

Neutral Citation Number: [2002] EWCA Civ 145

Case No: B2/2001/0732

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM GLOUCESTER COUNTY COURT
(Mr Recorder de Navarro QC)**

Royal Courts of Justice
Strand,
London, WC2A 2LL

28 February 2002

Before:

**LORD JUSTICE MANCE
and
MR. JUSTICE PARK**

Between:

ROBERT MARK JEWELL	Respondent
- and -	
(1) DIANA MARGARET McGOWAN	
(2) PAUL MERRETT GIBBONS	Appellants

**William Batstone (instructed by Messrs Burges Salmon) for the Respondent
Mark Wonnacott (instructed by Messrs White and Bowker) for the Appellants**

Lord Justice Mance:

1. This is an appeal with his permission from the judgment dated 15th March 2001 and the order dated 16th March 2001 of Mr Recorder de Navarro QC, whereby he declared that proposed activities set out in paragraph 18 of the Particulars of Claim would not be in breach of a farm Tenancy Agreement dated 20th January 1982 made between, as tenant, the respondent and, as landlords, the appellants, who are trustees of the will of Mr M. J. Merrett as well as being the respondent's brother and cousins.
2. Mr M. J. Merrett was the respondent's grandfather. The respondent is also a trustee of the will. The background to this dispute lies in disagreement between him and the appellant trustees, as to whether the farm should be sold with a view to development.

3. The Agreement provides by clause 1 as follows:

“The Landlord shall let and the Tenant shall take ALL THOSE Farm lands with the buildings and premises known as LAND AND BUILDINGS AT ST AUGUSTINES FARM ARLINGHAM GLOUCESTER for the purpose of identification edged in red on the plan attached hereto and more particularly described in the First Schedule hereto containing 110.53 acres”

4. In 1988 a small corner of the red land, with buildings on it, was sold for development. This was by agreement, although the respondent was evidently disappointed that neither as trustees nor in their individual capacity were his brother and cousins willing to put money back into the continuing farm.
5. In the same area as the corner sold off and adjoining the remaining red land is some land (the yellow land) which belonged to the respondent personally until 1996 when he sold it off also for development and two further plots of land (the green land) which continue to belong to him personally.
6. The period of the lease was expressed in clause 1 as being from 29th September 1981 to 29th September 1982

“and thence for one year and so on from year to year until at least 12 calendar months notice to quit be given in writing by either party to the other expiring on the 29th day of September in any year ...”

7. Under clauses 1 and 11 the rent reserved was £1500 “and any rent substituted therefor by agreement or arbitration under the provisions of the Agricultural Holdings Act 1948”. There are numerous further references in the Agreement to the Agricultural Holdings Act 1948. Clause 50 provides:

“Any reference in this Agreement to a Section of the Agricultural Holdings Act 1948 shall be deemed to include a reference to any amendments to such Section that has now been or hereafter may be made and to any Section or Sections substituted therefor by any subsequent enactment relating to Agricultural Holdings”

It thus becomes relevant to consider the Agricultural Holdings Act 1986.

8. The Agreement contains a number of detailed provisions regulating specific aspects of the intended agricultural use of the premises. Among the covenants by the respondent as tenant appears the following:

“The Tenant agrees with the Landlord:

22. That he will use the holding for agricultural purposes only and no part thereof as a market garden as to which nothing in this Agreement shall be taken to give such consent”

9. Use as a market garden would, we were told, entitle a tenant on termination of the lease to special compensation. Hence, probably, the exclusion of such use in clause 22. Clause 38 provides the trustees with a right of re-entry in the event of any breach of the agreements in the Agreement.

10. The proposed activities set out in paragraph 18 of the Particulars of Claim, and to which this litigation relates, are as follows:

“18.1 The creation of a new farm access along the route shown coloured brown on the First Plan.

18.2 The parking of visitors’ vehicles on that part of the Red Land shown hatched red on the First Plan.

18.3 The walking by visitors of a route-marked trail on the Red Land.

18.4 Access to the Red Land for visitors to roam and look at the crops and animals about the farm.

18.5 To take the public around the farm on a trailer pulled by a tractor.”

11. The respondent used to carry on activities of this general kind on the land from 1988. These were acquiesced in by the trustees until at least 1994, but the respondent ceased them after October 1997 following a threat then by the trustees to serve notice to quit. The present proceedings aim at establishing a right to resume them. The issue of waiver (i.e. conduct precluding the trustees from asserting that the proposed activities would in future constitute a breach) is no longer a live one. The only issue before us is whether the proposed activities would be in breach of the terms of clause 22.

