

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 02/02/2018

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

Between :

(1) Stephen Charles Smyth-Tyrrell
(2) Beaujolois Katherine Smyth-Tyrrell

Claimants

- and -

William Robert Bowden

Defendant

Guy Adams (instructed by **Clarke Willmott LLP**) for the **Claimants**
Gordon Nurse (instructed by **Neil Gilbert Solicitors**) for the **Defendant**

Hearing dates: 31 October – 7 November 2017

Judgment Approved

HHJ Paul Matthews:

Introductory

1. This is my judgment on a claim brought by the claimants in relation to a parcel of about 9.51 acres of land at Boswidjack Farm in Constantine, Falmouth Cornwall (“the property”). The parcel is generally known as Mellinzeath, or Mellanzeath, or sometimes Melanzeth. The claim form, issued on 26 February 2015, seeks a declaration that the property is an agricultural holding within the meaning of the Agricultural Holdings Act 1986, and/or an order for a new tenancy pursuant to section 24 of the Landlord and Tenant Act 1954 of the property, and/or a declaration that the tenancy of the property continues and/or that the claimants are entitled to such interest as the court thinks fit by way of proprietary estoppel. It was accompanied by particulars of claim also dated 26 February 2015, in which these claims were elaborated. The claim was further explained by a number of requests for further information made by the defendant. The defendant is the freehold owner of the property, it having been transferred to him by his parents, the late Mr Bernard Bowden (who died on 30 August 2012) and his wife Mrs Ada Venna Bowden, on 4 March 1999.
2. The defendant filed a defence and counterclaim dated 18 May 2015. This included at paragraph 36 an allegation that, if there was otherwise a right to a new tenancy under the 1954 Act, the defendant intended to occupy the relevant holding for the purposes

of his own business, and therefore objected to the grant of a new tenancy. It also included a counterclaim for a declaration that the claimant's tenancy was not of an agricultural holding within the meaning of the 1986 Act, a declaration that the defendant was entitled to possession of the land concerned, subject only to the rights of a company called Bosvarren Ltd in a sublet part of the land, and also mesne profits from the expiry of a notice to quit dated 16 June 2014 to the delivery up of possession to the defendant or his agent. The claimants filed a reply and defence to counterclaim on 15 June 2015.

3. The relationship between the parties in respect of this land was governed initially by an agreement in writing, which is undated, but is expressed to be for the grant of a tenancy of 15 years to date from 1 January 1993. This is signed by the claimants as tenants, but not by the defendant's parents, who at that stage constituted the relevant partnership owning the land in question. The rent was stipulated to be £400 per annum, paid quarterly in advance on the usual quarter days. After the expiry of 15 years from this date, the relationship between the parties was treated as a tenancy from year to year of the property. A notice to quit dated 16 June 2014 was given on behalf of the defendant as landlord to the claimants as tenants, to deliver up possession of the property on 24 December 2014. The defendant also gave a notice that, if the tenancy was a business tenancy within the 1954 Act, the landlord intended to occupy the holding for the purposes of a business to be carried on by him therein.
4. The claim and counterclaim were tried by me at the Rolls Building of the Royal Courts of Justice in London between 31 October and 7 November 2017, no courtroom being then available in Bristol. This was the consequence of the continuing effects of the flood in the basement of the Bristol Civil and Family Justice Centre which had taken place in late June 2017. Mr Guy Adams appeared for the claimants, instructed by Clarke Willmott LLP. Mr Gordon Nurse, instructed by Neil Gilbert Solicitors, appeared for the defendant.

Witnesses

5. I heard evidence from the following witnesses: the first claimant, the second claimant, the defendant, Mrs Angela Bowden (the defendant's wife), Martyn Middlewick (claimants' expert surveyor) and Alan Alker (defendant's expert surveyor). The evidence of Mr Bryer was contained in his witness statement, but as it was not challenged he was not tendered for cross-examination.
6. I give here my impressions of the witnesses whom I saw. The second claimant was a calm, reserved and clear witness. She is plainly intelligent and understands money, and how to run a business. However, she professed herself ignorant of all the business matters concerning the property, and in effect referred to her husband, the first claimant, all the questions which she found difficult to answer. I think that what she said was truthful as far as it went, but she was quick to express the view that particular questions should not be asked of her, but instead of her husband.
7. The first claimant was a slow, grave and careful witness, who gave evidence in an authoritative fashion. He gave his evidence frankly and largely without hesitation, even when it did not suit his case. I am sure that from his own point of view he was telling the truth. However, I felt also that he had convinced himself that he was right,

and was reinterpreting some events from that perspective. Accordingly there were some areas of fact where I felt that I could not accept his evidence uncritically.

8. The defendant was a straightforward witness, thoughtful, perhaps even taciturn. He was prepared to “go along with” many suggestions put to him by counsel. His evidence was mostly clear, but sometimes hazy about events that had happened many years ago. I am satisfied he was telling the truth so far as he was able.
9. The defendant’s wife was a quick and forthright witness, obviously very capable both in running a home and in running a business. She was completely frank, but also opinionated. She too was sure that her side was in the right. I had no doubt that she was telling the truth. However, she was not party to all the meetings and discussions which took place over the years. I accept her evidence as truthful, so far as it went.
10. The two experts were quiet and professional. I heard very little from them, as counsel had only a few questions, but what I heard led me to believe that both were doing their best to assist the court and give their honest opinions. There was also the factual evidence of Mr Peter Bryer (the claimants’ farm consultant) in witness statement form, but he was not tendered for cross-examination, so I had no opportunity to form a view of him. His evidence is not however central to the case.

Facts found

11. Based on the evidence contained in witness statements, as supplemented by oral evidence, I find the following facts.

The parties

12. The claimants own a property known as Bosvathick, near Falmouth in Cornwall. This property and surrounding land has been in the second claimant's family since 1760. They run a bed-and-breakfast business there. They also farm about 200 acres of land, known as Bosvarren Farm, and own further land occupied by tenant farmers. The first claimant's occupation is the operation of the farm and the management of the properties and estate at Bosvathick. The farming activities include cattle farming, various cash crops and the management of woodland. Mellinzeath is approximately 2 to 3 miles away from Bosvathick. In addition, the first claimant is a member of the Institute of Historic Building Conservation and has worked as an historic building adviser. He has a particular interest in preserving and restoring historic and listed buildings. He has published books on the subject. The second claimant is responsible for organising the bed-and-breakfast bookings at Bosvathick.
13. The defendant was born in 1960, into a farming family. His father was born in 1922, and by the 1990s had been in farming for nearly fifty years. He was familiar with all aspects of farming business. He was fully aware of the nature of agricultural holdings and the security of tenure that they brought. The only lettings he granted were of single crop arable land, so as not to create an agricultural tenancy. In partnership with his brother the defendant farms 750 acres of land with dairy and beef cattle, including milking cows. They also have a farm contracting business, and long term lettings in 4 houses and a bungalow. He and his wife have been involved in holiday letting since 1999. They married in 1984 and have lived at Boswidjack Farm since then.

