

Case No: B5/2011/0056/0754

Neutral Citation Number: [2011] EWCA Civ 1417

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Exeter County Court
His Honour Judge Cotter QC
9EX02206

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/11/2011

Before :

LORD JUSTICE WARD
LORD JUSTICE ETHERTON
and
LORD JUSTICE PITCHFORD

Between :

BRIAN JAMES POTTER
- and -
STEPHEN GERARD CRISPIN DYER

Appellant

Respondent

Mr Derek Wood QC and Mrs Serena Gowling (instructed by **Clarke Willmott Llp**) for the
Appellant

Mr Stephen Jourdan Q.C. (instructed by **Wilsons Solicitors LLP**) for the **Respondent**

Hearing dates : 12th October 2011

Judgment

LORD JUSTICE ETHERTON :

Introduction

1. This is an appeal from the order of His Honour Judge Cotter QC on 17 December 2010 in the Exeter County Court, by which he ordered the appellant, Brian James Potter (“Mr Potter”), to give possession of Little Heath Farm, Heath Lane, Pennymoor, Tiverton, EX16 8LU to the respondent, Stephen Dyer, by 31 January 2011 and to pay mesne profits at the rate of £1300 per year for the period from 26 March 2010 until possession.
2. The property ordered to be delivered up to the Respondent can, for the purposes of this judgment, be divided into two parts, comprising a farmhouse and adjacent garden (“the Farmhouse”) and farm land and farm buildings extending to approximately 44.2 acres (“the Farm”).

The Facts

3. The Farm and the Farmhouse were acquired in 1947 as a single agricultural holding by Mr Potter’s parents, Harold and Annie Potter. In 1966 they transferred the whole of that land to themselves and Mr Potter’s brother, Gordon Potter (“Gordon”), as joint tenants. In 1971 Mr Potter’s parents and Gordon granted Mr Potter an oral tenancy of the Farm, but not the Farmhouse. Mr Potter’s tenancy was protected by the Agricultural Holdings Act 1948 (as amended). He continued to live in the Farmhouse with his parents.
4. After the deaths of Mr Potter’s father in 1978 and his mother in 1982, Gordon became the sole owner of the Farm and the Farmhouse. As a result of legal proceedings in 1985, Gordon evicted Mr Potter from the Farmhouse.
5. In 1986 an annual rent of £1300 was agreed for the Farm. By 1987 Mr Potter was living with Christine Hallett (“Christine”) in a shed on the Farm. In 1987 Mr Potter assigned his oral tenancy of the Farm to himself and Christine as joint tenants. Notice of the assignment was not given to Gordon. Christine ended her relationship with Mr Potter and left the Farm in August 1990.
6. In November 1990 Gordon sold the Farm and Farmhouse to Mrs Diana How. Mrs Howe agreed that Mr Potter could take up occupation of the Farmhouse, which was then in a very dilapidated condition. Mr Potter undertook works to the Farmhouse and made it habitable.
7. Mrs How instructed her solicitor, Peter Pugsley, to prepare a tenancy agreement of the Farm and Farmhouse. There were protracted negotiations with Mr Potter. It is apparent from a draft tenancy agreement prepared by Mr Pugsley that Mrs How contemplated a tenancy on extremely generous terms regarding repairs. Clause 7 of that draft agreement stated that the parties agreed that the farm buildings were beyond economic repair and neither party was under any obligation to the other for their maintenance in good repair; and the Farmhouse was in a dilapidated condition and neither party was under any obligation to the other to restore it or maintain it in good condition, but the tenant was at liberty to restore, improve and maintain it for his own occupation.

8. Those negotiations never progressed to a conclusion. Mr Potter continued to occupy the Farm on the basis of his oral tenancy, and the Farmhouse pursuant to the licence granted by Mrs How.
9. Christine left the United Kingdom in 1992. She became resident in New Zealand, where she married and changed her name to Christine Goscomb.
10. Mrs How died in September 1995. Mr Potter continued to live in the Farmhouse. On 7th November 2006 Mr Dyer purchased the freehold of the Farm and the Farmhouse from the trustees of a trust created by Mrs How (“the Trustees”).
11. In May 2007 Mr Dyer served on Mr Potter notices to remedy disrepair pursuant to the Agricultural Holdings Act 1986 (“the AHA 1986”) and the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1973 SI 1973/1473 (“the 1973 Regulations”). Following the service of a counter-notices, the matter was referred to arbitration.
12. Mr Potter appointed Barry Meade of Davis Meade, surveyors, to act for him in connection with the arbitration proceedings. As a tactical manoeuvre in the arbitration, on 29 October 2007 Mr Meade disclosed the 1987 assignment vesting the oral tenancy of the Farm in Mr Potter and Christine jointly for the purpose of contending that all notices served only on Mr Potter were invalid.
13. Mr Dyer responded by serving a notice pursuant to section 6 of the AHA 1986 dated 30 October 2007 requesting Mr Potter and Christine to enter into a written agreement embodying the terms of the tenancy of the Farm and containing provision for all the matters specified in Schedule 1 to the AHA Act 1986, including a prohibition against assignment, sub-letting, or parting with possession of the whole or any part of the holding.
14. Mr Dyer also made contact with Christine in New Zealand. He spoke to her on the telephone about what was happening. Christine’s version of what Mr Dyer said in the course of that telephone call was recorded in a witness statement which she subsequently made and is dated 14 January 2010, to which I will refer in more detail later in this judgment.
15. Following the telephone call, Mr Dyer sent Christine a copy of the section 6 notice together with the 1987 assignment. He also sent her a lengthy letter dated 2 November 2007, which was headed “Without Prejudice”. He suggested in that letter that Christine should give notice to quit in respect of the tenancy, and he attached to the letter a draft 12 months notice to quit. Reliance is placed by Mr Potter on this letter. It is sufficient to set out the following parts of it:

“Firstly I want to relieve you of liabilities which you may have through being a joint tenant of Little Heath, so please do not be concerned at anything I say, or figures that I quote, they are examples and not threats!

....

You may want to take your own advice on this matter, but as promised I have spoken to my solicitor and asked him how he would advise you. He suggested:

1. That you should give notice to quit the tenancy, because this will serve to stop the build-up of any liabilities that you may have.
2. If you do so before November 19th 2007 this will stop you from being joined as Tenant in the current Arbitration. Up to now it has only been Brian because you were not known, but now Brian has revealed you as a tenant the notices and the costs will apply to you too.
3. Given the rather draconian liability clauses in the Assignment, and the fact that you did not (?) have independent legal advice in 1987 before signing the document you should have a fairly strong case to avoid any claims from Brian Potter in relation to rent, arbitration, legal costs, or the costs of remedying the state of the farm or Dilapidation charges on leaving the Tenancy.