12. The judge summarised the history as follows:

“In about 1988, having had to reduce his dairy herd as a result of European agricultural policy, the claimant began to use his farm for what I shall call “open farm activities”. Whilst continuing to farm the land as an organic dairy farm, he invited visits from school children and others to the farm. His purpose was twofold, firstly to educate the children and the public generally with regard to agriculture and dairy farming and to promote the farm and its produce and secondly to increase his income from the farm so as to be able to put more money into farm improvements.

The venture flourished. A shop, tearoom and toilet facilities were provided on the yellow land, which was the claimant’s own land, and the blue land, which was not. In addition the claimant allowed the visitors to park vehicles on part of the red land (the upper part of the field numbered 6720 on the plan) and to walk round the red land by means of a farm trail and generally to roam on it to observe the farm and look at the crops and animals and feed the animals. After a few years the open farm activities were so successful that the farm received up to 10,000 visitors a year, about half of whom were children from schools in Gloucestershire and Avon, the remainder members of the public, who largely consisted of families living in Gloucestershire. The venture had the support of the NFU and other bodies and was featured on several television programmes. At its height, the claimant estimated it provided approximately one-third of the farm’s income, the remaining two thirds coming from the dairy farming operation.”

13. The evident attractiveness of the open farm activities to the public – a tribute to the skill and application of the respondent and his wife – makes it a matter for regret that the present dispute could not be resolved without proceedings. We were told that mediation was considered, but for whatever reason not pursued. As it is, we have to view the rights or wrongs of the proposed open farm activities by reference to the terms of the lease, sensibly construed in the light of any relevant surrounding circumstances.

14. Turning to what was proposed for the future, the judge said:

“It is important to appreciate that the bulk of the facilities provided in connection with the open farm activities, such as the shop, tea-room, schoolroom, museum, and toilets, are intended in the future to be sited on the green land, that is on the claimant’s own land. So (on the evidence before me) is the milking parlour and dairy, which visitors will visit. That use of the green land cannot amount to a breach of the terms of the tenancy of the red land. Moreover it is, as I understand it, of the essence of the operation that the red land (and indeed the green land) should continue to be used as a working farm. It is the very nature of an “open farm” as opposed to a farm park or museum that it should be a working farm. The claimant’s intentions are summarised in the document (p145). For present purposes it is sufficient if I quote from the second and third paragraphs of that document.

“Visitors come to see a real working farm rather than a farm park. Being able to go into the parlour to watch the milking is one of the highlights of the day, as is the opportunity to get close to animals, to talk to farm staff, to spend time in the countryside.

The farm land belonging to [the defendant landlords] will continue to be used for agricultural purposes including the dairy herd, followers, other animals, farm machinery, farm storage and related activities. The tenant reserves the right to decide from time to time to use it for other agricultural uses (such as arable).”

Although the matter was not explored in detail in evidence my clear impression was that the shop and tea-room, although no doubt designed to be profitable, were there as an adjunct to visits to the working farm and that the principal purpose of the visits would be as set out in Paragraphs 52-56 of the claimant’s Witness Statement (pp. 48-9), namely to observe a working farm in action.

What is proposed in relation to the red land is the use of a new access road over the red land, marked brown on the plan (p8), for visitors to the open farm. The defendants do not object to the creation of the access road but they do object to its use by visitors. Further, it is proposed to use a part of field 6720 on the red land (the area hatched on the plan) as a car park for visitors, to create a farm trail over the red land, to allow visitors to use that trail, roam generally over the land and be taken for tractor rides on the red land in order to observe the farm in action and to feed the herd.”

15. The oral submissions made before us clarified the position as follows: (a) the access road would be required for farm purposes in any event, even if no open farm activities were undertaken, while (b) the hard-standing involved in the area of car-parking (relatively very small in relation to the red land as a whole) would only be required because of the proposed open farm activities.