The land

14. As already stated, the property the subject of the present dispute forms part of Boswidjack Farm. It was formerly a miller's cottage situated to the south west of the main farmhouse. The cottage is about 300 yards away. To get to it from Boswidjack farmhouse it is necessary to cross some land called Tucoys belonging to neighbours, the Harris brothers. In the 1990s the defendant and his father and family considered that they had a right of way, although more recent events have raised a question about that. But in practice there was and has been no real difficulty about rights of access. Before the events described in this judgment, the property was in a very poor state. The buildings were derelict, the vegetation was overgrown, it was overrun with bracken and the land was so steep in places as to be unploughable and therefore unfarmable. However, the defendant's father said that in about the 1930s someone had kept pigs at the property.
15. At some time during 1993 the first claimant was out walking to learn the area, and also looking for opportunities to extend his farm. He came across the property, although it was in such an overgrown state that it was impossible to see the barn. The house was derelict, a non-complete shell. Subsequently the first claimant researched the history of the property. Somehow he discovered that the defendant's father owned it. He had a meeting with the defendant's father in October 1993 at which they discussed the possibility of the first claimant's using it. There were further discussions during October and November 1993.

The proposal

16. On 4 November 1993, the first claimant wrote formally to the defendant's father to put a proposition to him. That letter included the following:

“As I mentioned, I have no building renovation projects planned at the moment, and would be interested in the possibilities of restoring the small house and barn at Mellinzeath.

1. I imagine, indeed understand that you and your sons would be unwilling to sell the property, and also understand that you are concerned about retaining the water rights. My own objective would be to clear some of the undergrowth and suckers from the property, renovate the buildings as stores, and then in the long term apply for permission to rehabilitate the buildings as a house.

To this end, I would like to suggest that I take a long lease of the property, over a timescale which would enable this to go ahead, and then have a sufficient period for renting out of the property to give me a return once the property were renovated.

It is difficult to envisage how long this process would take, but it is my experience that this type of planning procedure should be approached slowly and carefully. I believe that I would need at least 15 years to ensure that the project was viable, and would suggest a rent based on the value or use of the woodland area surrounding the place, possibly related to a value per acre that seemed reasonable to you.

You would retain water rights and access; I understand that there is no right of way through Tuoys, and believe that access would be necessary through Boswidjack. At the end of the period, there is a chance that you and your family would have obtained a renovated period house in a pleasant surrounding, which someone else had paid for.

2. It seems possible that you would not wish to consider any of the above, and that there was a case for your carrying out the above actions yourself. If this is the case, I would be happy to act on your behalf, prepare proposals in detail and sort the matter out. However, there would be a fee due for this, but I would be happy to discuss this further.”

17. In this letter, the first claimant states his interest to the defendant’s father, the then owner of the property, in a project of restoration of the house and barn on the property. He says he would need a long lease, at least 15 years, in order to make his expenditure and effort worthwhile and achieve a return on his investment. He was not *undertaking* to do the renovation work. That would depend on what he found and whether he thought it worthwhile. But if he did do it, the advantage for the defendant’s father would be to obtain “a renovated period house in a pleasant surrounding” without paying for it. However, it is striking that, in cross examination, whilst the first claimant accepted that he put the project to the defendant’s father on this basis, he accepted that he was actually trying to get some extra land for his own activities, having moved into his (inherited) estate only a year or so before. He accepted that it was steep land, which was not easy to farm, but he considered that he could put his dexter cattle on the land as long as the trees were cleared. So he saw it as a project with opportunities for him, only one of which he put to the defendant.
18. So the first claimant was looking at this project in a quite different way to that which he presented to the owner of the land. He saw it as a long-term project for himself to obtain ownership, or at least indefinite use, to go with his own nearby farmland. From the owner’s point of view, on the other hand, the project was a very attractive one. He would give up possession of an unproductive and un-economic parcel of land which was currently producing no income, in return obtaining a modest rent from it, and would regain possession in 15 years (which no doubt he thought was within his own lifetime, as indeed it was) but perhaps renovated so that there was a (much more valuable) habitable cottage and barn there, which then could be sold or rented out.

The agreement

19. The defendant’s father discussed the possible project with members of his family. Generally, they were in favour. They were attracted by the idea of giving up something which was no use to them for a period, and then getting it back in a form which was economically useful. Only the defendant’s wife appears to have been against the idea, because she was worried about people having access over the farm and was uncertain as to the long-term consequences. She was concerned about the family’s ability to enforce its rights at the end of the term. Nevertheless, the defendant’s father invited the claimants to draft an agreement. In accordance with the discussions at the meeting, it contained no *obligation* for the claimants to do any renovations. That would be their choice. This draft, with certain small amendments, was finalised, signed by the claimants, and sent to the defendant’s father. It is not

clear whether he ever signed it. Certainly he never signed the version which the claimant signed, although that does not mean that he never signed any copy of it.

20. However, the failure to produce a copy signed by the defendant's father, or at least evidence that he did sign it, has an important legal consequence. It means that on the evidence before me the agreement cannot qualify as a valid agreement at law for the grant of the tenancy of 15 years, because it does not comply with the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. The short leases exception in section 52 of the Law of Property Act 1925 does not apply, because the tenancy is to last longer than 3 years. Since the equitable doctrine of part performance preserved by section 40 (2) of the Law of Property Act 1925 was abolished by the Law of Property (Miscellaneous Provisions) Act 1989, section 2, the agreement could not be the subject of a claim for specific performance. Accordingly, at law, given that the claimants took possession of the land and began to pay rent at quarterly intervals, a periodic tenancy would have sprung up, probably a tenancy from year to year.
21. However, in circumstances where the claimants took possession under an "agreement" for a 15-year lease, and began to spend money and effort on the project, to the knowledge of the defendant's father (and indeed the defendant), the claimants would have had at least a serious claim in proprietary estoppel to the grant of some such interest in the land as the 15-year lease agreed. But it is not necessary to decide this. The defendant's father, and then the defendant, made no attempt to determine the occupation of the property by the claimants during the agreed 15 years, nor indeed for some time afterwards. The term expired while the relationship between the parties was still good. At the end of the agreed term of 15 years, rent was still being paid as before and the legal tenancy from year to year would have continued. The only change was that in 2011 it was agreed that the rent would be increased from £400 per annum to £1000 per annum. It was this annual tenancy which the defendant sought to bring to an end by his notice to quit served on 16 June 2014, to take effect on 24 December 2014.

The allegation of a "common understanding"

22. In his witness statement, the first claimant says this:

"147.... Although me and my wife are the claimants in this claim, we were forced to issue these proceedings because, out of the blue, [the defendant] served us with notices to quit, with complete disregard to what was clearly a common understanding between us that:

a) one day my wife and I (or alternatively my son) would buy [the property]; and

b) in the meantime, we could continue as tenants indefinitely."
23. During cross-examination, the first claimant was challenged on the assertion of this "common understanding". He said that he stood by his witness statement. He said that there were references in his witness statement to negotiations to sell and buy the property. To him, events seemed to show that his understanding was correct. So far as his son was concerned, he recalled a brief conversation with the defendant or the defendant's father in which he said he was interested in transferring his and his wife's

interests in the land to their son. But he accepted that he was not saying the defendant or his father had agreed. What he was putting forward was an impression gained over a long period. He was unable to point to any action or any words on the part of the defendant or the defendant's father that demonstrated that they had given any assurance or shared any such understanding as he had referred to. It is true that after earlier negotiation attempts had come to nothing, there was a meeting in the kitchen at Boswidjack Farm on 20 October 2013, at which the defendant was now prepared in principle to sell. But the parties were too far apart on price, and the matter was dropped.

