Ref: 9BM30477

NEUTRAL CITATION NUMBER [2011] EWHC 3553 (Ch)

IN THE HIGH COURT OF JUSTICE

(CHANCERY DIVISION)

Birmingham District Registry

The Priory Courts

Bull Street

Birmingham

11th November 2011

Before

THE HONOURABLE MR JUSTICE MORGAN

- - - - - - - - - - - - - -

HARRY FITZHUGH

(Claimant)

-v-

ANTHONY FITZHUGH

(Defendant)

- - - - - - - - - - - - - -

APPEARANCES:

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HARRY FITZHUGH -v- ANTHONY FITZHUGH

For the Claimant:MR CLARKE

For the Defendant:MR HOWLETT

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**JUDGMENT**

MR JUSTICE MORGAN:

**The Fitzhugh family**

Harry Fitzhugh Senior was a farmer. He died on 10th April 1995. He died intestate. He had married twice. His first marriage to Joan Fitzhugh was dissolved in around 1978, his second marriage to Irene ended in her death in December 1988. At the date of his death, he was survived by nine children. They were all the children of himself and his first wife Joan. The nine children, in order of seniority in the family, were as follows: Jeffrey, the eldest, was born in 1941. The next was Maureen, followed by Joan, followed by Colin, followed by Marion, followed by Harry Junior, then Yvonne, then Amanda, and then Anthony.

The claimant in this action is Harry Junior. I will refer to him in this judgment as Harry Fitzhugh or Harry, that will not be a reference to his father. Anthony was the youngest, although he was a twin of Amanda. He is also known as Tony, or perhaps a little unusually as Tom. I will refer to him as Anthony or Tony. Anthony was born in 1960 and is the defendant in these proceedings.

Since the death of Harry Fitzhugh Senior, there have been other deaths in the family. Colin died on 25th January 1997 and Jeffrey died on 24th April 2001. It is also relevant to refer to the fact that Joan and Marion live in different places in the United States of America. Amanda, also known as Mandy, I was told had a mental illness. She has been diagnosed with schizophrenia, and I was also told she had been sectioned under the Mental Health Act.

**The estate**

As I have explained, Harry Fitzhugh Senior died intestate. There was a grant of letters of administration on 15th June 1995. The four administrators to whom letters were granted were the four boys in the family, Jeffrey, Colin, Harry and Anthony. That was the position in 1995. Of course, following the death of Colin and Jeffrey, as I have described, the administrators became two only, namely Harry and Anthony. That has been the position since 2001 and is the current position.

**The principal assets of the estate**

The principal assets of the estate for present purposes have been and remain certain parcels of land and buildings. I have been shown a plan on which the areas of land and buildings have been numbered plots 1 to 6. A detailed description of the land and buildings can be found in a report of an agreed joint expert and I will not recount all of the detail of that description, I will attempt a more concise statement of what is involved.

Plot 1 consists of a substantial farmhouse and garden. It is shown edged red on the plan to which I have referred. Plot 2 consists of some barns around a courtyard. The plan shows plot 2 as a square or rectangle, although on the ground I think it is not quite as regular as the plan would suggest. Plot 2 is shown coloured yellow. Plot 3 is something of a mixture. There appears to be a substantial surfaced open yard and not in very regular positions at the perimeter of the yard there are some further buildings. The expert's report, as I have said, describes the construction of these buildings in detail. Suffice to say that they are not so substantial as the barns around the courtyard in plot 2. Behind the open yard and the buildings in plot 3 there appears to be some open farmland. Plots 4 and 5, which are respectively to the south and to the north of plot 3, consist of farmland. Plot 6 is on the other side of the road from the plots I have already described. Plot 6 is principally a field, but at the edge of the field by the roadside there is a cottage which has been variously described as Primrose Cottage or Rose Cottage.

I have also been shown a conveyancing plan which was based upon an earlier ordnance survey plan. That showed that the layout in earlier times was not quite what it has become more recently. If one takes acreages from this plan, plot 4 together with some part of plot 3 is approximately 3.9 acres and plot 5 together with some part of plot 3 is some 4.6 acres. These acreages and the field numbers are indeed used in one of the documents to which I will later refer.