16. Dealing specifically with the oral evidence given before him, the judge said:

“Although witness statements from the defendants have been served, in the event the defendants elected to give no evidence and only the claimant gave evidence. His oral evidence added little. He confirmed that the produce sold in the shop on the green land will not in the main be produce of the farm itself, because by law dairy farmers can no longer sell dairy produce at the farm, but will include souvenirs and the products of neighbouring farms. The visitors will not be charged a separate fee for car parking or for going on the red land. Rather there will be one charge to cover admission to the whole farm (both green and red land), although there will no doubt be additional charges for the products on sale in the shop and the tea-room. The aim is clearly to carry on open farm activities in conjunction with dairy farming and the claimant no doubt hopes to repeat the

scale and success of his previous venture. He accepted that the income from the open farm activities had not hitherto been taken into account in rent reviews, no doubt because of this dispute. So far as it is relevant I have included the other material parts of his evidence in the History set out above. The remainder of his oral evidence concerned matters only relevant to the issue of waiver and I need not record them here, because, as will appear, that is no longer a serious issue in this case.”

17. Before the judge the parties’ submissions developed. At the end of the trial the respondent was contending that all activities on the farm should be viewed as a whole and that so viewed they would continue to be for agricultural purposes when the proposed activities were commenced, but that, even if it was right to view the individual activities separately, the proposed open farm activities would constitute “use for agricultural purposes”. The appellants’ position was in contrast that regard must be had to each of any activities, not being de minimis, which were carried on upon the land and that, so viewed, the open farm activities could not be regarded either as “use for agricultural purposes” or as de minimis.
18. The judge was referred to legislation and authority in the agricultural, rating and planning fields. He did not regard the statutes and cases cited in the last two fields as helpful. But he gained assistance from those cited in the first field. I start therefore with them.
19. The 1948 Act defined an “agricultural holding” as follows:

“1.-(1) In this Act the expression “agricultural holding” means the aggregate of the agricultural land comprised in a contract of tenancy

(2) For the purposes of this and the next following section, the expression “agricultural land” means land used for agriculture which is so used for the purposes of a trade or business”
20. It was common ground that this section was interpreted by the courts in the manner indicated in Howkins v. Jardine [1951] 1 KB 614. There was in that case a tenancy from year to year of 7 acres which had on them three cottages, which the tenant in fact sub-let to persons not engaged in agriculture. The tenancy itself contained provisions usual in agricultural tenancies, and the tenant used the land for agriculture. The judge held that the protection afforded to the tenant by the Act in invalidating a notice to quit was limited to land used for agriculture and did not extend to the cottages. The court of appeal held that either the whole of the property demised was subject to the protection of the Act or no part. It took as the test of whether or not the Act applied, whether or not the tenancy was in substance an agricultural tenancy: see per Somervell LJ at p. 623 and Jenkins LJ at p. 628 - and see also Hodson J at pp. 630-1, taking the slightly different formulation “whether or not a substantial part of the holding is being used for non-agricultural purposes”
21. It is common ground that this reasoning must have inspired those drafting the 1986 Act. They defined the concept of “agricultural holding” more explicitly as follows:

“1.-(1) 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 of employment held under the landlord.

(2) For the purposes of this section, a contract of tenancy relating to any land is a contract for an agricultural tenancy if, having regard to-

(a) the terms of the tenancy,

(b) the actual or contemplated use of the land at the time of the conclusion the contract and subsequently, and

(c) any other relevant circumstances,

the whole of the land comprised in the contract, subject to such exceptions only as do not substantially affect the character of the tenancy, is let for use as agricultural land.

(3) A change in user of the land concerned subsequent to the conclusion of a contract of tenancy which involves any breach of the terms of the tenancy shall be disregarded for the purpose of determining whether a contract which was not originally a contract for an agricultural tenancy has subsequently become one unless it is effected with the landlord's permission, consent or acquiescence.

(4) In this Act "agricultural land" means-

(a) land used for agriculture which is so used for the purposes of a trade or business, and

(b) any other land which, by virtue of a designation under section 109(1) of the Agriculture Act 1947, is agricultural land within the meaning of that Act."

22. Agriculture is defined in s. 96 as follows:

"“agriculture” includes horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and “agricultural” shall be construed accordingly.”

