argument should ultimately prevail. It can

conversely be argued that the arrangement whereby the other children were to be incentivised by the conditional gifts in clause 6.1 to sell to Michael their shares (pursuant to father's will) in Michael's Land indicated that the mother understood that Michael could only expect to be able to occupy Michael's Land if he were able to buy out the interests of his siblings in that land and that if he could not buy out his siblings, Michael's Land would have to be sold. Nonetheless, I will proceed for the sake of the argument on the assumption that Michael could show that section 12(1) were satisfied in relation to the mother's half share in Michael's Land. How then would section 12 apply to such a case?

127. As regards the sub-trust in relation to Michael's Land, section 12 potentially applies to the executors: see section 18(1). Further, Michael as a person interested in the due administration of the mother's estate comes within the provisions of the 1996 Act which refer to a "beneficiary": see section 18(2). Section 22(2) does not disqualify him from being a beneficiary who is beneficially entitled. Section 12 refers to "an interest in possession in land" and "a trust of land". "Land" is defined by section 23(2) of the 1996 Act by incorporating the definition of "land" in section 205 of the Law of Property Act 1925 and that definition does not exclude an undivided share in land.
128. The result of the foregoing is that Michael cannot show a right to occupy the father's half share in Michael's Land but he, arguably, can show that he has a right to occupy the mother's half share in Michael's Land. He cannot show that he has a right to occupy Michael's land under the main trust as he is not one of the beneficiaries under the main trust. Putting matters another way, the physical land which is Michael's Land is held on the main trust but Michael is not entitled under section 12 to occupy the physical land which is held on the main trust. As regards the sub-trusts, Michael is not entitled to occupy the half share vested in the father's estate but arguably is entitled to occupy the half share vested in the mother's estate. I was not shown any authority which discusses how the court should apply section 12 in these circumstances. I consider that the right conclusion is to hold that the right "to occupy the land" in section 12 is a right to occupy physical land and not a right to occupy an undivided share in physical land. On this basis, Michael did not have a right under section 12 to occupy Michael's land. Further, it may be that the mother's estate's undivided half share in Michael's land could be said to be unavailable and/or unsuitable for occupation within section 12(2), because it could not be physically occupied.
129. I have considered what the situation would be if the executors administered the two estates and instead of selling Michael's land and dividing the proceeds of sale in accordance with the two wills, they constituted themselves trustees so that they held Michael's land on the combined trusts pursuant to the two wills. On that basis, Michael would have a one-half share pursuant to his mother's will and a one-sixth share pursuant to his father's will. There would then be a single trust rather than a main trust and two sub-trusts. The subject matter of the single trust would be physical land which was capable of being occupied. Michael could argue that part of the purposes of that main trust, derived from his mother's will, was that he was to be entitled to occupy that

physical land. It may be that Michael would be obliged to pay an occupation rent for the land with the result that five-twelfths of that rent would be available for the other beneficiaries with an interest in Michael's Land. In such a case, are the executors obliged to constitute themselves trustees in this way, with this consequence? I consider that the executors are not obliged to act in that way. As the executors of the father's estate, owning an undivided share in the land which is defined in the mothers' will as Michael's Land, they are entitled to apply for an order for sale of Michael's Land so that one-half of the proceeds of sale can be administered in accordance with the father's will. If an order for sale were made in that way, then the executors would not constitute themselves as trustees in relation to Michael's Land on the combined terms of the two wills.

Payment by Michael for his occupation

130. It follows from the foregoing, that Michael has been in possession of the land which he has occupied since 1st October 2007 without the consent of the legal owners (the executors) of that land. He is therefore obliged to pay the executors damages for trespass from 1st October 2007 until he gives up possession. Further, if I had held that Michael had been entitled to occupy any part of that land under section 12 of the 1996 Act, I would have ordered him to pay an occupation rent in accordance with the principles discussed in French v Barcham [2009] 1 WLR 1124, in particular, at [34].

The Single Payment Scheme

131. The parties are in dispute as to Michael's entitlement to retain various payments which were made to him by the Rural Payments Agency ("RPA") purportedly pursuant to Council Regulation (EC) No 1782/2003, dealing with the Single Payment Scheme ("SPS").
132. The SPS was set up by the above Regulation. Article 2 of the Regulation defined "farmer", "holding" and "agricultural activity". The conditions for eligibility were set out in Article 33 which referred to access to the SPS being available to a "farmer". Article 34(2) required a farmer to apply to participate in the SPS not later than 15th May in a year. The SPS provided for the calculation of a payment to be made to a farmer in accordance with the detailed provisions of the SPS. One part of the calculation involved reference back to the total amounts of payments granted to a farmer under earlier support schemes in each calendar year of the reference period which was 2000, 2001 and 2002.
133. Michael applied to participate in the SPS. He made his application before 15th May 2005. He qualified as "a farmer" within the Regulation. He was able to show that he had been granted a payment under earlier support schemes during the reference period. His application was accepted and he received payments from the RPA. His application related to, or included, the same land as had been the subject of his earlier participation in the various support schemes.
134. If the mother had not died on 15th January 2005 and had continued to be a farmer, then it seems that she would have been able to participate in the SPS

provided that she made her application to do so before 15th May 2005. What actually happened was that Michael contacted the RPA and made his own application, as a farmer, in relation to the land which had previously been farmed by the mother and in relation to which land she had earlier participated in various support schemes. As I understand it, Michael has received payments from the RPA in relation to this further land.