Technically as Tenant you do have a liability to me for legal costs, repair costs, dilapidations and so on, but I will be happy to release you from all such liabilities if I receive the signed notice to quit before the Arbitration starts on Nov 19th 2007 which is when heavy costs might be applied to yourself.

I have attached a notice to quit which gives about 12 months notice. Legally you have to give that long a notice, but I will release you from all liabilities immediately on receipt of the signed document, and will write to you to that effect.

If you decide to give up your tenancy please sign and date the attached notice and send it to me by fax and the original by post.”

16. Christine replied by letter dated 6 November 2007, in which she said the following, among other things:

“Thank you for your recent communication regarding my joint tenancy of Little Heath.

As I stated on the phone the tenancy agreement is an area that I have not reflected on for a good number of years and I was unaware that it was still in existence.

...

I would like to give up my tenancy of Little Heath as soon as possible and so I am signing and returning the notice that you sent to me.

Thank you once again for explaining the situation about the tenancy agreement to me. I hope that you will be able to work something out with Brian over Little Heath in the near future.”

17. She enclosed with that letter the notice to quit previously sent to her in draft by Mr Dyer, which she had now signed. She forgot to date it, but she subsequently sent another copy dated 8 November 2007 (“the Notice to Quit”).
18. Mr Dyer failed to reach an agreement with Mr Potter on the matters in dispute between them. He sent a further letter to Christine dated 19 November 2007. He said in that letter that he was formally accepting the Notice to Quit, which he believed brought the tenancy to an end at midnight on 24 March 2009. He also said that his solicitor had advised that an unconditional release of her liabilities as joint tenant of the Farm would put him in difficulty in maintaining any claim against Mr Potter. He said that, unless and until he and Mr Potter reached a settlement, he had to preserve his right to pursue claims against Mr Potter, but it was his firm intention to ensure so far as he could that Christine suffered no loss arising from the tenancy or any claims against her by Mr Potter.
19. Mr Dyer’s solicitors wrote to Mr Potter a letter dated 20 November 2007 notifying him that his tenancy of the Farm had been terminated by the Notice to Quit with effect from the next anniversary of the tenancy falling after 12 months had passed.
20. Mr Potter sent Christine a draft deed of assignment, which had been prepared by his solicitors, and which was intended to re-assign the joint tenancy to Mr Potter as sole tenant.
21. Christine wrote Mr Potter a letter dated 24 November 2007, in which she informed him of the various communications and developments she had had in relation to the tenancy of the Farm. She said that it came as a big shock when Mr Dyer phoned her one night and told her that she was still a joint tenant of the Farm. She continued:

“Stephen sent me a fax explaining his side of the story promptly the next day or so and a letter to sign to end my part of the Tenancy on 2nd November. He had spoken to me prior on the phone and I remember asking him what would be the significance of the letter. He told me that all it would mean is that he would have to deal with one tenant rather than two and it would make it much easier at the arbitration hearing that would take place on November the 19th. I signed and returned the letter/notice to quit in good faith hoping to make things easier for you and Stephen to come to some agreement. I was clearly under the impression that the arbitration would still proceed and that you would continue to be the sole tenant.

I received another fax from Stephen on 19th November to say that he had received my Notice to Quit and had accepted it.

....

I have not intended to make anything difficult for you but I wish to end my connection to Little Heath as soon as possible for once and all”.

22. She also said in that letter that she could not sign the deed of re-assignment because the effect of the service of the section 6 notice by Mr Dyer precluded any such re-assignment.
23. Christine sent a letter to Mr Potter dated 29 November 2007 in which she said that, following Mr Potter’s telephone call the previous day, she was returning the deed of assignment signed, as he had requested. It is common ground the deed was ineffective to vest the joint tenancy in Mr Potter alone due to the section 6 notice which had already been served by Mr Dyer. She concluded the letter as follows:

“I do not want to be caught up in the argument between you and the landlord. I want nothing to do with Little Heath; I left the country about 15 years ago.”

24. In July 2008 the arbitrator issued an award in favour of Mr Dyer requiring Mr Potter to carry out work.
25. Christine sent a handwritten letter dated 24 November 2008 to Mr Selley of Crosse & Crosse, Mr Potter’s solicitors, in which she said as follows, among other things:

“Yes I do remember asking S. Dyer what difference it would make if I ended my tenancy agreement – He told me that it would be easier for him to deal with arbitration with only one tenant not two (especially as I was here). He did not explain that in any way Brian’s part of the tenancy would become invalid and that I would be affecting Brian in any way – I thought he would become the sole tenant.

...

It is interesting to note how quickly Mr Dyer wanted me to act on signing the paper to end the tenancy – At that time everything was hurried – letters sent by fax etc - maybe he knew I wouldn’t sign if I had known that Brian’s part of the tenancy would also come to an end. Letters from S. Dyer are no longer sent by fax -

I have not had 2 way communication with S. Dyer since 8th Nov and signing the notice – that was the last time I contacted him.”

26. In a letter dated 16 November 2009 to Mr Selley Christine said as follows, so far as relevant:

“I was very surprised when Mr Dyer contacted me in October 2007 and told me that I was a joint tenant of Little Heath. I had

no reason to believe though that he would not be telling the truth. He knew that I had not used a solicitor when I first signed the joint tenancy agreement with Brian because he asked me.

I had been out of the country for so long and definitely didn't want any further ties with Little Heath.

We spoke on the phone and I definitely asked him how I signing the agreement would affect Brian. He said that it would make no difference to Brian. It would just mean that in future he could talk to Brian without contacting and involving me, Brian would be the sole tenant. So I thought it would be in the best interest to sign the Notice to Quit.

On reflection I do feel that I was misled by Mr Dyer on two key points:

1. That I was not a joint tenant anyway (because of the later agreement with Brian and Mrs How) as I have said I had absolutely no correspondence about Little Heath since I left England in the early 1990's. I wonder if this was just a set up to get me to sign the paper! It is very interesting that Mr Dyer said he needed the Notice to Quit signed so promptly and spoke of the involvement of solicitors and Tribunals. He encouraged me to use faxes and to do everything rapidly not really giving me time to make careful considerations as what to do.
2. The fact that he said it would not effect [sic] Brian and the end of my part of the tenancy would just mean that Brian would be the sole tenant. In this regard I have been completely misled, by Mr Dyer. I would never have agreed to sign this if I had known what would be happening in the future. I would have chosen to get in touch with Brian and find out what was going on."