23. It was accepted, rightly and inevitably, before the judge (and was not disputed before us), that the present tenancy was, and would with the proposed open farm activities remain, a tenancy of an agricultural holding within the meaning of both the 1948 and the 1986 Acts. The farm would continue; and the open farm activities would not affect the farming of the red land, or barely so, since the only land which it would take up would be the parking lot, a very small area in comparison to the whole. The open farm activities would, in short, be either supplementary or additional activities.

24. The essence of the judge's reasoning in the present case was that the provisions of clause 22 of the Agreement mirror the effect of the 1948 and 1986 Acts. He said:

"My conclusion is that Clause 22 of the lease must be taken to permit, within an essentially agricultural use, exceptions, provided they do not substantially affect the agricultural character of the tenancy. Uses going beyond such extended use are however prohibited."

25. He went on to say that the primary use of the land would on any view continue to be for agricultural purposes, and that the open farm activities would be ancillary to that principal activity. Viewing the matter on this basis, he held that the character of the tenancy remained agricultural. for the purposes of the lease.

26. The judge added, however, that he would, if necessary, also have held that the “concept of agriculture is not fixed in a time warp”, that the proposed open farm activities, related to a continuing working farm, were “essential to make farms profitable so that farming can continue and so that the young and the public can learn about farming” and that the proposed open farm activities could therefore be described as use for agricultural purposes.
27. In the course of reaching these conclusions, on what he acknowledged was a point not free from difficulty, the judge concluded that the word “only” in clause 22 was “too slight an addition to have the effect” for which the appellants were contending.
28. Before us, Mr Batstone advanced the points accepted by the judge in reverse order. He put as the respondent’s primary case that the proposed open farm activities were themselves agricultural in character, while maintaining as the secondary position that, even if they were not, they were permitted on the judge’s construction of clause 22. I shall however take the points in the same order as the judge, since an understanding of the proper scope of clause 22 is appropriate before determining whether the proposed open farm activities would involve use for agricultural purposes within its scope.
29. Mr Wonnacott in opening the appeal invoked, at the outset, a broad spectrum of principles derived from planning and rating legislation and authority, as well as from the interplay between the Agricultural Holdings Acts 1948 and 1986 and Part II of the Landlord and Tenant Act 1954 considered in Russell v. Booker (1982) 263 EG 513. All of this was, in his submission, part of the background or matrix to the present standard form of lease for an agricultural holding. The gist of his submissions was as follows. Firstly, under planning law, use for the purposes of agriculture is not development, and there is no requirement in this connection that use should be solely or only for agriculture, the consequence being that a farmer may undertake an activity (such as sale of his produce in a retail shop) which has both agricultural and retail purposes, without requiring permission; secondly, the position in this respect contrasts with the position under rating law, where the legislation, by use of words such as “used solely in connection with agricultural operations”, had been said to make rateable such a shop, for example a butcher’s shop on the farm selling the farmer’s fat stock: see e.g. Millington v. The Secretary of State for the Environment [2000] JPL 297, 308-311; thirdly, even assuming that the proposed open farm activities were to be regarded as part of the respondent’s basic farming activity and to that extent as having agricultural purposes, they would still also have non-agricultural purposes (those of an educational and/or leisure enterprise), just as the butcher’s shop in the example in Millington had non-agricultural purposes (those of a retailing business); and, fourthly, applying the approach adopted in the rating cases, the present Agreement should therefore be read as excluding the proposed open farm activities, because they involved purposes which were not “only” agricultural.
30. The effect of these submissions by Mr Wonnacott would, if accepted, be that, although the lease requires use for agricultural purposes only (apart from market gardening), it would *not* permit use for all such agricultural purposes, if any of them could be said also to have another concurrent purpose. That is not a proposition which presently appeals to me, and Mr Wonnacott’s argument thus far appears to me to rest upon extrapolating into the present lease considerations which may, if Mr Wonnacott is right, apply in other legislative contexts, but which do not have direct bearing on the construction of the present lease.
31. Fifthly, Mr Wonnacott invoked the principles set out in Russell v. Booker in support of a pragmatic argument that, if clause 22 was construed as the judge construed it, there would be an increased risk that an originally agricultural tenancy might change in character into, and become, a tenancy protected by Part II of the Landlord and Tenant Act 1954, which protects business tenancies. That

argument also does not impress me. Russell v. Booker decided that an originally agricultural tenant may, by changing the substantial use of his or her holding, lose the protection of the Agricultural Holdings Acts, but went on to hold that he or she did not thereby acquire the protection of some other scheme of legislation (in that case the Rent Acts), unless a new contract with his or her landlord was made or inferred from both parties' conduct. Not only does loss of the protection of the Agricultural Holdings Acts therefore depend on change of the *substantial* user, which, even on the respondent's case, would be prohibited by clause 22, but acquisition of the protection of any other scheme of legislation depends on the conscious conduct of the landlord, which is a matter entirely within the appellants' control.