135. It is clear that some of Micheal's siblings are unhappy that Michael has received payments from the RPA and that the mother's estate, in particular, has not received any such payments. Michael's siblings did not try to explain to me the legal basis on which Michael could or should be asked to account for all or any of such payments to the executors. The executors did argue that some account should be taken of the payments made to Michael.
136. As regards the payments made to Michael in relation to the land where I have held that Michael was a trespasser after 1st October 2007, the executors submitted that when the court conducts an inquiry into the sum which should be paid as damages for trespass, it will be open to the court to take account of, and to the extent that it considers appropriate to reflect in its award, the fact that Michael has benefited from his use and occupation of that land and, in particular, the fact that he has been paid sums by the RPA under the SPS in relation to that land. I agree that the court should approach the matter in that way. It is not appropriate to say anything further in relation to the assessment of damages for trespass in advance of evidence and submissions on that subject.
137. In relation to the payments made to Michael in relation to the land which, before her death, had been farmed by the mother and which had been the subject of earlier claims by her under the various support schemes, the executors submitted that Michael had received property which belonged to the mother's estate and that he should account for it. Before expressing my conclusion on that submission, I will refer to some evidence given on this subject by Michael.
138. Michael said that following the mother's death, he had contacted the solicitors for the executors pointing out that there was a time limit (of 15th May 2005) for applications under the SPS and asking the executors what they proposed to do. The executors did not indicate that they wished to apply on behalf of the mother's estate and they did not do so. Michael told the executors that because he was a farmer within the Regulation he proposed to apply. The executors did not say anything to Michael to stop him doing so. Michael also gave evidence that he contacted the RPA and explained the problem to them. He said that they told him to apply in relation to the land formerly farmed by the mother and that he then did so apply.
139. Mr Wallington, on behalf of the executors, did not submit to me that the executors were entitled to apply to participate in the SPS. On the face of it, the executors were not farmers as apparently required by the Regulations and I was not shown any provision which dealt with the case of executors of the estate of a deceased farmer. It is possible that the executors could have taken steps to become farmers by farming through the agency of another, perhaps

even Michael. However, the executors did not take such steps and they did not apply under the Regulations. Further, they knew that Michael was applying in relation to the land formerly farmed by the mother and they took no steps to stop him.

140. I am far from clear that Michael was entitled under the Regulations to apply to participate in relation to the land formerly farmed by the mother. However, he did apply on that basis and the RPA was prepared to make payments to him. The RPA has not asked him to return those payments.
141. I am not persuaded that the executors have shown that Michael received property to which the executors were entitled and for which he must therefore account. As that was the only way in which the executors put their case against Michael, I am not able to find in their favour that Michael is obliged to account to them for payments made to him in relation to the land formerly farmed by the mother.

The Administration of Estates Act 1925

142. The executors have raised a short point about the classification of the gifts in clauses 6.1, 6.2 and 6.3 of the mother's will for the purposes of Part II of Schedule 1 to the Administration of Estates Act 1925.
143. Paragraph 6 of Part II of Schedule 1 to the 1925 Act refers to: "property specifically devised or bequeathed". Paragraph 2 of Part II of Schedule 1 refers to: "property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift".
144. Clause 6 of the mother's will begins with the words: "My trustees shall hold my residuary estate upon the following trusts". However, the gifts in clauses 6.1, 6.2 and 6.3 of the will are in substance specific devises. I consider that these gifts fall within paragraph 6, rather than paragraph 2, of Part II of Schedule 1 to the 1925 Act.

Other matters

145. Michael asked the court to define the boundaries of Sweet Briar Cottage which had been given to Richard in 1983. The background to this request was that in recent times, Richard had raised with the executors a question as to the boundaries of Sweet Briar Cottage. I understand that this request was dealt with to the satisfaction of Richard and the executors in a way which resulted in the agreed position being recorded at the Land Registry in relation to the registered title of Sweet Briar Cottage. It follows that the boundaries of Sweet Briar Cottage are in accordance with the current registered title of that property.
146. In the course of the hearing, reference was made to two other topics, namely the insurance monies received by Michael following the destruction by fire of the barn at Landguard on 21st October 1995 and a traction engine. No party has made any claim in these proceedings in relation to these matters and so neither of them is before the court. The parties have not given evidence in

relation to them (although these matters were referred to in passing) and no submissions were made in relation to them. Accordingly, I will not say anything further about those two topics.

The next steps

147. I believe that I have now determined all of the points which have been raised in these proceedings. I will indicate the steps which I envisage should now be taken.
148. Clause 6.1 and the definitions in clauses 10.1.1 and 10.1.2 of the mother's will permit and indeed require the executors to specify certain matters in accordance with the directions contained in those clauses. It seems to me that it is now appropriate for the executors to consider how to deal with those matters.
149. I will also ask Mr Wallington, counsel for the executors, to prepare a minute of order to give effect to the determinations in this judgment. The minute of order should also include an order for possession against Michael of all of the land which he occupies and direct an inquiry as to damages in relation to his occupation of all such land from 1st October 2007 until possession is delivered up. All matters consequential on this judgment will be adjourned to a further hearing.