24. Notwithstanding all this, in cross-examination the first claimant said that, although he knew the agreement was for 15 years, it never occurred to him that it would not continue. He knew that the defendant's father was unwilling to sell at the outset. But 15 years was a long time. As he said, he "hoped or believed that something might happen". He admitted that, between 1993 and 2014 when the claimants received the notices to quit, the parties never discussed the term. Moreover, the second claimant herself accepted in cross-examination that she did not know of anything that might change the deal between the parties from a 15 year tenancy of the property. And the work that had been done on the property was that which had been proposed back in December 1993, and which was to justify the length of the term.
25. In my judgment, on the totality of the evidence before me, it is crystal clear that there never was any such "common understanding". The defendant denies it. The defendant's wife denies it. I accept their evidence on this point. There is nothing in the documents that supports it, and the first claimant was entirely unable to point anything said or done by the defendant or his family which pointed in favour of it. Even the second claimant did not share it. Whether one looks at each individual act or statement of the defendant and his father or at the whole of the course of dealing, I find nothing that could amount to a promise or assurance by them to the claimant beyond what was agreed in December 1993. What has happened is that the first claimant *has convinced himself* that the claimants would be able to stay in the property beyond the initial 15 years of tenancy, and ultimately persuade the defendant and his family to sell the property to them for a price at which they (the claimants) wished to buy.
26. So far as the term of 15 years was concerned, this was agreed in principle at a meeting in November 1993 at the defendant's father's house. When in 2000 the first claimant, having renovated the cottage, was considering embarking on restoration of the barn, he again did not consider the remaining length of the tenancy term that he had, as he put it "rightly or wrongly". He thought this was a long-term arrangement and a continuing relationship. Even when he sent further copies of the agreement to the defendant's father or the defendant (at their request, because they could not find a copy) in 2004 and 2008, he did not worry about the fact that the term of 15 years was running out.
27. I find that the claimants bargained for a term of 15 years, and hoped and expected that it would be extended indefinitely, and that ultimately they would be able to buy the property. The hope may have arisen from the occasional discussions with the defendant's father about a possible sale, but of course they never came to anything. But neither the hope nor the expectation were agreed with the defendant's father or family, and (apart from the discussions as to a possible sale themselves) were not the

result of anything which the defendant or his family did or said. Accordingly, any expenditure by the claimants on the property was *prima facie* at their own risk. In terms of the original bargain between the parties, the claimants had had the 15 years they asked for (indeed by the time of the notices to quit they had already had a further 6 years, and by the time of this judgment they will have had another 3) as the minimum period they would need to justify the expenditure which would be involved in renovating the property, to make it possible to let for short-term holiday purposes so as to obtain a return on their investment.

28. Although the defendant and his family were aware of the works that the claimants were carrying out, at least in broad terms, I find that they were not aware of the claimants' "understanding" that they could one day buy the property and stay there in the meantime, or anything of the sort. In particular, I do not consider that the claimant's work on the property (described below) was only explicable on the basis of such a common understanding. Indeed, in my judgment it was not even obvious that that was why they were doing this. Moreover the defendant and his family did nothing which could be construed as consistent only with recognising or encouraging such a belief. They quite reasonably saw the claimants' efforts entirely in terms of the original business plan put forward by the first claimant when he came to see the defendant's father. Their expectation was that, given that the claimants had successfully renovated the property, they (the defendant and family) could look forward to getting back the property with the benefit of those renovations on the determination of the tenancy, exactly as foreseen at the original meeting.
29. I accept that the defendant's father on more than one occasion entertained the possibility of selling, but I consider that this was more out of politeness and neighbourliness than because the defendant's father had decided to sell. Only by the time of the October 2013 meeting had the defendant reached the view that the property could be sold, because of particular family circumstances, and only then at the "right" price. In my judgment, it would be a retrograde step in our law to hold that, merely because there were overtures made by the first claimant, which were politely entertained but not taken further, that should count as encouragement of a belief in a common understanding that one day the first claimant would be able to acquire the property. In my judgment, that is not the law.

Work done by the claimant

30. Having (as he thought) obtained a lease of the property for 15 years, the first claimant began to work on it in order to see what could be done by way of improvement. First of all an access track had to be paid for, including work to rebuild a bridge across the stream. There was then the clearance of some of the woods and woodland in order to enable the creation of tracks that would allow access and eventually the withdrawal of timber. This led to clearance planting and regeneration, for which an agreement was signed in November 1995 approved by the relevant government department in December. In that year the first claimant also applied for a grant through the Woodland Grant Scheme.
31. In 1996 there were discussions with both the defendant and the defendant's father. This included a suggestion as to the first claimant's purchasing the property, but this led to nothing. Meanwhile, the first claimant turned his attention to the cottage. Work began in the 2nd half of 1996. In effect the cottage had to be rebuilt. The first

claimant has set out details of the work done to the cottage in paragraph 65 of his witness statement. The cottage was finished in about late 1996 or early 1997. It was first occupied by holidaymakers in June 1997.

32. I mention here that, from 1 June 1997, the cottage was the subject of a subtenancy granted by the claimants to a company called F Smith Tyrrell Ltd. The intention was that the money received from holiday rentals should be paid to this company, which would in turn pay rent to the claimants for the cottage, initially fixed at £233.33 per calendar month. This arrangement was terminated in 1998, when F Smith Tyrrell Ltd was replaced by Forgotten Houses Ltd, a separate company. It seems that that company in turn was replaced by Bosvarren Properties Ltd in 2000. All three companies were or are owned and controlled by the claimants. But the subtenancy now vested in Bosvarren Properties Ltd only extends to the cottage, and not to the rest of the property. (Bosvarren Properties Ltd is not a party to these proceedings. But I record that a notice under section 25 of the 1954 Act was served on it by the defendant in July 2015.)
33. The first claimant was still pursuing the possibility of buying the property. But the defendant's father was concerned about a number of issues, including access and water supplies. The first claimant tried to negotiate with neighbouring landowners over access, but without success.
34. By 2000 the first claimant had turned his attention to the barn. It had no roof except at one corner, and much of the rear wall had fallen in. During that year and the following one the first claimant carried out significant works at the barn to make it usable, either as overflow accommodation, or at least for storage. He also did research and wrote letters about the property to the Cornwall Archaeological Unit and The Royal Cornwall Museum. In 2001-02 the first claimant installed a second septic tank at the property, as the original single tank was proving to be not enough.
35. The original works of improvement of the land, and then to the cottage and the barn represent the most important work done by the first claimant on the property. All of this (complete by about 2002) is clearly consistent with the original plan put to the defendant and his father. The next significant work (although not on the same scale) was in 2012. The first claimant improved the foul water system serving the property. The existing pipes and tank systems were excavated, as was about 750 m² of the front lawn or pasture. The ground was then made good, the surface relaid and reseeded and stone walls rebuilt.
36. Following floods in 2012 the first claimant also remade the access road, dredged the millpond, reordered and banked the stream, and altered its course. At about the same time further work was done to the rear of the cottage. The terrace was altered, excavation was undertaken and the level of the land reduced further to below the ground level of the rear wall. In 2013, as it was not possible for visitors to park on the property itself, further works were carried out by the first claimant, including creating a parking and turning space outside the property (so not on the land let to the claimants) in order to improve access to it.
37. The first claimant's evidence was that the costs of the work on the property fell into three main areas. First there was the maintenance of the farming land. These costs were recorded in the claimant's farming account, although not all of these costs were

written off in that account. Second, there were the costs of maintenance of structures, namely the cottage and the barn. These costs were written off against the income subsequently received for holiday lets. Third, there were the costs of the structural improvements themselves. These were not written off against tax and no record of them was kept by the claimants. (Their practice is to destroy paperwork after 12 years.)