32. Alternatively to his primary submissions, Mr Wonnacott advanced the "moderate" submission (to use his own word) that the proposed open farm activities would simply constitute distinct activities with their own distinct non-agricultural purpose(s). He takes issue in this connection with the relevance which the judge attached (in the construction of clause 1 of the Agreement) to the potential scope of a contract for an agricultural tenancy under the Agricultural Holdings Acts 1948 (as interpreted by common law authority) and under s.1 of the successor 1986 Act.
33. The drafters of the present form of lease, clearly and unsurprisingly, had the Agricultural Holdings Act 1948 well in mind. Not merely are there frequent references to the Act in other clauses, but clause 22 itself takes care specifically to exclude the use of the holding as a market garden, a use which would under the definition in s.96 normally fall to be regarded as agricultural. That does not, however, mean that there is any necessary equation between, on the one hand, the scope of potential application either of the 1948 Act, as indicated in Howkins v. Jardine, or of the 1986 Act under s.1(2) and, on the other hand, the scope of activity permitted by the Tenancy Agreement. S.1(2) of the 1986 Act, to which the judge referred as mirroring the effect of s.1(1) of the 1948 Act, speaks of letting of the whole of the land "for use as agricultural land, subject to such exceptions only as do not substantially affect the character of the tenancy". The judge treats the requirement in clause 22 of the Agreement that the tenant "use the holding for agricultural purposes only" as (in effect) a paraphrase of this provision, or of the common law interpretation of the 1948 Act which underlay it. But clause 22 and the statutory provision appear to me essentially different, not just in terminology but in spirit. To use land "in substance" for particular purposes gives a greater freedom than a requirement to use it "only" for those purposes. To use land as agricultural land, subject to such exceptions as do not substantially affect the character of the tenancy, is not the same as to use a holding "for agricultural purposes only". Indeed, if one does seek to assimilate the principles determining the application of the Agricultural Holdings Act with the wording of clause 22 of the Agreement in the way that the judge did, the right conclusion would seem to be, not that the Agreement permits such exceptions as do not substantially affect the character of the tenancy, but that it positively excludes them, by use of the word "only".
34. It is true that, on Mr Batstone's construction, the word "only" still has a purpose, in that, without it (if clause 22 simply required "use for agricultural purposes"), it might be permissible to use the holding for both agricultural *and* other substantial purposes. But, as I have said, the natural effect of the language used is to go further. Had the lease intended the judge's assimilation with the scope of the Agricultural Holdings legislation, it could have been achieved by a wording which required the tenant to use the holding in substance as agricultural land, or in substance for agricultural purposes. Mr Batstone felt unable to submit that the word "only" in clause 22 of the lease means in effect "mainly", but the effect of the judge's judgment was, it seems to me, to give it a meaning which is close, if not identical.
35. Mr Batstone also submitted that the mischief at which clause 22 was aimed was other activities affecting the agricultural use. Apart from the fact that clause 22 seems essentially negative (in other

words, it does not require any use at all, and would for example permit the land to be set aside), this submission again fails to give natural effect to the word “only”. Further, a landlord may not wish other activities to take place. Whether or not they affect the agricultural use of the land, they may still have an impact, whether physical, social or (as in the case of use as a market garden, which was expressly excluded, although agricultural in nature) financial. Mr Batstone also drew attention to clause 5 of the Agreement, where the landlord’s reservation of a right to take water is expressly subject to a proviso that “sufficient water is left for the Tenant for domestic and agricultural purposes”; and to clause 13, where the tenant’s covenant not to assign underlet or part with possession of the holding or any part thereof is subject to an exception “in the case of the occupation of any of the dwelling houses and cottages by service occupiers so that they do not become tenants or sub-tenants”, and it is further provided that the tenant “will not without the prior written consent of the Landlord allow any encampments or temporary dwellings or caravans or the like on any part of the holding ...”. The red land in fact has no dwelling house or cottage on it. References in the printed version of clause 1 to any dwelling house(s) and cottage(s) were thus deleted, as was the covenant in the printed version of clause 13 “personally [to] reside in the farmhouse”. Even if the provisions in clause 5 and 13 could have significance or could, if utilised, mean that the holding was no longer being used for agricultural purposes only, they would operate as express qualifications of clause 22. There is no equivalent qualification in respect of the use which the respondent proposes.