**The witnesses**

I heard evidence from a number of witnesses on each side of this dispute. There are a number of matters in dispute. There are two matters where the dispute is a considerable one. The first relates to whether a meeting took place on 22nd March 1998, and if so who attended that meeting and what happened. The second area of disputed fact concerns Anthonys dealings with a Solicitor in relation to a conveyance to him and Karen Body, that conveyance being entered into on 3rd July 1998. So the time period with which one is concerned, in this respect, is from around March 1998 to that date in July 1998.

It is not necessary I think for me to refer to each and every witness who gave evidence before me. It is, however, relevant to refer to six witnesses, three who gave evidence for the claimant, Harry, and three who gave evidence for the defendant, Anthony. For the claimant, the three witnesses are Harry himself, Judith, the widow of Colin, and Joan Bishal, who was the partner of Jeffrey. On the defendant's side the three witnesses are Anthony himself, Karen Body, his long-term partner, and Joan Beers, who is one of the siblings, originally Joan Fitzhugh.

Of these witnesses, the witness whom I find it easiest to assess is Judith Fitzhugh. She gave important evidence about the meeting or the alleged meeting on 22nd March 1998. She produced a note, which she said was contemporaneous, which contained important information about what happened at that meeting. She appeared to me to be a transparently honest witness. I put it that way because what is said by Anthony through his Counsel about Judith is that Judith has participated in a very deliberate, dishonest, perjured fabrication of documents and untruthful evidence to the court. I will explain in due course my findings in relation to that, but suffice it to say at this stage that I regard that suggestion of fabrication as being wholly without any foundation. Although the allegation of fabrication was put in terms to Harry Fitzhugh, my note does not suggest that it was put in anything like clear terms to Judith Fitzhugh herself. I am not in a way surprised it was not put to Judith Fitzhugh. It would have been an obviously inappropriate suggestion to make to that witness. Suffice to say that I accept the main thrust of her evidence. It may be that she is not able to recall every matter of detail, but that in itself after the passage of time is not surprising.

The second witness for the claimant whom I should assess is Harry Fitzhugh himself. I find that his evidence was generally reliable, although again I do not necessarily accept every matter of detail. There is scope here for faulty recollection.

The third witness for the claimant is Joan Bishal and I also found her evidence to be generally reliable, but again reserving my position in relation to matters of detail.

I turn then to the very different picture on the other side of the litigation. I am not prepared to accept Anthony Fitzhugh's evidence on any significant matter where it conflicts with the evidence of the claimant. I am quite satisfied that he is wrong about the events of 22nd March 1998. I base that finding on the contemporaneous documents, the inherent probabilities, the veracity of other witnesses who conflict with him, and the self interest which he has in the evidence which he gave. I am also satisfied that he is wrong about the communications he had with the Solicitor in the period March or April 98 to July 1998 essentially for the same reasons as I gave when I rejected his evidence in relation to the meeting of 22nd March 1998.

It may not be necessary for me to find how it comes about that Anthony Fitzhugh has given evidence which I am not prepared to accept. Sometimes a witness genuinely misremembers the events, sometimes a witness persuades himself that events happened or did not happen when, objectively speaking, the position is otherwise, sometimes a witness deliberately attempts to mislead the court and gives evidence that he knows to be untrue. In this case, because Anthony Fitzhugh is an administrator and because I am asked to remove him, essentially because he is unfit to be an administrator, I think I ought to express my finding as to how it comes about that Anthony Fitzhugh has given the evidence which he has given. I am satisfied that at least in part of the evidence he gave, he must have appreciated that the evidence which he gave was not true.

I turn then to Karen Body, who is, as I have described, the long-term partner of Anthony Fitzhugh. She was not able to recollect a number of matters and suggested that they had not occurred. She was supportive of Anthony Fitzhugh. I find that she has allowed her loyalty to Anthony Fitzhugh to prevail over her duty to recollect matters correctly and describe them correctly in her evidence.