38. The first claimant therefore prepared a Scott schedule for the purposes of this litigation, necessarily estimating both the dates of works and their cost at the time, because there were either no records kept at all or those that were kept were inadequate. The schedule includes costs that were paid to third parties, but also estimates of the value of the time of the claimants spent personally on these works. The total shown on the schedule adds up to a little over £170,000, of which about £115,000 is clearly attributed to the period from the outset up to the refurbishment of the barn in 2000-02. The significant works clearly attributed to the period thereafter (foul water system, access road and rear of cottage) are estimated at a much lower figure, under £10,000. Then other works are estimated over a wider range of dates, which include the earlier period as well as the later. But the exact figures do not matter. It is clear that the claimants have spent significant amounts of money on renovating the property, most of it in the period up to 2002. I deal with the expert valuation evidence below.

Receipts from holiday lettings

39. The first claimant also gave evidence in relation to the receipts from holiday lettings of the property. The property was not continuously let. In the early years there was no net return after expenses, and it was only from about 2003 that any profit began to be seen. In the calculations there has been no internal charging of the claimants' own time or labour, which has been significant. The first claimant described the work which they have done in running the lettings as "very onerous in terms of time". Overall, the first claimant said that they had still not yet recouped all their expenditure on renovating the property.

Expiry of the fifteen years, and subsequent events

40. As I have said, the property was given to the defendant on 4 March 1999. The 15 year term which had been agreed with the defendant's father expired at the end of 2008, but the claimants did not offer to give up, and nor did the defendant seek, possession. Instead the claimants continued to pay, and the defendant to accept, rent as before. The claimants continued to run holiday lets at the property. In February 2011 the defendant telephoned the first claimant and sought a rent increase from £400 per annum, but did not suggest a figure. The first claimant carried out some research and suggested an increase to £1000 per annum. This was agreed by the defendant, on the basis that it covered inflation over the last 18 years, and the rent was increased to that figure from March 2011.
41. In 2013 there were further discussions between the parties concerning the possibility of the first claimant's buying the property. The defendant and his wife both told me (and I accept) that they were prepared to sell then because of family circumstances. They were re-organising the family partnership, because the defendant's brother was in the middle of divorce proceedings. None of their sons (then aged 27, 25, and 21)

was interested in the property. Eventually, there was a meeting on 20 October 2013 in the kitchen at the defendant's farmhouse. The defendant said he had had valuations done and that he would sell to the first claimant at £400,000, although with better access it could be worth up to £500,000. The claimant was not prepared to pay anything like this. He offered £80,000, but would consider going up to £100,000. The defendant and his wife were shocked at the offer. Although discussions continued, no agreement was come to. After the meeting there were further letters from the first claimant suggesting alternatives, but without response from the defendant.

42. In April 2014 the defendant's solicitor wrote asking the claimants for the justification for their continuing to occupy the property. Eventually, the claimant's solicitor responded in May 2014. But in June 2014 the defendant served notices to quit which required the claimants to vacate the property by 24 December 2014. The claimants responded by issuing the present claim on 26 February 2015. In his defence and counterclaim dated 18 May 2015, the defendant said that if there was otherwise a right to a new business tenancy, he opposed the grant on the basis that he intended to occupy for the purposes of carrying on his own business.
43. Before me, the defendant and his wife gave evidence (which I accept) of their intention, assuming possession was obtained, to renovate the property and to carry on the business of holiday lettings there. The defendant was particularly clear on this in his witness statement at [27], which was unchallenged in cross-examination. As he says there, they already have considerable experience of carrying on such business at Boswidjack itself, and I have no reason to doubt that they would do the same at the property.
44. Mrs Bowden in particular was convinced that the property had made “an awful lot of money” over the years, because she had seen the number of visitors, and would therefore be profitable. But she also said that she did the work involved in holiday letting because she enjoyed it. She was not shaken in cross-examination. The first claimant in cross-examination accepted that the defendant's wife had experience of carrying on holiday lettings, that such lettings at the property could in principle be managed by the defendant's wife, and that he knew of no reason why she should not do so. On the evidence before me, I am satisfied that the defendant does intend to carry on the business of holiday lettings at the property if possession is given up.

Valuation evidence

45. The parties' experts met on 14 February 2017 to discuss the expert evidence put forward on each side. They managed to reach a large measure of agreement. In particular, they agreed the following:
 1. The value of the works to the main building was £181,000.
 2. The value of the original property in its unconverted state in 1994 would be £25,000-£30,000.
 3. The value of the property at the current time in an unrestored state on the assumption that planning permission would be obtained would be £180,000-£190,000.
 4. The value of the property in its restored condition was £375,000.

5. The value of the property in its unconverted state at the present time would be £180,000-£190,000.

6. Accordingly, the increase in the value of the property by reason of the works that have been undertaken is £185,000-£195,000.

I accept this evidence and therefore find these values.

46. Some matters however were not agreed. Mr Middlewick for the claimants valued the works to the barn at £36,296.22 (not including professional fees), and £39,925.83 (including fees). Mr Alker's report did not include costs simply relating to the barn. The value of the property unrestored at current day values without planning permission was not agreed. Mr Middlewick valued it at £38,000. Mr Alker provided an alternative value of £50,000-£70,000. The increase in value of the property unrestored at current day values without planning permission was not agreed. Nor was the level of the costs associated with the letting of the property. On the question of the value of the works to the barn I accept the figures put forward by Mr Middlewick. On the question of the value of the property unrestored at current day values without planning permission I think Mr Middlewick was too pessimistic, and prefer the lower end of the range provided by Mr Alker. That is a value of £50,000.

The claimants' arguments

47. The arguments for the claimants fell into three parts. First, the claimants were said to have a tenancy of an agricultural holding under the Agricultural Holdings Act 1986, which was protected by that Act, so that the notice to quit was of no effect. If for any reason they did not, then they had a business tenancy under the Landlord and Tenant Act 1954, Part II, and were therefore entitled to the grant of a new tenancy on the expiry of the old one. Lastly, they were entitled to an interest in the land, of a nature and extent unspecified in the statements of case, by virtue of the operation of the doctrine of proprietary estoppel. I will deal with them in the same order.

Agricultural Holdings Act 1986

48. The Agricultural Holdings Act 1986 applies to "agricultural holdings" as defined by section 1:

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

49. Section 1 also provides that a contract for an agricultural tenancy is a contract of tenancy relating to land if the *whole* of the land comprised in the contract (subject to exceptions not substantially affecting the character of the tenancy) is "agricultural land", having regard to the terms of the tenancy, the actual or contemplated use of the land then and subsequently, and any other relevant circumstances. Agricultural land is "land used for agriculture which is so used for the purposes of a trade or business" and other land designated under the Agriculture Act 1947 to be agricultural land (s 1(4)).