36. I therefore consider that the judge was wrong in his construction of the Agreement.

37. Mr Wonnacott drew to our attention this court’s decision in Methodist Secondary Schools Trust Ltd. v. O’Leary [1993] 1 EGLR 105, where the trustees of Kent College, Canterbury contracted as tenants of a cottage to use it “for the purposes of a private residence in single occupation only”. They used it to house the school caretaker, who was, by his contract of employment, required to live there and given general responsibilities for school security and emergencies out of normal school hours; and to enable him to fulfill these responsibilities efficiently they provided the cottage with a telephone and an extension of the school alarm and gave him a pager. It was held that the cottage was being used by him partly to perform his contractual duties, and so that the trustees were in breach of the lease. The court distinguished the position of, for example, a chef required to live in a hotel cottage in order to be able to comply with the onerous duties and long hours required at the hotel, but not required to perform any part of his functions in the cottage. In the case of Kent College, there were, essentially, two activities being conducted in the cottage, with two separate purposes, one the ordinary activity of living in it as a private residence, the other the continuing performance by the caretaker of his contractual responsibilities. The latter could not have been conducted without the former, but they were still distinct. One may suspect that the use made of the house consisted pre-dominantly of ordinary living activities, rather than performance of school duties. The case was not, however, decided against the background of the Agricultural Holdings legislation, nor was any issue raised as to precisely how much user for another purpose would constitute breach of the covenant to use the cottage as a private residence “only”. While in no way inconsistent with the conclusions to which I have come, it is not therefore of direct assistance.

38. The conclusion that the judge was wrong does not mean that the requirement to use the holding “for agricultural purposes only” is to be read in any extreme or unreasonable sense. Where a dwelling house is part of an agricultural tenancy or permitted by a tenancy agreement, such a provision must necessarily allow it to be inhabited in the ordinary way. I have, in this connection, already drawn attention to provisions in clauses 5 and 13, which would, if necessary, fall to be read as allowing some relaxation from the strictness of clause 22. Apart from the effect of such express provisions, there are clearly other things which a farmer may still do on land which will fall to be regarded as peripheral or minimal, and do not mean that he is using the land for non-agricultural

purposes. No-one would, for example, sensibly suggest that clause 22 would be infringed by a farmer or his family or friends walking, picknicking, sketching or fishing on his land for pleasure. In this connection, although case-law on rating has no direct bearing on the construction of clause 22, the courts would no doubt take a similar approach to that adopted in the Lands Tribunal in a rating context in Honiton & District Agricultural Association v. Wonnacott [1955] 48 Rating and Income Tax Cases 589. There, the Rating and Valuation (Apportionment) Act 1928 excluded from rates “agricultural land”. S.2(2) of that Act stated that “Agricultural land” means any land used as arable or pasture land only”. The use of a field for one day in a year (which did not in any way interfere with or interrupt the use of the lands as pasture or meadows, as the grass was removed before the show and the show took place during the normal rest period given to the land) was disregarded as de minimis. The present respondent’s proposed open farm activities, intended largely to mirror those previously undertaken (which were so extensive as to involve up to 10,000 visitors a year and to contribute up to one-third of the farm’s income) fall into a quite different category.