The third witness for the defendant that I need to refer to is Joan Beers. She gave evidence that the meeting on 22nd March 1998 did not take place, or at any rate there was no meeting which she attended. I am satisfied by the totality of the evidence that she is wrong about that. I do not find that she is deliberately misleading the court. I think that she has forgotten or misremembered. She also may be influenced by some degree of hostility to other family members, in particular Harry. It is fair to say that there were signs that that hostility was reciprocated, which is unfortunate. At any rate, I have expressed my view as to the overall reliability of her evidence.

**The family meetings up to 22nd March 1998**

As I have explained, Harry Fitzhugh Senior died in 1995. He died intestate. The four sons took out letters of administration and decisions had to be made as to what was to be done with the assets in the estate. At an early stage, it seems to have been decided that it would not be a good idea to sell off all of the land, plots 1 to 6. I think I was told that Harry Fitzhugh Senior himself before his death had expressed the wish that the land should be retained, that the prospect of planning permission should be pursued, and the land should be sold as development land with the benefit of planning permission. At any rate, that is what the family appeared to agree should happen. So they had these parcels of land, they were not going to sell them in the immediate future, and of course the land had to be dealt with in some way. It is not necessary for the purpose of this judgment to describe the initial arrangements which involved Jeffrey and his wife occupying the farmhouse and making some use of some of the land at any rate, but I will refer to the dates of some of the meetings of which there are written notes.

The first note to which I refer is a note of a meeting on 24th March 1996. That was attended by three of the administrators, but not as it happened Harry. There was discussion of various points which needed attention.

I can go from there to a much more significant meeting on 11th February 1997. There is a two page note of that meeting. The note has been prepared with considerable care and attention and with a view to every family member having a copy of the note to retain and no doubt to consult if a dispute should arise. Indeed, the agreement which was reached between the family members on that occasion was given the title 'The Fitzhugh family farm agreement.'

I will attempt to summarise the note. In other circumstances it might have been appropriate to read out the precise terms of the note. However, in this case no one says that the note had contractual effect, so I do not as such have to enforce it or give effect to it. Furthermore, there are, despite the care with which the note was prepared, there are real ambiguities in the record of the arrangements. There are a number of far from straightforward questions as to what was to happen in certain events. It may be the parties had not thought through all the possibilities. That is not a criticism of them. They appear to have thought that the day would soon come when planning permission would be obtained for some part of the land and the land would increase in value, be sold, and the proceeds dealt with.

The essential terms that I need to note at this point were that it was agreed that Anthony Fitzhugh would buy something called the farmhouse and buildings for 250,000 with the use of the land until planning permission was obtained. The meaning of the word farmhouse is not itself difficult. What was contemplated by the word buildings and what was contemplated by the words the land is more open to dispute, but it is not a dispute that I need to resolve.

The note went on, providing for the ways in which payment was to be made by Anthony Fitzhugh to his brothers and sisters. There appears to have been a distinction drawn between four family members who would participate in one way and four family members who would participate in another way. It seems to have been contemplated that the figure of 250,000 would be divided by nine, giving a figure of approximately 25,777. That sum would be paid to Jeffrey, that sum would be paid to Colin, that sum would be paid by instalments to Maureen and to Harry, but the other family members, if one leaves out Anthony there were four other family members, Amanda, Joan, Marion and Yvonne, they were not to receive that sum of money certainly at that stage. They were to do something which was called 'staying in.' 'Staying in' appears to have involved them waiting until the land was sold. When the land was sold, the first 200,000 would be treated separately from the remainder of the proceeds, and that 200,000 would be split four ways between the persons who were 'staying in.' So take the case of Joan, instead of her receiving 25,777 in the same way that four family members were, she would instead eventually get a quarter of 200,000 and then her one ninth share of any further proceeds of sale.

It seems to have been contemplated that although Anthony would buy the farmhouse and buildings, there would come a point when he would have to put them back in to be sold when planning permission was obtained. I say that because the words, "till planning permission", could be construed as governing not only the use of the land, but also the buying of the farmhouse and buildings, and secondly there is a reference to Anthony receiving again what is described as his initial 100,000 plus improvement costs out of what is described as the initial payment. As I say, there are real difficulties in interpreting all of those provisions, but happily for present purposes I am not called upon to do so.