50. Finally, ‘agriculture’ is defined under the Act so as to include “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”. It will be noted that the use of land for woodlands where that use is not ancillary to other agricultural purposes is therefore *not* agriculture.
51. In *Howkins v Jardine* [1951] 1 KB 614, 628, Jenkins LJ said that the question was "Whether, as a matter of substance, the land comprised in the tenancy, taken as a whole, is an agricultural holding". In *Russell v Booker* [1982] 2 EGLR 86, 89, Slade LJ said that the primary consideration was “What was the substantial purpose for which the premises were let?”
52. As a matter of fact, this letting was of land which historically had formed part of a farm, where pigs may have been kept. However, it consisted of land which was described as “unfarmable”, which in recent years had not been farmed, and whose buildings had been allowed to become derelict. At the time it was let, it could not have been farmed in the condition in which it then was. The claimants did not undertake any obligation to put it into a farmable condition. On the evidence, I find that the proposal put by the claimants to the defendant’s parents in 1993 and accepted by them was, and this letting was accordingly entered into by the parties, for the purposes of considering whether to restore, and then if thought fit restoring, the ruined buildings and creating access thereto, so that they might be used for tourism (initially camping, though later in fact holiday lets). The letting was *not* for the purpose of the tenant’s carrying on any agricultural activity on the land. Subsequently some woodlands were worked on, but as a complement to the holiday lettings business, to create a rural ambiance for the paying guests, and not as ancillary to another agricultural purpose carried out on the land. That work did not therefore constitute agriculture within the meaning of the Act.
53. The facts that the land had been farmed in some way in the past, that it was a source of water for the wider farm of which it had formed part before being separately let, that the claimants themselves farmed elsewhere, that the landlords were a farming partnership, and that access for the landlords to take water was subject to leaving sufficient water “for domestic and agricultural purposes” (amongst other matters) do not alter that conclusion. In particular, despite stray references to possibly agricultural activities, the terms of the contract did not provide for or contemplate the use of the land for agricultural purposes. In the condition it was in, the land was not in practice capable of being so used, and certainly not economically, the parties did not intend to let or take it for such purposes, and it has not been in fact so used. Instead it has been used (as was contemplated from the beginning) for the restoration by the claimants of the ruined buildings to create premises which can be and have been used since 1997 for the purpose of holiday lettings.
54. The inescapable conclusion is that this was not a contract for an agricultural tenancy, the land was not an agricultural holding, and accordingly the tenancy was not protected under the 1986 Act. I mention in passing, though it has no legal consequence for the success or failure of the argument itself, that the idea that this letting constituted an agricultural tenancy of an agricultural holding was not mentioned at any time during its subsistence, when negotiations were afoot for the

claimants to buy the property, or indeed at any time before the notices to quit was served. As the first claimant admitted in cross examination, this argument has come out of legal advice sought and given subsequently. If it were correct in law, it would be none the worse a claim for that. But the claimants cannot say that they thought at the time that that was what they were entitled to.

Landlord and Tenant Act 1954, Part II

55. I turn then to consider the question of protection under the Landlord and Tenant Act 1954, Part II. This legislation protects “business tenancies”, which are defined so as to exclude those subject to the 1986 Act. Section 23(1) provides:

“Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes”.

56. The tenancy does not come to an end in the normal way, but continues in accordance with the Act. In the present case the landlord served a notice to quit under s 25 of the Act. But the tenant under the Act is given the right to a new tenancy, under s 29(1):

“Subject to the provisions of this Act, on an application under section 24(1) of this Act, the court shall make an order for the grant of a new tenancy and accordingly for the termination of the current tenancy immediately before the commencement of the new tenancy”.

57. However, protection under the 1954 Act is given only to the “holding”, *ie* that part of the demise occupied by the tenant. So, by s 32(1):

“Subject to the following provisions of this section, an order under section 29 of this Act for the grant of a new tenancy shall be an order for the grant of a new tenancy of *the holding...*” (emphasis supplied).

58. Section 23(3) provides that

“the expression ‘the holding’, in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies”.

59. Importantly for our purposes, section 23(1A) (inserted only in 2004) provides:

“Occupation or the carrying on of a business— (a) by a company in which the tenant has a controlling interest; or (b) where the tenant is a company, by a person with a controlling interest in the company, shall be treated for the purposes of this section as equivalent to occupation or, as the case may be, the carrying on of a business by the tenant”.

60. Section 23(1A) thus enables the tenant to be treated as carrying on a business in his premises when in fact it is being carried on there by a company in which he has a controlling interest. It does not enable the tenant to be treated as carrying on a

business in the company's *own* premises. Yet in the present case Bosvarren Properties Ltd, the company controlled by the claimants, does not carry on business *in the claimants' premises*. It does so *in its own*, namely the house the subject of the sub-tenancy granted to it by the claimants.

61. Similarly, section 23(1A) enables the tenant to be treated as occupying premises where he is carrying on business, when in fact those premises are being occupied by a company in which he has a controlling interest. It does not enable the tenant to be treated as occupying premises (the sublet house) where *the company* is carrying on the business. That is, however, the present case.
62. So the claimants in the present case can have no right to the grant of a new tenancy in respect of the house. In principle they could claim that right in relation to the rest of the land let to them. The problem is that the landlord claims that he intends to carry on business (indeed, the same business) himself in that part of the land.
63. Section 30 (1)(g) provides that

“The grounds on which a landlord may oppose an application under [section 24(1) of this Act, or make an application under section 29(2) of this Act,] of this Act are such of the following grounds as may be stated in the landlord's notice under section 25 of this Act or, as the case may be, under subsection (6) of section 26 thereof, that is to say:— [...] (g) subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence”.
64. And in the present case the landlord in serving a notice to quit dated 16 June 2014 gave notice of his opposition under s 30(1)(g). Moreover, I have found as a fact that the defendant intends to carry on the business of holiday lettings in the premises. He has both a settled desire to do this, and a reasonable prospect of being able to achieve it: *cf Humber Oil Terminals Trustee Ltd v Associated British Ports* [2012] 2 EGLR 59, [16]. Accordingly, the claim to a new business tenancy fails.

Proprietary estoppel

65. The last part of the claim concerns proprietary estoppel. This is not, as its name would suggest, simply a common law rule of evidence or procedure regulating when a person is estopped (prevented) from making a claim to a property right or interest which he or she owns, although in one of its forms it can have that effect. For example, X tells Y about an existing property right (or its absence). Y relies on that representation to his detriment. X is estopped from asserting differently: he cannot resile from his representation (see *eg Hopgood v Brown* [1955] 1 WLR 213, 223-24). That is the positive form. There is also a negative form is when X is aware that Y is acting under what X knows to be the mistaken belief that there is (or is not) an existing property right. In that case X has a duty in equity to speak. If X does not disabuse Y, and Y relies on his belief to his detriment, X cannot (in equity) assert the inconsistent right: see *eg Dann v Spurrier* (1802) 7 Ves 231, 235-36; *Ramsden v Dyson* (1866) LR 1 HL 129, per Lord Cranworth at 140-41; *Willmott v Barber* (1880) 15 Ch D 96.