39. I turn to the question whether the holding would be being used for agricultural purposes only, if the proposed open farm activities were to be undertaken. Mr Batstone submitted that the concept of “use for agricultural purposes” within the meaning of clause 22 is not restricted to activity that would by itself necessarily constitute “agriculture” as defined in section 96. With that one can agree. To take a simple example, a gate or a road may be constructed in many contexts and for many purposes: industrial, domestic, toll, tourist, etc. “Agriculture”, as defined in section 96 is an activity, business or enterprise. The present enquiry is whether the proposed open farm activities would involve use for the purpose of such an activity, business or enterprise.
40. The judge identified as relevant factors that the land would continue to be used primarily for dairy farming if the proposed open farm activities were undertaken, that the only open farm activities to be undertaken on the red land would relate directly to the agricultural use of the red land and that the open farm activities would depend on the continued use of the red land as a working farm. Before us, Mr Batstone stressed that the dairy farming activities would in no way be affected. On the contrary, the open farm activities depended entirely upon the continuation of the dairy farming activities. Further, the physical facilities required for or connected with the carrying on of the open farm activities (the tea-shop, the toilets and the museum) were, essentially, located off the red land. Only the parking lots were to be on a small area of the red land. Those are, I accept, all very relevant factors, and they lend the tenant’s case considerable attraction. However, they do not, in my view, represent the ultimate test, and so cannot be decisive. A “primary” activity is not necessarily the only activity undertaken on land. Activities which “relate directly” to and depend on the existence of a working farm may not necessarily themselves be agricultural in either character or purpose. If land was used for a working farm, and also for the making of films for educational and commercial purposes about farming, the dependent relationship between the working farm and the film activity would not mean that the latter activity was being conducted for agricultural purposes. An additional activity or business which is only possible because of some primary activity conducted on land may nonetheless have a different character and purpose from the primary activity or business.
41. Mr Batstone also pointed out that there was no finding that any detriment would be caused to the trustees through the use of the red land for the proposed open farm activities. There would, he submitted, be none, and (in particular) income from open farm activities would fall to be taken into account as a relevant factor on any rent review under the Agricultural Holdings Act 1986 - cf Schedule 2, paragraph 1(1). I for my part proceed on this basis. Detriment is not however the test of breach of clause 22, although its apparent absence is a matter which any court is likely to have in

mind when considering whether there has really been a breach, and could be important if and when deciding whether a particular user fell to be regarded as *de minimis*.

42. Mr Batstone further pointed out that the local planning authority had insisted on an application being made for permission for change of user for the green land, but not for the red land. However, as the judge said, that cannot decide the present case. Apart from the different planning context, the local authority may simply have been wrong, or may just have decided to tolerate any relevant user of the red land, once appropriate planning arrangements had been made regarding visits to the green land (which arrangements it may have regarded as adequate, in practice, to regulate also visits to the red land).
43. The additional open farm activities proposed are explained as having the purposes of educating children and the public generally with regard to agricultural and dairy farming generally and of promoting the farm and its produce (although its produce could not be sold in the respondent's proposed shop on his green land) and secondly to increase the respondent's income from his farm so as to be able to put money into farm improvements. The open farm activities previously conducted provided as much as one-third of the total income. The judge's account of the origin of the open farm activities, after European agricultural policy required the respondent to reduce his dairy herd, and the judge's suggestion at the end of his judgment that it was essential to make farms profitable in modern conditions that such proposed open farm activities should be permitted, reinforce the natural assumption that the second purpose is a major one.
44. In my judgment the respondent is by the open farm activities proposing to use the red land, and to do so for the purpose of an enterprise which is distinct in character and purpose from his agricultural enterprise. The red land would be used, because (although the proposed tea shop, museum and toilets would all be on the respondent's own green land) the proposal is to give members of the public considerable access to the red land. It is of the essence of the proposed scheme that they will not only bring their cars onto that land, but then, more importantly, have extensive access to the red land, walking or being driven over it. This is not a situation where members of the public are being invited simply to view the red land, and the farming activities there undertaken, from (say) an observation platform on the green land. That by itself would not involve use of the red land at all.
45. As to the character and purpose of the proposed use of the red land, what is proposed is a commercial enterprise admittedly dependent upon, but nonetheless different in character and purpose from, the respondent's agricultural activity. It would involve the education (and/or recreation) of the public, the promotion of interest in organic farming and farm produce and the making of profit thereby. The education of children and the public generally about, and the generation among them of interest in, agricultural and dairy farming or organic farming is not in my judgment a purpose that is agricultural, even if it is of indirect benefit to the respondent, in so far as it makes it more likely that the public will buy organic produce. The undertaking of open farm activities to make profits which can benefit the farm is equally not an activity undertaken for agricultural purposes, even though the profits made may or will be devoted to the benefit of the respondent's agricultural enterprise. It is a separate commercial activity, for purposes of profit, and its character or purpose cannot be derived from the fact that the respondent may choose to devote its profits to the farm.
46. At one point in his judgment the judge described the proposed open farm activities as ancillary to the principal activity of farming the red land. In so far as he meant that they depended on that primary activity taking place, I have already dealt with the significance of this. If he meant to suggest that they were associated activities which could as such take their colour or purpose from