The Proceedings

27. The claim form for the proceedings was issued on 10 July 2009. Mr Dyer claimed possession of the Farm and the Farmhouse and mesne profits; alternatively, a declaration that upon expiry of the Notice to Quit Mr Dyer was entitled to possession of the Farm and the Farmhouse; alternatively, an injunction restraining Mr Potter from interfering with Mr Dyer's rights to enter and inspect the Farmhouse and to carry out works to it. The Particulars of Claim alleged that Mr Potter's occupation of the Farmhouse was pursuant to a gratuitous licence granted by Mrs How and continued by the Trustees. The Particulars referred to service of the Notice to Quit by Christine and stated that the Notice to Quit expired on 24 March 2009, whereupon the tenancy of the Farm came to an end. The Particulars alleged that Mr Potter should have given up possession of the Farm on or before that date but did not do so. The Particulars also stated that on 24 May 2009 Mr Dyer's solicitors served written notice

on Mr Potter terminating his gratuitous licence to occupy the Farmhouse, whereupon Mr Potter was obliged to give up occupation of the Farmhouse, but he had not done so. Possession of both the Farm and the Farmhouse was claimed on that basis. So far as concerns the alternative claim for an injunction, the Particulars alleged that, if Mr Potter continued to hold a tenancy which included the Farmhouse, then Mr Dyer was entitled to an order restraining Mr Potter from interfering with Mr Dyer's rights to enter and inspect the Farmhouse pursuant to section 23 of the AHA 1986 and to enter and carry out all works to the Farmhouse of the kind described in part 1 of the Schedule to the 1973 Regulations.

28. The Defence dated 14 October 2009 alleged that Mrs How and Mr Potter reached an oral agreement that Mr Potter was to have a single tenancy of the Farm and the Farmhouse; neither party was to be under any obligation to repair or maintain the Farm, including the Farmhouse and buildings; and Mrs How would not pursue outstanding notices seeking an increase in the rent and in relation to repair. It further alleged that Mr Potter took possession of, and moved into, the Farmhouse on those terms; he signed a written tenancy agreement consistent with those terms; the effect of the agreement with Mrs How was that the joint tenancy was surrendered by operation of law, and there was a new tenancy of both the Farm and the Farmhouse between Mrs How and Mr Potter, to which Christine was not a party, or alternatively there was a new tenancy in favour of Mr Potter by estoppel. It was admitted in the Defence that Mr Dyer was entitled to enter and view the state of the Farmhouse, but denied that Mr Dyer was entitled to carry out repairs as the respective obligations of landlord and tenant to repair the Farmhouse under the 1973 Regulations were released by the oral agreement between Mr Potter and Mrs How.
29. Mr Potter subsequently served a draft proposed amended Defence. The principal proposed amendments were (1) an allegation that the oral agreement between Mrs How and Mr Potter took effect as a tenancy from year to year pursuant to section 2(1) of the AHA 1986; and (2) an allegation that the Notice to Quit was void and of no effect, having been procured by the fraudulent misrepresentation of Mr Dyer. The matters relied upon in support of the allegation of fraudulent misrepresentation were set out in proposed paragraph 19A, which so far as relevant was as follows:

“(3) On 1 November 2007 the Claimant telephoned Mrs Goscomb at her home in New Zealand and informed her that, by reason of the assignment of 13 November 1987 she was still one of the joint tenants of Little Heath Farm and that she remained potentially liable for the costs of the arbitration and for costs of repair, dilapidations and other sums under the tenancy.

(4) Mrs Goscomb was very surprised by the Claimant's statement and was keen not to have any liability in respect of the Farm, with which she had not been involved in any way for at least 15 years.

(5) The Claimant informed Mrs Goscomb that she could terminate her liabilities by giving a notice to quit to him.

(6) Mrs Goscomb asked the Claimant during the telephone call what effect her giving a notice to quit would have on the Defendant.

(7) The Claimant informed Mrs Goscomb that the notice to quit would make no difference to the Defendant and would just mean that in future the Claimant and the Defendant could deal with each other without involving Mrs Goscomb and that the Defendant would be the sole tenant.

(8) On 2 November 2007 the Claimant sent Mrs Goscomb, by fax, a letter enclosing a draft of the Notice to Quit prepared by his solicitors and offering to release her from all liabilities for legal costs, repair costs, dilapidations and so on if she signed and returned the notice to quit to him before the arbitration hearing on 19 November.

(9) In reliance on the representation that the notice to quit would have no effect on the Defendant Mrs Goscomb signed and returned the Notice to Quit to the Claimant on 6 November 2007.

(10) The representation as to the effect of the Notice to Quit on the Defendant was false and was known by the Claimant to be false, or alternatively was made recklessly, without caring whether it was true or false. The Claimant intended and believed that the Notice to Quit would determine the Defendant's tenancy and enable the Claimant to recover possession of the Farm.

(11) Mrs Goscomb would not have given the Notice to Quit unless the Claimant had reassured her that it would have no effect on the Defendant.

(12) Accordingly, the Notice to Quit was void and of no effect."

30. Under cover of a letter dated 8 March 2010 Crosse & Crosse served Mr Dyer's solicitors with a copy of a signed witness statement of Christine dated 14 January 2010. They said that, pursuant to CPR 33.2, the letter was formal notification of the intention to rely on the witness statement even if Christine was not called to give oral evidence since it was possible that, in view of the fact that she lived and worked in New Zealand and indeed was some distance away from any main city, she would not be called. The following are material passages in that witness statement:

"14. Then late 2007 I "out of the blue" was approached both by the Claimant and Defendant. I cannot now be sure who approached me first but think it was the Claimant. He certainly was the one who was in the most contact.

15. He spoke to me at some length on the telephone, largely in a polite and friendly manner. In view of what he said to me and the way he did I quite simply believed what he was telling me, namely that there was a joint tenancy still in existence.

16. Against this backdrop it was of course the case that I wanted to have nothing further to do with Little Heath and so and as I said in my letter to him of 6 November 2007 "*I would like to give up the tenancy of Little Heath as soon as possible and so I am signing and returning the notice that you sent to me. Thank you once again for explaining the situation about the Tenancy Agreement to me. I hope that you will be able to work something out with Brian over Little Heath in the near future*". I had indeed been very surprised when the Claimant did contact me and told me I was a joint tenant and had no reason to believe he would not be telling the truth.

17. I must however say how now I feel I was misled by the Claimant. Although keen not to have any liability in respect of the farm there quite simply is no way that I would have done something to prejudice the Defendant's rights in respect of Little Heath.

18. When the Claimant spoke to me about giving notice on the telephone, I definitely asked him how I signing the agreement would affect the Defendant. His reply to me was that it would make no difference to the Defendant. It would just mean that in future he could talk to him without contacting and involving me. He added that the Defendant would be sole tenant.

19. By these comments he indeed persuaded me to give the Notice to Quit and I feel completely misled by him. I would never have agreed to sign this if I had known that he was later to use this as a lever to try to evict the Defendant.

...

22. To sum up therefore I do not actually consider that I remain a tenant of Little Heath after the Defendant's arrangements with Mrs How. If however it was to be concluded that the joint tenancy created by the deed in 1987 indeed remained in place then I feel as mentioned above that the Claimant misrepresented the position to me. As a result of what he said to me I signed and served the Notice to Quit in the belief that all that did was to remove me of any liability and that it had no affect on the continued occupation by the Defendant. I did not give my Notice to Quit ever even thinking that it might impact on Brian in any way at all."