66. But in this case we are not concerned with that simpler form of proprietary estoppel. Instead, this case concerns the *promissory* form of proprietary estoppel. This is an equitable doctrine focusing on a property owner's *promise to* or *expectation created in* another person by the act of the former which was intended to be relied on by the latter, has been relied on by the latter to his or her detriment, such that it would be unconscionable for the property owner not to give effect to the promise or expectation. The property owner is compelled to make good the equity thereby created. This may be by performing the promise, or by something else. The doctrine accordingly gives effect to *expectations*. It is in this respect like the doctrine of contract, if somewhat less certain in its operation: see *eg James v James* [2018] EWHC 43 (Ch), [51]-[52]. The first clearly recorded case of this kind in English law seems to be *Dillwyn v Llewellyn* (1862) 4 De G F & J 517. The leading case in this jurisdiction remains *Thorner v Major* [2009] 1 WLR 776, HL. In that case, Lord Walker said that:

“29. ... most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance...”

67. The moral base of the doctrine lies in the fact that it is *the act of the landowner* that has caused the conduct in reliance of the other party to his or her detriment. In homely terms, the landowner has brought it upon him- or herself. In *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 675-76, Dixon J put it this way:

“The justice of an estoppel is not established by the fact in itself that a state of affairs has been assumed as the basis of action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position. It depends also on the manner in which the assumption has been occasioned or induced. Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it.”

68. So there are two basic requirements from the point of view of the landowner. First, he or she must have made a promise or created an expectation in the other, intended to be relied upon. As to this, however, it must be borne in mind that, as Parke B put it in *Freeman v Cooke* (1848) 2 Exch 654, 663,

“if whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth.”

See also *Thorner v Major* [2009] 1 WLR 776, [78], per Lord Neuberger, where a similar point is made in more modern language.

69. Second, that promise or expectation must be of some definite interest which the law is able to quantify. That does not mean absolute precision, but the claimant must at least be able to say what the expectation is. In *Thorner v Major* Lord Walker said:

“56. I would prefer to say (while conscious that it is a thoroughly question begging formulation) that to establish a proprietary estoppel the relevant assurance must be clear enough. What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context. I respectfully concur in the way Hoffmann LJ put it in *Walton v Walton* [1994] CA Transcript Number 479... Hoffmann LJ stated, at para 16:

‘The promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made’.”

70. I have said that the first claimant was unable to point to any *particular* action or any words on the part of the defendant or the defendant’s father that demonstrated that they had given any assurance or shared any such understanding as he had referred to. That is however not fatal to his claim, as the court will look at the whole course of conduct between the parties: see *eg* the decision of the House of Lords in *Thorner v Major* [2009] 1 WLR 776. However, I have also held that even looking at the whole course of conduct and taking it together there was no promise or assurance beyond what was agreed in 1993.

Hoyle Group Ltd v Cromer Town Council

71. The claimants rely heavily on the decision of the Court of Appeal in *Hoyle Group Ltd v Cromer Town Council* [2015] EWCA Civ 782. The claimant agreed to take a 21-year lease of an upper floor of a substantial 19th-century house belonging to the defendant. The house lay in the middle of a public park, belonging to a different local authority. The claimant later agreed to take a 99-year lease of the basement of the house, with a view to converting it into a residential apartment. The existing access to the basement was via the main entrance to the house on the ground floor. But there was a fire exit from the basement at the eastern end of the north side, which led out into the surrounding garden (“the garden access”). There was also the possibility of creating an access through a shed at the eastern end of the south side of the house which would lead to a car park (“the car park access”).
72. The first plan for the residential conversion of the basement (“plan A”) proposed to block off the internal access, to provide the main entry to the apartment via the car park access, and to use the existing garden access as a fire escape door. This plan was agreed between the claimant and the defendant, and an agreement for lease was signed. The lease was granted on 24 August 2007. The only right of way granted was via the car park access. By October 2007, the claimant had decided to pursue a less expensive approach, involving a revised plan (“plan B”). The main entry to the apartment would now be via the garden access, and the car park access would be the emergency fire exit. The changes were discussed between the claimant and the defendant at a meeting in early October and the representatives of the defendant indicated that the arrangement was likely to be acceptable, although it needed to be shown to and approved by the planning committee of the defendant.
73. There were then a number of contacts and discussions between the parties. The internal access was not blocked off at this stage, and continued to be used most of the time. But the defendant was aware of plan B, involving garden rather than car park

access. The works on the apartment continued in 2007 and 2008. A formal licence for the alterations was granted in November 2008, when the works were nearly complete. That licence required the claimant to carry out the works in accordance with plan B. In 2012 the claimant surrendered its lease of the upper floor and blocked up the internal access. It then sought a purchaser of the basement apartment. But the absence of a formal right of way via the garden access was discovered, and led to litigation, when the claimant sought a declaration as to the existence of a right of way via the garden access.

74. At first instance, the judge held that the claimant believed it had or would have the right to use the garden access, a belief encouraged or allowed by the defendant. The claimant had acted on its belief to its detriment. The defendant was acting unconscionably in denying the right of way claimed. Accordingly a proprietary estoppel had arisen. The defendant appealed to the Court of Appeal. The Court of Appeal dismissed the appeal.
75. In so doing, the court considered the relevant legal principles. Floyd LJ, with whom Longmore and McFarlane LJJ agreed, said:

“35. In *Willmott v Barber* (1880) 15 Ch D 96 Fry J identified the essential elements of what has become known as estoppel by acquiescence in the following way:

‘In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do.’

[...]

38. The principles of proprietary estoppel, as they have developed since *Willmott v Barber*, were reviewed by Oliver J in *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133. A critical issue in *Taylor's Fashions* was what needed to be shown about the state of knowledge of the party estopped. There were two aspects to this question. The first was whether the party estopped needed to know what his strict rights were. The second was whether the party estopped needed to know that the other party was acting in the belief that those strict rights would not be enforced against him. It was argued on behalf of the

party resisting the existence of the estoppel that there was a clear distinction between cases of proprietary estoppel or estoppel by acquiescence on the one hand and promissory estoppel or estoppel by representation on the other hand. In the latter case, so it was argued, the state of mind of the promisor or representor was largely irrelevant (except to the extent of knowing, actually or inferentially that his representation was likely to be acted upon). In the former case, however, it was necessary that the party alleged to have acquiesced in or encouraged the other's belief knew that other believed that the right of the party resisting the estoppel would not be enforced against him.

39. To determine what needed to be shown about the state of knowledge of the party estopped, Oliver J started with the judgment of Fry J in *Willmott v Barber*. Of this case he said:

‘It has to be borne in mind, however, in reading the judgment, that this was a pure acquiescence case where what was relied on was a waiver of the landlord's rights by standing by without protest. It was a case of mere silence where what had to be established by the plaintiff was some duty in the landlord to speak.’

40. It was argued in *Taylor's Fashions* that Fry J's fourth *probandum* was not met, i.e. (i) knowledge by the possessor of the legal right of the other party's belief and (ii) knowledge that that belief is mistaken. As to the alternative approach of estoppel by representation, no representation was ever made, or if it was it was a representation of law. Oliver J said of that argument:

‘Now, convenient and attractive as I find Mr. Millett's submissions as a matter of argument, I am not at all sure that so orderly and tidy a theory is really deducible from the authorities - certainly from the more recent authorities, which seem to me to support a much wider equitable jurisdiction to interfere in cases where the assertion of strict legal rights is found by the court to be unconscionable. It may well be (although I think that this must now be considered open to doubt) that the strict *Willmott v. Barber* ... probanda are applicable as necessary requirements in those cases where all that has happened is that the party alleged to be estopped has stood by without protest while his rights have been infringed.’