The next family meeting was on 12th May 1997. It is not necessary to go to the detail of this. I do note the fact that there is a reference to Anthony paying a rent, it appears to be 80 per week. That appears from this document and indeed from other documents. Anthony gave evidence that he was paying 1,250 per month, but that does not appear to be accurate. I do not need to investigate how that discrepancy came about. I was asked by Mr Howlett, Counsel for Anthony, to note the fact that this note refers to rent having been paid on 12th February 1997 and paid up until May 1997.

The next meeting to which I refer occurred on 20th February 1998. In particular Tony and Harry were present at that meeting. About a year had gone by since the family farm agreement. Anthony had not bought the farmhouse and buildings, and this meeting, amongst other things, discussed the up to date position. Anthony told the others that he could raise 70,000, but he was plainly somewhat short of the money needed to pay for shares of approximately 27,000.

The note then refers to there being an argument over the deeds to the place, I suppose the land and buildings. Anthony wanted the deeds. He wanted the deeds so he could grant a mortgage in return for a loan to make up the shortfall between 70,000 and the price he had to pay. Harry appears to have been completely opposed to Anthony having the deeds. He did not want there to be a charge on the property, whether that was to make up the shortfall in price or in any other way to raise money on the security of the land and buildings.

The note contains this statement, "Tony refused to buy farm if cannot have the deeds." The note also refers to Harry suggesting that the barns be converted and sold, the cottage (I take that to be Primrose Cottage) be sold, the house be sold with planning permission to do it up. The suggestion was that the assets should be realised for as much as they could fetch.

It seems therefore that a year after the family farm agreement, the original intention of selling the land and buildings to Anthony had run into serious difficulties.

The next note to which I refer is of the meeting, or the alleged meeting, of 22nd March 1998. The handwriting on this note is Judiths. The pages on which the note was written are two pages from a notepad. There was some debate whether the two pages were from the same notepad or from a different notepad. My own assessment is that they are from the same notepad. I also consider that they were written, or most of them was written, at the same time. When I say most of them, I refer to the fact that not only is there writing on the front of the page, there is also writing on the back of the page. It is possible that the writing on the back of at least one page was placed there at a different time and does not itself record anything said on 22nd March 1998.

The first of these two pages is dated 22nd March 1998. Furthermore, later on that page, there is again the date 22nd March 1998, and the note says in relation to unpaid rent, "70 owing until now, 22nd March 1998." So that indicates very powerfully that this writing was placed on the page on that date.

The second page was not dated at the time, although when this dispute arose Judith placed the date of 22nd March 1998 on the page to indicate her recollection was that that was the date of the meeting and this note related to that meeting.

Staying with the first page, there is not I think a reference on that page to selling anything to Anthony, but there is a reference to property being 'leased', as it is described, for 1 a year. The property in question was the buildings, yard, fields, ground, except Primrose Cottage. In context, the buildings to my mind does not include the farmhouse, so the farmhouse was not to be leased, but essentially everything else except Primrose Cottage was to be leased.

Bearing that in mind, if one goes to the second page, there is recorded under the word 'decision' the agreement that Tom, that is Anthony, will purchase the house and garden only. It was also provided that he would not be entitled to sell it. The next phrase is in these terms, "covenant given to sell to anybody" It may be that what was envisaged was he would not sell to anybody, but he would make the property available to the estate, for the estate to realise the value. At any rate, that is not said to have contractual force so I do not have to interpret its meaning. There is then a reference to barn conversions not being permitted. There is a reference to paying rent up until 1st June. The idea seems to have been that Tony would pay rent until he had bought and he would buy around 1st June.

On the reverse of that page, there is a reference to rent being owing, it says, "up to today" Then it says, "The last rent was paid on 21st February 1997." That is somewhat mysterious. First of all, rent had been paid on 12th February 97, it was not paid on 21st February 1997. Secondly, if rent was paid on 21st February 1997 and 320 was owing up to today, whenever that was written, 320 is four weeks rent, we saw earlier that rent was paid up to May, that would suggest that note had been written there in around June of 1997 or thereabouts. I was not told of any meeting which had taken place around that time.