31. Mr Ben Sharples, a senior associate with Mr Dyer's solicitors, wrote Christine a letter dated 1 April 2010, in which he said that her witness statement raised a new allegation that Mr Dyer misled her because he told her that signing the Notice to Quit would make no difference to Mr Potter's continued occupation of the Farm. He said that Mr Dyer denied misleading her in that way; the new claim made by Mr Potter that the Notice to Quit should be treated as ineffective because she was misled in signing it had important consequences for her; and it was important for her to take her own legal advice on the situation, and to be guided by that, rather than by anything which he said. The material part of the letter continued as follows:

"... [Mr Dyer]... says there was no binding agreement with Mrs How, and the original tenancy continued. If he wins on that point, the notice to quit becomes very important. If the notice to quit was effective, then the tenancy is now at an end. If it was ineffective, the tenancy still continues.

If, as you claim, Mr Dyer induced you to serve the notice to quit by misrepresentation, then you have a choice as to whether to treat the notice to quit as valid. You can make that choice by a clear statement to us, on behalf of Mr Dyer, as to what your choice is.

In deciding what choice to make, you need to consider the consequences for yourself. If you choose to treat the notice to quit as valid, then the tenancy ended on 24 March 2009. Mr Dyer has already made clear that, in that event, he will not seek to enforce against you any liability you may have under the tenancy.

If you choose to treat the notice to quit as invalid, then the tenancy is still continuing. As one of the two joint tenants under the tenancy, you are and will continue to be, jointly and severally liable to pay the rent, and to perform the tenant's obligations under the tenancy.

....

The position, in our view, is that you have not made a decision as to whether or not the notice to quit should take effect. You have that choice but before you make it you should take independent legal advice. Mr Dyer advised you to do this back in November 2007 and the need for that advice is even more pressing now.

If you do choose to treat the notice to quit as being of no effect, or fail to make any choice, then Mr Dyer will apply to the Court to have you added as Second Defendant in the claim. We enclose draft Amended Particulars of Claim which show the sort of claim you would be facing. There are two reasons for needing to join you as a party. The first is that if the Court decides that there was no misrepresentation, then your

allegation that you were misled will have led to additional costs which will be sought from you. The second reason is that, if the misrepresentation claim leads to the court deciding that the original tenancy is still in effect, you are a joint tenant and will be directly affected by the decision.

We should point out that, if the original tenancy still continues, with you as one of the joint tenants, then it is Mr Dyer's case that there are obligations on the tenants to repair and maintain the holding. There was an arbitration about the extent of those obligations, and the arbitrator made an award, in which he determined the works that need to be done to the holding to comply with the tenant's obligations. Mr Potter is seeking to have that award set aside by the High Court, but Mr Dyer contends that it correctly determined the extent of the tenant's obligations."

32. Mr Sharples said that Mr Dyer was willing to pay Christine up to £2350 (inclusive of any VAT or other tax and disbursements) to obtain independent legal advice from a solicitor specialising in agricultural law as to her position and the action she should take which was in her best interests. He emphasised that she should not reply to the letter without taking legal advice.

33. Christine took legal advice from Thring Townsend Lee & Pemberton ("Thring Townsend"). They wrote to Crosse & Crosse by letter dated 19th May 2010 saying as follows, so far as relevant:

"...we are instructed to inform you that our client does not wish to be involved in the proceedings. Similarly she does not wish to pursue Mr Dyer in respect of any claim for misrepresentation relating to the Notice to Quit which our client signed in 2007. Accordingly, your previous request that our client participate by way of video conference as a witness in relation to her statement dated 14 January 2010 is rejected.

Although our client had not been aware that she remained a tenant of the agricultural land at Little Heath Farm after she had moved away the Notice to Quit signed in November 2007 was sufficient to terminate her interest in the tenancy."

34. Christine's solicitors wrote to Mr Dyer's solicitors a letter of the same date enclosing a copy of the letter sent to Mr Potter's solicitors. They said:

"As we have confirmed in the accompanying letter our client has no wish to be involved in the pending proceedings as a witness or as a party in her own right and consequently acknowledges that the Notice to Quit that was served in 2007 on your client was sufficient to determine any interest that she may have had in Little Heath Farm at the time."

35. Mr Potter's solicitors then formally served his Amended Defence (permission to amend having been given on 20 May 2010) under cover of a letter dated 26 May 2010. It omitted the allegation in the earlier proposed draft that the Notice to Quit was void and of no effect by reason of having been procured by the fraudulent misrepresentation of Mr Dyer. The earlier draft paragraph 19A was also omitted.
36. By letter to Crosse & Crosse dated 17 June 2010 Thring Townsend confirmed that Christine wished them to repeat her position set out in their letter dated 19 May. They said: "Essentially our client has no wish to become embroiled in this matter."
37. The proceedings were due to be heard in a trial window commencing on 21 June 2010, with a time estimate of three days. In the event, due to the lack of a judge, it was adjourned.
38. In December 2010, shortly before the adjourned trial, Christine had a change of heart and said that she was prepared to give evidence by telephone. Mr Potter's new solicitors, Clarke Willmott LLP, prepared a notice pursuant to CPR 33.2 dated 7 December 2010 stating that Mr Potter intended to put in evidence Christine's witness statement dated 14 January 2010 together with exhibits and also correspondence between Christine and Mr Dyer's solicitors and correspondence between Christine and Crosse & Crosse. By an application notice also dated 7 December 2010, Clarke Willmott applied for an order for Christine's evidence to be given by means of a telephone conference because she lived in New Zealand and was unable to attend in person and she was reluctant to give evidence by way of video link.
39. By a further application notice dated 8 December 2010 Clarke Willmott applied for permission to amend the Defence in accordance with the draft amended Defence filed with the notice. That document, among other proposed amendments, resurrected the allegation that the Notice to Quit was void and of no effect, having been procured by Mr Dyer's fraudulent misrepresentation. The former draft paragraph 19A was reinstated with rather more elaborate allegations than in the earlier draft, but it is not necessary to set them out in full here.

The trial

40. There was a five day trial, which began on 13 December 2010. Mr Potter's counsel applied for permission to re-amend the Defence. The application was opposed. On the first day of the trial the Judge disallowed a new estoppel allegation. There has been no appeal against that decision.
41. On the second day of the trial the Judge disallowed the proposed re-amendments alleging fraudulent misrepresentation by Mr Dyer in relation to the Notice to Quit. By that time, there had been obtained from Christine a further statement dated 14 December 2010, in which she said that she stood by her statement in the letter written by Thring Townsend dated 19 May 2010 on her behalf, the effect of which was, she said, to confirm the Notice to Quit was to bring her part of the tenancy to an end and not the whole tenancy. She said that she was misled by Mr Dyer and was mistaken as to the effect of the Notice to Quit. She thought it would end her liabilities, as Mr Dyer had told her it would, and not the whole tenancy. She said that she was happy to give evidence by telephone should the Judge require her to do so; but she felt uncomfortable about giving evidence by video link.