41. Oliver J went on to explain why this should be. In a pure acquiescence case, where all that is alleged is a standing by in silence:

‘... it is readily understandable that there must be shown a duty to speak, protest or interfere, which cannot readily be shown in the absence of knowledge or at least a suspicion of the true position.’

42. On the other hand it was submitted for the party seeking to create the estoppel that the authorities did not support the absolute necessity for compliance with all five probanda (and in particular the requirement of knowledge on the part of the party estopped that the other party's belief is a mistaken belief) in cases where the conduct relied on has gone beyond mere silence and amounts to active encouragement. Thus it could be that the fostering of an expectation in the minds of both parties at the time but from which, once it has been acted upon, it would be unconscionable to permit the landlord to depart, could give rise to the estoppel. Oliver J said:

‘The fact is that acquiescence or encouragement may take a variety of forms. It may take the form of standing by in silence whilst one party unwittingly infringes another's legal rights. It may take the form of passive or active encouragement of expenditure or alteration of legal position upon the footing of some unilateral or shared legal or factual supposition. Or it may, for example, take the form of stimulating, or not objecting to, some change of legal position on the faith of a unilateral or a shared assumption as to the future conduct of one or other party. I am not at all convinced that it is desirable or possible to lay down hard and fast rules which seek to dictate, in every combination of circumstances, the considerations which will persuade the court that a departure by the acquiescing party from the previously supposed state of law or fact is so unconscionable that a court of equity will interfere.’

43. This led Oliver J to conclude:

‘Furthermore the more recent cases indicate, in my judgment, that the application of the *Ramsden v. Dyson*... principle - whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial - requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, *knowingly, or unknowingly*, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour. So regarded, knowledge of the true position by the party alleged to be estopped becomes merely one of the relevant factors (it may even be a determining factor in certain cases) in the overall inquiry.’ (emphasis supplied)

44. I have laboured the case of *Taylor's Fashions* at some length to demonstrate that Oliver J's reference to “that which, knowingly, or unknowingly, he has allowed another to assume to his detriment” is deliberate. Whilst Oliver J was certainly not saying that questions of knowledge by the party estopped are not relevant – he says the opposite – they fall to be considered in the overall

assessment of whether it is unconscionable to allow him to deny the interest which he has allowed or encouraged to believe in or to assume.

45. This final passage in Oliver J's judgment was approved in general terms by Lord Walker in *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 at 1779G- 1780B. In the course of his own judgment in that case Lord Walker made some other important observations. Firstly, at paragraph 54, he describes *Plimmer v Wellington Corporation* (1884) 9 App Cas 699 as a 'common expectation case'. Mr Plimmer, a businessman of some substance, dealt with the provincial government, under arrangements attended by a high degree of informality. Lord Walker described the nub of the Privy Council's decision in this way:

'In the present case, the equity is not claimed because the landowner has stood by in silence while his tenant has spent money on his land. This is a case in which the landowner has, for his own purposes, requested the tenant to make the improvements. The Government were engaged in the important work of introducing immigrants into the colony. For some reason, not now apparent, they were not prepared to make landing-places of their own, and in fact they did not do so until the year 1863. So they applied to John Plimmer to make his landing-place more commodious by substantial extension of his jetty and the erection of a warehouse for baggage. Is it to be said that, when he had incurred the expense of doing the work asked for, the Government could turn round and revoke his licence at their will? Could they in July, 1856, have deprived him summarily of the use of the jetty? It would be in a high degree unjust that they should do so, and that the parties should have intended such a result is, in the absence of evidence, incredible.'

46. Secondly, Lord Walker notes at paragraph 56 that *Willmott v Barber*:

'calls for mention because Fry J's five probanda have over the years proved something of a stumbling-block in the development of equitable estoppel, until the position was clarified by Oliver J in *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* (1979) [1982] QB 133. Gray and Gray comment (para 10.204, footnote 1) that courts often tried to force factual situations into the probanda even when they were "ludicrously irrelevant or inapplicable" to the case.'

47. Thirdly he pointed out with approval at paragraph 58 that Oliver J had explained:

'the five probanda (including the defendant's knowledge of his own title, and of the claimant's mistake as to title) are relevant only to cases of unilateral mistake, where the defendant's only encouragement to the claimant has been passive nonintervention'.

48. Fourthly Lord Walker, at paragraph 65, dealt with the difference between a party believing that he has a right and a party hoping, or even confidently expecting that he would be granted one. He noted however that the point that hopes were not enough came out most clearly in the commercial context, and surfaced less often in cases with a domestic or family flavour.

49. The following year in *Thorner v Major* [2009] UKHL 18, Lord Walker commenced his judgment with the following, expressly approving the passage in an earlier edition of *Megarry & Wade, Law of Real Property*, to that which the judge in our case relied:

‘... most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance (see *Megarry & Wade, Law of Real Property*, 7th edition (2008) para 16-001; *Gray & Gray, Elements of Land Law*, 5th edition (2009) para 9.2.8; *Snell’s Equity*, 31st edition (2005) paras 10-16 to 10-19; *Gardner, An Introduction to Land Law* (2007) para 7.1.1).’

50. It might have been thought that cases of pure acquiescence did not fit into that general formulation. However, Lord Walker explained at paragraph 55 that:

‘... if all proprietary estoppel cases (including cases of acquiescence or standing-by) are to be analysed in terms of assurance, reliance and detriment, then the landowner’s conduct in standing by in silence serves as the element of assurance. As Lord Eldon LC said over 200 years ago in *Dann v Spurrier* (1802) 7 Ves 231, 235-236:

“this Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement”.’

51. So far as the clarity of the assurance is concerned Lord Walker declined to lay down a hard and fast rule. He said at paragraph 56 that:

‘I would prefer to say (while conscious that it is a thoroughly question-begging formulation) that to establish a proprietary estoppel the relevant assurance must be clear enough. What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context.’

52. In support of his argument based on the fourth probandum in *Willmott v Barber* Mr Kokelaar relies on *Brinnand v Ewens* [1987] 19 HLR 415. In that case the landlord, Mrs Brinnand, knew that the tenants of a flat in her house, Mr and

Mrs Ewens, had moved into the whole house and expended money on repairs. The trial judge had held that Mrs Brinnand's knowledge of the occupation and repairs did not mean that she knew that the work was done in expectation of a tenancy of the whole house. Nourse LJ, in deciding that this finding meant that Mrs Brinnand had not encouraged the Ewens' belief that they would have an interest in the whole property, said:

‘You cannot encourage a belief of which you do not have any knowledge.’

53. I think it would be wrong to read too much into this dictum, particularly in the light of Oliver J's recognition that it may be sufficient in some cases for someone “unknowingly” to cause someone to assume something. *Brinnand v Ewens* was a case in which it was not at all obvious that what the tenants were doing would require any right or interest in the landlord's property. The landlord not only did not know that the tenant was acting on a belief that he would be granted a tenancy of the whole house, she had no means of knowing that either. In order to encourage a belief in those circumstances it may be correct to say that one must have at least constructive notice of it. But there will be other cases where it is self-evident that the acts which the tenant is doing, and of which the landlord is fully aware, necessarily require some right to be granted. If, therefore, I encourage a tenant to do acts which are only consistent with him having some right or interest on or over my property, so that he in fact believes that he has such a right, I can see no reason why it is not correct to say that I have encouraged him to believe or assume that he has the right. Of course whether a proprietary estoppel arises in such circumstances will depend on all the particular facts of the case.