As I indicated, I accept the evidence of three witnesses called by the claimant that this meeting did indeed take place on that date and it was agreed that Anthony would buy the house and garden only. Mr Howlett on behalf of Anthony has skilfully pointed to a number of difficulties which these documents present. I agree with him that there are difficulties and I am not fully confident of the explanation of each and every thing which is recorded in these pages, four pages if you include the front and the back of the two sheets. However, the fact that those difficulties exist, and I am not confident of their solution, does not in any way undermine the confidence of my conclusion that the meeting did take place and there was an agreement as these notes record. After all, that was the oral evidence from witnesses whom I accept. It was contradicted by witnesses for the defendant, whose evidence I do not accept. It is also of a piece with what happened.

I drew attention to the meeting in February 98 when the sale seems to be off or had stalled, but yet at the end of March 1998 Harry, as we will see, gave instructions to Solicitors to prepare conveyancing documents to convey the house and garden only to Anthony and his partner Karen Body. I will refer to the Solicitor's notes in a moment, but it is entirely rational to make a finding that the difficulties which were encountered in February 98 were indeed overcome towards the end of March 98, and that is readily then explained by the contents of these notes.

I will break off referring to family meetings at that point and go to the conveyancing documents and then the Solicitor's file. The first document I go to is the conveyance of 3rd July 1998. This is a short document, three pages, with a plan. The vendors were the then three administrators, Jeffrey, Anthony and Harry. The purchasers were Anthony and Karen Body. The recitals are straightforward. The fifth recital refers to the parties having agreed on the sale to the purchasers of the property described for 111,000. 111,000 is about four times the share of about 27,000, and indeed the figures, 111,000 and other figures, were explained in the note of 22nd March 1998 to which I have referred.

The operative parts of the conveyance begin with Clause 1, where there is conveyed the freehold of the land edged red. The plan on which the land is edged red shows the house and garden. It does not show other land. There is then a grant of a right of way over the farmyard said to be hatched green and another right to park not more than two private motor vehicles on that same yard. The plan shows the area which I have described as the courtyard and the barns. It is not hatched green, it is cross-hatched green, but there is no mistaking that is the land referred to as the farmyard hatched green. That shows that the farmyard, courtyard and barns as I have described them were not conveyed to the purchasers.

There is then in Clause 2 a covenant by the vendors, I need not set it out, but it refers to circumstances in which the vendors might wish to develop what are called the outbuildings edged green, that would seem to be the barns, and in that event there was to be offered to the purchasers a vehicular right of way to the red land, and that was over a road or an intended road sketched on the plan and coloured brown. So that is the conveyance.

On the same day, the parties entered into a document called a licence. The licensor consisted of three persons, three administrators, Jeffrey, Anthony and Harry. The licensee consisted of two persons, Anthony and Karen.

Clause 1 of the licence is in these terms, "The licensor grants to the licensee the right to keep sheep, cattle, horses or pigs on the premises described in the first schedule hereto for grazing purposes and the right to mow premises twice a year and to take away the grass."

Clause 2 provides, "Further, the licensor permits the licensee to enter onto the premises to the extent necessary to exercise the rights and for the avoidance of doubt, full occupation and possession of the premises remains with the licensor subject only to the rights granted by this licence to the licensee."

Clause 3 is in these terms, "The licensee agrees with the licensor to pay the licence fee of 1 a year and to use the premises for the exercise of the rights and for no other purposes and on termination of the agreement to remove the licensee's stock from the premises."

Clause 4 provides for the period during which the rights and the licence are to continue and the circumstances in which the licence may be determined. Clause 4 identifies in three paragraphs numbered (a), (b) and (d) the three relevant circumstances. 4(a) refers to the licensee dying or becoming incapable of discharging the obligations of the agreement. 4(d), if I go to that, refers to the licensor obtaining planning permission. 4(b), I ought to read, is in these terms, "If the licensee commits any grave or persistent breaches of this licence and the licensor having given written notice to the licensee of such breach of breaches the licensee fails within such period as the licensor may specify to rectify such breaches if capable of rectification."