42. On the morning of the second day of the trial, Ms Serena Gowling, Mr Potter's counsel, made further handwritten amendments to the draft re-amended Defence. The substance of them was that Christine had elected to treat the Notice to Quit as effective to terminate her interest in the tenancy of the Farm, and so it took effect as a surrender of her interest, which was accepted by Mr Dyer on 19 November 2007, but it did not affect the continuing status of Mr Potter as tenant.
43. In a detailed extempore oral judgment the Judge refused to allow the proposed re-amendments alleging fraudulent misrepresentation. He observed ([26]) that, in the light of the information available to him, Christine did not wish in any way to rescind the Notice to Quit in so far as it affected her. He said that it was also clear to him, by virtue of the content of Christine's witness statement of January 2010 and Thring Townsend's letter of 19 May 2010, that Christine was aware of the implications and effect of the service of the Notice to Quit. He rejected Ms Gowling's submission that Mr Dyer's alleged fraudulent misrepresentation gave rise to a form of offer that Christine was able to accept that enabled her to surrender her interest in the tenancy whilst leaving the tenancy of Mr Potter unaffected. The Judge said ([313]) that that argument was "doomed to failure".
44. The Judge went on to say ([34]) that, even if he had been satisfied that the argument would have some prospect of success, he would still have refused the application to re-amend the Defence in view of its lateness. On this point, he said as follows:

"34. If it did have a prospect of success I would then have had to go on to consider the position in relation to the prejudice afforded to the defendant. In this regard the defendant faces, on the second morning of the trial, an application in handwriting by way of an amendment to the defence, with an uncertain legal basis, clear shifting sands, and a lack of full appreciation of the position of Ms Goscombe. But perhaps most importantly the claimant has no ability to join Ms Goscombe to these proceedings and argue any claim in the alternative. When the amendment first arose as a potential development in this case in March and April the defendant took steps to consider joining Ms Goscombe, indeed such steps may well have provided a substantial inducement for her to serve the notice to quit, but now that simply would not be possible. The claim would have to stop, there would have to be considerable reamendment, the case wholly recast, and consideration of the joining of Mrs Goscombe. Within this there are considerations of speed, of costs thrown away, the ability of the defendant to pay such costs, and the overriding justness principle.

35. It seems to me at this stage that were I convinced of the possibility that this argument had some legal foundation I would not at this stage in any event have allowed the amendment, however I should state quite clearly that the principal ground upon which this judgement is based is that in law the argument, as advanced in the pleading, in relation to the notice to quit is, in my judgement, doomed to failure."

45. On 16 December 2010, the fourth day of the trial, the Judge delivered another detailed and conscientious extempore oral judgment giving his decision on issues of fact that were in dispute and which it was necessary to resolve before it was possible to reach a final conclusion on the claim for possession. The Judge found that Mr Potter did not at any time sign any document embodying an agreement with Mrs How. He further found that Mrs How had not orally agreed any specific terms. He said as follows:

60. ... it is my judgement that no formal agreement was signed. In my judgment it is also likely that there were conversations between Mrs How and the defendant prior to the 18th that concerned her intentions in respect of the farm and farmhouse towards the defendant. However she wished to have a concluded agreement, and without a concluded agreement I do not believe that she orally agreed any specific terms. Conversations had only been in terms of generalities. She was happy for the defendant to re-enter and live in the farmhouse in contemplation of an agreement she anticipated would be concluded. After all, she was being very generous towards the defendant and was in many ways his saviour. I think it is highly unlikely than she went further than suggesting what she had by way of outline intention to the defendant before asking Mr Pugsley to prepare a draft agreement.”

“63 ... In effect, it is my judgement that her instructions were just to leave the matter alone, leave it, as it were, unresolved.”

“64 ...It was, therefore, a position whereby the stalemate as to precise agreement did not cause the defendant any prejudice and Mrs How, having failed to finally get an agreement, simply left the matter there.

“68. So as to my relevant findings of fact, they are that there was no written agreement of any form signed, and secondly that the steps prior to the attempt to sign had been a lead up to an agreement. They never constituted an agreement, they did not constitute steps which were then enshrined with an agreement, rather an agreement to be reached. The dispute, such as it was a dispute, in relation to the liabilities for repair was one upon which the defendant had taken advice, and one that he pursued before Mr Pugsley. It was never resolved. Accordingly, it seems to me, there was never any oral agreement reached in relation to the occupation of the farmhouse such that what had happened is that he had been allowed to enter the farmhouse in anticipation of there being agreement, such agreement subsequently never transpiring. As to the surrounding farmland, he held that on a 1971 Act agreement and continued to do so. He paid the same rent and little altered. The real change was that the person who was the landlord had no malevolence towards the defendant, and that he well knew.”

46. In the light of those findings of fact, Ms Gowling submitted that Mr Potter had been permitted by Mrs How to occupy the Farmhouse on the terms of a contractual licence which, by virtue of section 2 of the AHA 1986, took effect as a tenancy from year to year. Ms Gowling, deviating significantly from the pleaded amended Defence, submitted that the consideration for the licence arose, firstly, by virtue of an agreement by Mr Potter, when he was given the keys to the Farmhouse, to carry out work to it; and, secondly, by virtue of Mr Potter agreeing to forego a potential rent decrease arising out of a rent review notice served in March of that year.
47. In his fourth and final judgment delivered on 19 September 2010 the Judge rejected both of those contentions. He said ([8], [20], [23]) that there was not a scrap of evidence to support the first alleged consideration, and, so far as concerned the second one, it was impossible on the evidence to colour the relationship between Mrs How and Mr Potter as a contractual one, that is to say one in which there was an intention on both sides for legal relations to be created.
48. Furthermore, even if there had been a contractual licence, the Judge rejected Mr Potter's case that the effect of section 2 of the AHA 1986 was to convert it into a tenancy from year to year, with necessary modifications. The Judge observed that, if a contractual licence granted by Mrs How to Mr Potter had been converted into a tenancy from year to year by virtue of section 2, the tenancy would (by virtue of AHA 1986 s.7) have incorporated the Model Clauses in the 1973 Regulations. The Model Clauses confer extensive rights and liabilities on the landlord and the tenant, including as to repairs. The Judge observed that those provisions would have been entirely inconsistent with the intention of both Mrs How and Mr Potter that neither would be under any obligation to carry out any works of repair. He said:
- “26 ... If this route, and route it is, is followed from contractual licence through Section 2 through the model clauses to the obligations it would in the present case not be anything other than diametrically opposed to what the parties had in mind at the time that the defendant was allowed to go into occupation. It would not merely simply be transforming or modifying the agreement, it would be turning it on its head. For that reason it seems to me that even if I were satisfied that there were not in fact merely a gratuitous licence but a contractual licence of some form, biting upon the consideration that Ms Gowling urges me to take as set out within the defendant's witness statement, then in any event it would be improper to find that Section 2 then transformed it into one that had the necessary protection that she now urges me to find. To do so would be quite against the agreement such that it was that she proved.”
49. In reaching that conclusion the Judge relied upon the judgment of Sir Anthony Evans in *Davies –v- Davies* [2002] EWCA Civ 1991 and, in particular, Sir Anthony Evans' acceptance of the principle that section 2 of the AHA 1986 does not apply where “the necessary modifications” in converting a contractual licence into a tenancy from year to year pursuant to section 2 would result in the substituted agreement being an essentially or radically different agreement from the agreement in fact made.