the principal activity of farming the red land, I disagree. On the evidence, they would constitute a distinct activity for separate, non-agricultural purposes.

47. I return lastly to the judge's statements (a) that open farm activities such as the respondent proposes "are essential to make farms profitable so that farming can continue and so that the young and the public can learn about farming", and (b) that, in these circumstances, such activities are today properly described as agricultural. The evidential basis for the most general proposition in (a) is not clear. That problems have been faced by small farmers (in particular) for some years is, I think, generally known. That the proposed open farm activities are essential to resolve them is a different matter. The respondent has, so far as appears, carried on business as a farmer since 1997 without undertaking any open farm activities. Quite apart from that, however, proposition (b) does not follow. Even if one accepts, as a general proposition, that traditional agricultural activities are no longer economic, and that other activities may have to be undertaken in conjunction with agricultural activities in order to achieve an economic unit, it does not follow that those other activities are to be characterised as having agricultural purposes. So long as the substance of the activity on the holding is agricultural, the Agricultural Holdings Act will apply. It is only the terms of the present tenancy, standard though they may well be, that limit the tenant to use for agricultural purposes – and the Tenancy Agreement was entered into at a date before the emergence of the economic imperative which the judge detected.
48. For these reasons, and having regard to the facts found by the judge as set out earlier in this judgment, I consider that the judge was wrong to grant the declaration sought by the respondent to the effect that the activities set out in paragraph 18 of the Particulars of Claim would not amount to a breach of the Tenancy Agreement. The declaration should be set aside, and we should hear counsel as to what, if any, other declaration or further orders may be appropriate.

Mr Justice Park:

49. I agree.
50. This case turns on a covenant that the respondent 'will use the holding for agricultural purposes only'. Like *Mance LJ*, I do not derive any significant help on the meaning and effect of the covenant from counsel's analysis, interesting though it was, of statutory provisions and cases concerning agricultural holdings, planning, and rating. Ultimately what matters is the construction of the covenant and its application to the facts. In my opinion the vital word in the covenant is 'only'. Mr Wonnacott submitted to the Recorder that the word was intended to prohibit all activities other than the use for agricultural purposes, except for activities which are de minimis. The Recorder did not agree with that submission, but I do. I respectfully disagree with the Recorder's 'conclusion that the word 'only' is too slight an addition to have the effect for which Mr Wonnacott contends.' In my opinion the addition is a significant one, not a slight one. As it seems to me the Recorder's analysis deprives the word 'only' of its clear and natural meaning, and indeed leaves it with very little practical effect.
51. Turning to the application of the covenant to the facts, the use by the respondent of the land for the proposed open farm activities would not be a use for agricultural purposes. I cannot agree with the Recorder's view that 'where they [open farm activities] are related to a continuing working farm, ... today such activities are properly described as use for agricultural purposes.' It is true that, if the land was not being used for agricultural purposes, it could not be used for the open farm activities, but that does not mean that the open farm activities are themselves use of the land for agricultural purposes. It makes no difference that, at all times when the land will, in the course of the open farm activities, be used for the information and recreation of visiting members of the public, it will also

be used for agricultural purposes: because of the contemporaneous open farm use it will not be used for agricultural purposes only. It will be used for agricultural purposes and for another purpose. Something else which makes no difference is that the use of the land for the information and recreation of visitors to a working farm may be an admirable thing, which I assume is the opinion of the respondent though it might not be shared by the appellants. Admirable or not, it is not use for agricultural purposes. Finally, the scale on which the respondent desires the open farm activities to take place will certainly be more than de minimis.

52. For those brief reasons and for the reasons explained by Mance LJ, I agree that this appeal should be allowed.