54. Similarly, although some formulations of the rule speak of the party estopped having knowledge of the acts of detrimental reliance, this is not a requirement that is rigidly insisted on in cases of encouragement. Thus for example in *Joyce v Epsom & Ewell Borough Council* [2012] EWCA Civ 1398, a case referred to in a passage from *The Law of Proprietary Estoppel* by Professor Ben McFarlane to which Mr Kokelaar referred us, Epsom & Ewell had encouraged Mr Joyce's predecessor to believe that he would be able to gain access over a road. The trial judge refused to recognise a proprietary estoppel because it was not clear that the council was aware of the particular detriment on which the claimant relied, the moving of a garage and the construction of a drive. Davis LJ with whom Lord Dyson MR and Treacy LJ agreed, said this:

‘...I do not think that the alleged lack of knowledge on the part of the Council of the precise works actually undertaken by Mr Holborn can have the crucial significance the judge seems to have ascribed to it. As the judge had himself found, this was a case of encouragement, on which there was in fact detrimental reliance. It was known what Mr Holborn intended to do. It is not an invariable requirement in a case of this particular kind - indeed it is contrary to the flexible approach which the more recent authorities establish - that the person encouraging necessarily must know just what the person encouraged may have actually done in reliance on the encouragement: see, for example, *Crabb v Arun District Council* [1976] 1 Ch. 179 at p. 189 D-E (per Lord Denning MR) and at pp. 197H-198E (per Scarman LJ); and

Taylor[s] Fashions at p.151 (per Oliver J). Mr Green himself very fairly accepted in argument that this could be so: he acknowledged that cases of encouragement are capable, depending on the circumstances, of standing in this respect on a different footing from cases based on acquiescence. But ultimately, of course, all depends on the particular facts of the individual case’.”

76. The Court of Appeal in *Hoyl Group Ltd v Cromer Town Council* held that the judge had been entitled to find that the claimant believed it had or would have the right, and that it had been encouraged by the defendant by its positive acts at meetings and in discussions, and also its silence on the question what was to happen when the internal access was blocked. The judge was entitled to find detrimental reliance by the claimant, and that the defendant had acted unconscionably.

Discussion

77. It is clear on the authorities that there can be a promise or assurance for the purposes of the promissory form of proprietary estoppel where X by words or conduct makes a positive promise or assurance. This is the typical case: see *eg Dillwyn v Llewelyn* (1862) 4 De G F & J 517, *Crabb v Arun DC* [1976] Ch 179, and *Thorne v Major* [2009] 1 WLR 776, among others. However, the question here is whether the promissory form applies in a *negative* sense too. Suppose that Y (without X’s positive words or acts) comes to believe that X will in the future give him some right or interest, and X either realises that this is Y’s belief and does nothing to disabuse him, or (even if he does not realise this) nonetheless positively encourages Y to act in ways only consistent with Y’s having such a belief (so that, objectively speaking, it should be obvious to X what is going on). Yet it is much harder to find examples of standing by in silence, realising that the other party mistakenly believes that you have made a promise or given an assurance. Lord Walker refers to the case of *Dann v Spurrier*, but that seems to have been a case of belief in an actual rather than (informally) promised right. Still, I respectfully agree with Lord Walker that it seems correct in principle.
78. In paragraph [53] of his judgment in *Hoyl*, Floyd LJ said

“In order to encourage a belief in those circumstances it may be correct to say that one must have at least constructive notice of it.”

No authority is stated for this proposition, although in any event it is not part of the decision itself. It is also a proposition which is not stated *necessarily* to be correct, because of the use of the words “it may be”. I accept that, as Floyd LJ says,

“if I encourage a tenant to do acts which are *only consistent with* him having some right or interest on or over my property, so that he in fact believes that he has such a right” (emphasis supplied),

it may be fair to treat me as having encouraged the belief. This may be because the satisfaction of the objective test of “only consistent with” is material from which it may be inferred that I in fact realised that the tenant had that belief. Yet in such a case it is still necessary for me *to do something* to encourage the tenant. My positive action in encouraging the tenant to act has also encouraged his belief in his expectation. But I decline to hold that an equity by way of proprietary estoppel can arise where a

landowner *ought* to have realised, but *did not* realise, that the tenant believed that the landowner was promising an interest, and the landowner did nothing to encourage the tenant to act in the way that he did.

79. In any event, in my judgment, this case is a long way from what Floyd LJ was referring to in his paragraph 53. On the facts which I have found, the defendant did not know of the first claimant's belief that he would be allowed to stay as long as he liked and ultimately to acquire the property, and did not encourage it. Nor did the defendant encourage the acts which the claimants carried out on the property. The defendant thought that the claimants had the rights which had purported originally to have been granted, *ie* a 15-year term, and then had an annual tenancy thereafter. All of his (and his father's) words and actions were consistent with that. The works done by the claimants were all within the scope of the original purpose of renovating the property and letting it to holidaymakers over a 15-year term. In my judgment, there is nothing that would indicate to a reasonable man that either the defendant or his father was promising any more than that. He had no reason to think that the claimants believed that they had greater rights than that. So I find that there is no promise or assurance here, even in the extended sense given for the purposes of proprietary estoppel where there is a duty to speak cast upon the landowner, and who does not do so.
80. In case I am wrong about that, I say this. Even if I had found sufficient encouragement by the defendant to justify holding that there was for this purpose a promise or assurance, I do not find any sufficient detrimental reliance. The expenditure of the property was all that which was contemplated at the beginning as part of the renovation process. The claimants were under no duty – as everyone was clear – to do anything at all. They could have sat on the property for 15 years and done nothing at all. It was up to them whether and how they renovated the property. None of the work done shows that the deal had changed. The second claimant admitted as much. Moreover, the bulk of the work was done on the cottage and the barn, and completed by 2002. The claimants were letting the cottage from 1997, with the intention of recouping their expenditure. The expenditure after the refurbishment of the barn was much less significant, and is far more likely to have been caused by the need to make occasional improvements to an income-producing asset than by a promise to allow the claimants to stay indefinitely and/or buy the property.
81. Even if there had been any detrimental reliance, in my judgment it still would not be unconscionable for the defendant to rely on his strict legal rights by giving a notice to quit. Almost the first things the first claimant did in his offer letter of 4 November 1993 were (i) to express an interest in restoring the house and barn, whilst (ii) acknowledging the defendant's family's unwillingness to sell the property. I find that the claimants here played a long game to try and get the ownership of the land from their neighbour without letting on that this was what they were trying to do. In the meantime, they thought they could recoup their expenditure – and, indeed, make a profit – from the refurbishment of the property and then letting it for holiday lets. If it has not succeeded, it is because it was a speculation which could have gone either way but which in the event has not proved as profitable as hoped. If the claimants had made a fortune, recouping their expenditure many times over, the defendant could not have complained. The claimants have had what they bargained for, and indeed more. Enough is enough. In these circumstances, it is not necessary to go on and consider

the impact of the expenditure, and the receipts, by the claimants, or the value of the improvements to the property.

Conclusion

82. I have held that each of the three heads of claim in this case fails. The claim itself is therefore dismissed. On the counterclaim I will make suitable declarations, but the terms of the order can be discussed when I hand down this judgment.