50. Finally, the Judge rejected an argument advanced on behalf of Mr Dyer that, even if Mrs How had granted Mr Potter a contractual licence, section 2 of the AHA 1968 would not have applied to it because Mr Potter was permitted to reside in the Farmhouse as a residence and not as an agricultural holding. On this aspect, the Judge said:

“31. In the current case the house had been occupied by, initially the defendant's parents, as a farmhouse in what many people would understand to be the traditional sense. Then there became a divergence of ownership of the farm from the tenancy of the land and eventually and unhappily there came a point when the farmhouse became derelict and it had remained and deteriorated as such.

32. The house, it appears to me, was a house that was closely connected to the farm. It also had surrounding land which is the subject of an additional agreement of some form, either by way of gratuitous licence, as I have indicated, or as Ms Gowling would have it contractual licence, to accompany it. By that I mean there must have been land curtilage around the farmhouse which was relevant to the farming occupation.

33. Whilst it may well be that the defendant had lived in a dairy and in a barn and managed to use an office elsewhere, it seems to me that were one to stand back and have a look at the reality of the position this was in fact a farmhouse as part of a farm.

34. It seems to me the fact that it had been derelict and was capable of being occupied as a house separate from it does not defeat the argument.”

The Appeal

51. Mr Potter advances the following grounds of appeal. Firstly, it is said that the Judge was wrong to refuse Mr Potter permission to re-amend his Defence to allege that the Notice to Quit had been procured by Mr Dyer's fraudulent mis-representation and that the Notice to Quit took effect only as a surrender of Christine's interest, and did not otherwise affect the continuance of the tenancy. It is said, on behalf of Mr Potter, that the Judge was wrong to conclude that the argument that the Notice to Quit had that effect was “doomed to failure”.
52. Mr Potter further contends that the Judge, in expressing the view that he would in any event have refused permission to amend because of lateness of the application to re-amend and the prejudice it would cause Mr Dyer, failed to carry out a proper balancing exercise taking into account the prejudice to Mr Potter of refusing the application. It is said that the Judge's exercise of his discretion was in those circumstances fundamentally flawed and not in accordance with the overriding principle of justice.
53. The second principal ground of appeal is that the Judge was wrong in law in holding that Mr Potter's occupancy of the Farmhouse had not by operation of the AHA 1986

section 2 been converted into a tenancy from year to year. On that aspect Mr Potter contends that the Judge was wrong to conclude that the licence granted to Mr Potter by Mrs How was gratuitous. Mr Potter says that the Judge ignored the evidence that Mr Potter had agreed with Mrs How that, in consideration of his being allowed to take up his occupation of the Farmhouse, he would carry out works to the Farmhouse to make it habitable, and he did in fact carry out such works. Those works are said to include connection of the water and electricity supplies, plumbing in the kitchen and bathroom, opening a fireplace and mending the windows, ceilings and doors.

54. It is also contended that the Judge was wrong in law to conclude that, even if the licence granted by Mrs How to Mr Potter was a contractual licence, it was not converted by the AHA 1986 section 2 into a tenancy from year to year because the effect of the Model Clauses, particularly as regards repair obligations, would have made the tenancy radically different from the agreed terms of the licence.
55. On the first ground of appeal, Mr Derek Wood QC, for Mr Potter, acknowledged that the ordinary effect of the service of a notice to quit by one of two joint tenants is to terminate the tenancy. He submitted, however, that the usual rule did not apply in the present case because of the legal consequences of the fraudulent misrepresentation made by Mr Dyer to Christine inducing her to serve the Notice to Quit. The argument advanced on behalf of Mr Potter in this respect is shortly stated.
56. It is trite law that a person to whom a fraudulent misrepresentation has been made, which has induced that person to enter into a contract or other transaction, is entitled on discovery of the fraud to elect either to affirm or to rescind what was so induced. An election will only take place if it is communicated to the other party in clear and unequivocal terms: *China National Foreign Trade Transportation Corporation –v- Evlogia Shipping Co S.A. of Panama (The “Mihalios Xilas”)* [1979] 1 WLR 1018 at 1024; *Motor Oil Hellas (Corinth) Refineries S.A. –v- Shipping Corporation of India (The “Kanchenjunga”)* [1990] 1 Lloyd’s LR 391 at 398; *Watson –v- Burton* [1956] 3 All ER 929 at 937. Mr Wood submitted that, in the present case, Christine never communicated to Mr Dyer in clear and unequivocal terms that she affirmed the Notice to Quit as having its ordinary effect of bringing to an end the tenancy of the Farm. He submitted that what she did clearly and unequivocally affirm was that the Notice to Quit was to have the effect which Mr Dyer represented to her it would have, namely the termination of her own interest as a joint tenant and the continuation of the tenancy as a tenancy vested in Mr Potter alone.
57. Mr Wood accepted that there has not been any reported case comparable to the situation presently under consideration. He was not able to identify any reported case or academic commentary which considers, let alone expressly supports, the analysis and argument advanced by him on behalf of Mr Potter. Mr Wood submitted, nevertheless, that the linking of Christine’s election and affirmation to the representation made to her by Mr Dyer, so that she was entitled to elect, and did elect, to affirm the Notice to Quit to such extent as, but no more than, Mr Dyer represented it would have, is rather a strong case, and certainly not one doomed to failure as the Judge said. The analysis advanced on behalf of Mr Potter, Mr Wood emphasised, is consistent with a sound policy of not allowing Mr Dyer to escape being held to the representation that he made.

58. Attractively as that argument was advanced, I agree with the Judge that it has no real prospect of success. The suggested “middle course” of partial affirmation is wholly unsupported by authority and contrary to basic principle. Fraudulent misrepresentation gives rise to a right on the part of the representee to rescission and damages. The object of both remedies is to put the representee in the position in which the representee would have been if the misrepresentation had never been made. The damages are, therefore, calculated so as to put the claimant in the position in which they would have been if they had not entered into the contract or transaction in question. By contrast, damages for breach of contract are assessed so as to compensate the claimant for the loss suffered because the defendant’s promises were not carried out. The representee’s right of election is a right to decide whether to rescind the transaction and so be put in the position as if it had never taken place, or to be bound by the transaction notwithstanding that it was induced by misrepresentation and could, if the representee so wished, be set aside. There is no scope, therefore, for Mr Wood’s suggestion of a middle course under which the representee elects neither to rescind the transaction nor to affirm its full force and effect, but affirms the transaction only to the extent of the misrepresentation that was made. That would be to treat the misrepresentation as a promise pursuant to a contract, even though no contract has been made or broken.
59. It has never been alleged in any of Mr Potter’s Defences or proposed Defences that Mr Dyer made contractually binding promises about the effect of the Notice to Quit and that Mr Potter is entitled to enforce those promises in his own name and right. Any contract incorporating such promises would have been made between Mr Dyer and Christine, but Christine is not a party to these proceedings. No argument along those lines was ever raised before the Judge. There is no mention of any such argument in the written grounds of Appeal or the skeleton argument in support of the appeal.
60. Mr Stephen Jourdan QC, for Mr Dyer, also submitted that the substance and purported effect of any such contract would be to create a new tenancy in Mr Potter alone in place of the former joint tenancy, or to recognise an assignment of the former tenancy to Mr Potter, but there would have been no compliance with the Law of Property (Miscellaneous Provisions) Act 1989 section 2 (contracts for the disposition of an interest in land to be made by signed writing). It is not necessary to decide that point.
61. That is sufficient to dispose of Mr Potter’s appeal against the Judge’s decision not to permit Mr Potter’s application to re-amend his Defence to allege fraudulent misrepresentation. It is not necessary, therefore, to address the powerful arguments that were advanced by Mr Wood that the Judge failed to carry out a proper exercise of discretion in [34] of his judgment because the Judge concentrated exclusively on the prejudice to Mr Dyer if the re-amendments to the Defence were allowed at that very late stage, but without taking account of the prejudice to Mr Potter (assuming the fraudulent misrepresentation argument had a real prospect of success) if the re-amendments were disallowed. It is right to point out, however, that the Judge emphasised in [35] of his judgment that the principal ground on which he exercised his discretion was that the legal argument advanced in respect of the alleged fraudulent misrepresentations was doomed to failure.

62. I turn to the second principal ground of appeal, that is to say that the Judge was wrong to conclude that the licence granted by Mrs How to Mr Potter to occupy the Farmhouse was not converted into a tenancy from year to year by virtue of section 2 of the AHA 1986.
63. As I have said, Mr Potter's first complaint about the Judge's decision on this aspect of the case was that the Judge wrongly concluded that the licence was gratuitous rather than contractual. It is common ground that a gratuitous licence does not fall within section 2. Mr Wood submitted that the evidence before the Judge clearly established that Mrs How allowed Mr Potter to take up occupation in consideration of his carrying out works to the Farmhouse to make it habitable, in particular connecting the water and electricity supplies, installing plumbing in the kitchen and bathroom, opening up a fireplace and mending windows, ceilings and doors. The evidence showed that those works were indeed carried out by Mr Potter. Mr Wood frankly accepted that such an agreement and the execution of those works by Mr Potter are not alleged in the amended Defence and were not set out in the proposed re-amended Defence which was placed before the Judge for his consent. Mr Wood said that the allegation was, nevertheless, advanced orally to the Judge by Ms Gowling.
64. For the purposes of the appeal we have been provided with a note of proposed re-amendments to the Defence setting out the allegations concerning the agreement between Mrs How and Mr Potter that he would carry out works to the Farmhouse and that he duly executed them.
65. The insuperable difficulty of Mr Potter on this aspect of the appeal is that, contrary to Mr Wood's submission, I do not consider there is any cogent evidence that there was any such agreement between Mrs How and Mr Potter, and in any event the allegation is both inconsistent with Mr Potter's pleaded Defence and precluded by the factual findings of the Judge.
66. There is no doubt that the Farmhouse was in a very dilapidated condition when Mr Potter was permitted by Mrs How to take up occupation of it. Mr Wood referred to the following paragraphs in Mr Potter's witness statement dated 2 June 2010, which contained the following passages.

"17. In August 1990 we visited Mrs How, I apologised for Christine. Mrs How explained that she wanted to buy the farm for me (not Christine, I think she upset Mrs How).

a. She wanted complete regime change. I would never be harassed for the rest of my life as I had been by my brother.

b. she was not going to spend any money on repairs and she would not hold me liable for repair, but she wanted no rent from me, she said I could use this for repairs.

c. she wanted me back in the house as soon as possible and the whole farm was mine for my lifetime in trust to me.

d. If ever Little Heath was sold it would continue to be mine on the previous lines but I would have first refusal to buy the farm if it was for sale.

e. She would give me a written agreement on the lines she had explained.

f. She also said that she wanted hunting on the farm and would put it in the bagery trust if I did not mind. I did not as she was buying it for me. I agreed because these terms would prevent a return to my brother's regime."

"21. We looked in the back door. The hall ceiling was down, she said you can put that up Brian – I agreed we could not have a cup of tea because there was no water or electricity – 'you can do that Brian' she said – I agreed. She again wanted me in the house as soon as possible. She again said she would spend no money on the place and certainly would not force me to either – it was up to me to sort everything out. It was mine for my lifetime. She did not even expect me to farm it, I could get a job and go to work (she had previously offered me one when Gordon Pullen gave up). But I had always liked farming so I did not want a job. I also told her what a relief it was to have my brother off my back and thanked her. She said that she would get me a written agreement next."

"27. Later in 1991 and 1992 Philip Parnham helped me put the house in liveable order. We put a new water pipe from the well to the house. Fitted a gas water heater, slated the roof, put electricity in, using a generator, repaired windows and doors, put up ceilings, opened the fireplace in the front room with mantel and surround, plumbed hot and cold water in the kitchen and bathroom, painted the kitchen, hall, front room and put a phone line in etc. Mrs Williams brought carpets and curtains over for the front room, stairs, bedroom etc, she also tidied up for me until the late 1990's. I paid Phil for putting the house in order. Mrs How was pleased with what we had done, especially the fireplace which she thought Phil had done a good job on."

67. Mr Wood also referred to the witness statement of Philip Parnham dated 26 May 2010, in which he describes the assistance he gave Mr Potter in relation to work to the Farmhouse:

"7. I helped him to mend windows and doors, clearing up, whitewashing walls and opening up a fireplace. I recall at the time he himself did other work. He mainly focussed at the beginning on the kitchen living room and hallway and bathroom upstairs. I remember him plumbing in the kitchen and bathroom.

8. The Defendant paid me for the work I did.
 9. It was plain from the then state of the farmhouse that until this was done, he was not able to live in it.”
68. Mr Wood also relied upon the following evidence in the witness statement of Mr A. Williams dated 4 December 2010:
- “10.... Brian and his friend Phil put the house in order mending the roof, putting in water and electric run by a generator. I brought over curtains, carpet and some furniture. I did tidy the house up until I became ill in 2003.”
69. I have quoted extensively from the Judge’s judgment on 16 December 2010 as to his findings of fact. The Judge concluded ([60] and [68]) that not only was there never an agreement in writing between Mrs How and Mr Potter but there was never any oral agreement between them on any specific terms. The Judge said ([66]) he had little doubt that, if there had ever been a dispute about the state of the Farmhouse, Mr Potter would have suggested that he had no agreement in relation to it, that is to say no liability with regard to it. Mr Potter was unwilling to risk paying any significant sums to do up the Farmhouse to the benefit of a third party. The Judge accepted ([57]) the evidence of Mr Pugsley ([47]) that Mr Potter was unhappy to sign the draft tenancy agreement which Mr Pugsley had prepared because Mr Potter did not want anyone else getting financial benefit from any work that he undertook. He either wanted Mrs How to do up the Farmhouse and he would pay an increased rent, or he wanted to be compensated at the end of any tenancy agreement.
70. As Mr Jourdan pointed out, no transcript of the oral evidence before the Judge has been placed before us. I cannot see in any of the passages in the witness statements, on which Mr Wood relied, anything capable of supporting a case that there was an intention on the part of Mrs How and Mr Potter to create legal relations between them giving rise to a contract under which Mr Potter was bound to carry out certain works to the Farmhouse. Mr Potter relies particularly on his evidence in paragraph 21 of his witness statement that, on observing that the hall ceiling in the Farmhouse was down, and that there was no water and electricity, Mrs How told him that he could remedy that, and that it was up to him to sort everything out. That, however, falls far short of cogent evidence of an intention to create legal relations. Indeed, in the very same paragraph Mrs How is recorded as saying that: “she would spend no money on the place and certainly would not force me to either”. Furthermore, in paragraph 17b of the same witness statement, Mr Potter gave evidence that Mrs How said: “she was not going to spend any money on repairs and she would not hold me liable for repair”. In paragraph 23 Mr Potter said of Mrs How: “she agreed that she did not want me held liable for anything...” In paragraph 24 Mr Potter said that Mrs How’s desire was for Mr Potter’s tenancy agreement: “to be completely in my favour, no repair responsibility...”
71. Furthermore, the case now advanced by Mr Potter concerning his alleged obligation to carry out repairs to the Farmhouse in consideration of being allowed into occupation is inconsistent with his amended Defence, particularly the following pleaded allegations:

“6. In conversations which began in about August 1990 (and accordingly before completion of her purchase of the Farm) Mrs How and the Defendant agreed orally that:

...

b) Neither party would be under any obligation to repair or maintain the Farm, including the Farmhouse and farm buildings.”

“8. ...

b) Mrs How first presented the Defendant with a draft of a standard form of tenancy agreement, which included tenant’s repairing obligations. The Defendant pointed out to her that they had agreed that neither would be responsible for repairs and that he could not in any event afford to repair the farmhouse, which was in very poor condition. Mrs How agreed that this draft agreement did not reflect the oral agreement at paragraph 6 and took the first draft agreement away, saying she would get it altered.”

“11...

(2) The agreement for occupation of the Farmhouse included, and was made in consideration of the Defendant and Mrs How agreeing that neither would require the other to carry out any works of repair to the Farm or the Farmhouse (which would otherwise have been each of their responsibility under the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1973) ...”

72. Accordingly, Mr Potter’s case, as set out in his Statement of Case, which was supported by a Statement of Truth, was that it was specifically agreed by himself and Mrs How that he would be under no obligation to carry out repairs.
73. For those reasons I consider that the Judge was both entitled and right to hold that the licence granted by Mrs How to Mr Potter to occupy the Farmhouse was a gratuitous licence, and not a licence to which section 2 of the AHA 1986 applied.
74. It is not necessary, therefore, to consider Mr Potter’s further ground of appeal that the Judge was wrong to hold that, even if the licence granted by Mrs How to Mr Potter to occupy the Farmhouse was a contractual licence, it was nevertheless incapable of being transformed into a tenancy from year to year by section 2(1) of the AHA 1986 because such a tenancy would be radically different from the agreed licence by reason of the significant repair obligations cast upon both the landlord and the tenant under the Model Clauses which would be incorporated in the tenancy by section 7. This is an important point.
75. Both counsel referred to, and relied upon, *Davies –v- Davies*. Mr Wood’s argument, very briefly summarised, was that a licence cannot be prevented from being

transformed into a tenancy from year to year pursuant to section 2(1) merely because the Model Clauses impose substantially different repair obligations from those orally agreed. That situation, he argued, is different from a situation in which the licence does not confer the right to exclusive occupation and so, by its nature, is not capable of being converted into a tenancy. He submitted that it is analytically unsound to say that a licence, which does not have any features inherently inconsistent with a capability of being converted into a tenancy, is precluded from being converted into a tenancy from year to year by section 2(1) because of the Model Clauses which are themselves deemed to be incorporated in a tenancy resulting from such a conversion.

76. Mr Wood pointed out that, by virtue of section 7(3) of the AHA 1986, the Model Clauses are incorporated in every contract of tenancy of an agricultural holding except in so far as they impose on one of the parties to a written agreement a liability which under the agreement is imposed on the other. Accordingly, in the case of an oral contract of tenancy, the Model Clauses apply notwithstanding that they would impose a wholly different liability than one orally agreed. He reasoned that, if that is the case in respect of an oral tenancy and, as is apparent from section 2 of the AHA 1986, the legislative policy is to convert a licence to occupy land for use as agricultural land into a tenancy from year to year, there could be no good policy reason in the present case for precluding an oral licence granted by Mrs How from being converted into a tenancy from year to year under section 2 merely because the Model Clauses incorporated in any such tenancy would impose a greater repair liability than was agreed under the oral licence.
77. Mr Wood's submission was, in short, that the Model Clauses are irrelevant to the question whether a licence is transformed into a tenancy from year to year pursuant to section 2(1) of the AHA 1986 and, in particular, to the question whether, if the licence in question was so transformed, the tenancy from year to year would be so radically different from the agreed licence as to preclude such transformation.
78. Mr Wood's submissions on this part of the appeal were persuasive, but it is not necessary to reach a conclusion on them.

The Respondent's Notice

79. It is also not necessary to consider the further ground stated in Mr Dyer's Respondent's Notice for upholding the Judge's order, namely that Mr Potter's licence did not fall within the AHA 1986 section 2 because it was a licence to occupy the Farmhouse as a residence and not for use as agricultural land within section 2(2) of the AHA 1986.

Conclusion

80. For those reasons, I would dismiss this appeal.

Lord Justice Pitchford

81. I agree.

Lord Justice Ward

82. I also agree.