As will be seen in due course in this judgment, I will need to consider what is meant by the word 'breach', what is meant by the word 'persistent', possibly what is meant by the word 'grave', and what is involved in the licensor giving notice to the licensee.

To complete the conveyancing position around this time, I also refer to the fact that Anthony was permitted to borrow money on the security of the property conveyed to enable him to raise the funds needed to pay the 111,000 price. In fact, he only paid in the first instance 100,000. There was disputed evidence about what happened to the balance, but I need not investigate those matters. Anthony and Karen borrowed 40,000 from the Halifax, the Halifax instructed a valuer, he prepared a valuation. He described the condition of the farmhouse which at one time might have been a material matter. It is quite plain that what the valuer was valuing as the intended subject matter of the mortgage was the farmhouse and garden and no other land. In due course, on completion on 3rd July 1998, the mortgage was indeed granted and the mortgage extended to the farmhouse and garden but no other land. It took a little while, but eventually the title to the farmhouse and garden was registered at the Land Registry in the name of Anthony and Karen.

In view of the disputed evidence as to Anthony and Karen's involvement in this transaction, I need to refer to some things which appear on the file of the Solicitors who acted for the vendors and the purchasers on that occasion. It will be remembered on my findings that the parties had agreed what should happen when they met on 22nd March 1998. On 30th March 1998, Harry contacted a Mr Wilson, a Senior Partner of a firm in Belper, Walker, Kerry & Wilson. Mr Wilson made a note of what his client, Harry, had asked him to do. The note refers quite clearly to an intended sale of the house and garden only for a price of 111,000. That was 30th March 1998.

The next document shows that on 3rd April 1998, Anthony rang the Solicitors. That is not consistent with his evidence, which was to the effect that he only contacted the Solicitors later and that was merely for the purpose of going in to execute documents that had been prepared for him and in relation to which he had had no input. This note shows contrary to his evidence that he rang the Solicitors at quite an early stage after the meeting on 22nd March 1998.

The note to Mr Wilson shows that Anthony did not then immediately speak to Mr Wilson, Mr Wilson was asked to ring Anthony back. The note then has some handwriting by Mr Wilson, and doing the best I can, my finding is that the first part of the handwriting records the conversation between Anthony and Mr Wilson. If that is right then Anthony told Mr Wilson that he was buying the property for 111,000, he was seeking finance, both of which were true. That note does not describe in terms what property was being bought, but another part of the note is in these terms, "the use of yard and buildings, 1 per year rent" That shows that the land conveyed was not expected to include the yard and the buildings, although Anthony's evidence to me, which I have not accepted, is that he thought he was buying the yard and the buildings.

After Anthony spoke to Mr Wilson in that way, Mr Wilson on 6th April 1998 rang Harry, and as his note recorded Mr Wilson advised Harry of the position. That again helps me to find that Mr Wilson had spoken to Anthony. He may not have spoken about every detail of the transaction, but he had had the conversation which I have described.

The conversation between Mr Wilson and Harry then appeared to go on these lines, the note reads, "If planning granted, Anthony has to be offered buy out farm at cost and improvements and RPI." I just pause at that point. It will be remembered that in the note of 22nd March 1998, the suggestion was that Anthony would not sell to anybody else, but that the estate could buy from Anthony. This way it is described does not involve the estate having an option or a right to compel Anthony to sell to the estate, it rather gives Anthony a right to be made an offer, which on the face of it he would be free to accept or refuse.

Some weeks went by, and on 9th June 1998 Mr Wilson wrote to both Anthony and Harry. The letter to Harry simply recorded that the Halifax had offered to lend on the security of the property. The letter to Anthony is more revealing. Mr Wilson wrote this, "Please will you arrange an appointment to call and see Mr Wilson and confirm whether the instructions given to us by Harry in connection with the transaction are correct. We also note that the loan is being taken in the names of yourself and your partner, Miss Body." That shows that Mr Wilson wanted to have Anthony's confirmation that the transaction he was engaged in as stated by Harry accorded with Anthony's instructions also. There is obvious sense in the Solicitor asking for that confirmation. I was given evidence by Harry, which I accept, that the Solicitor said to Harry that he could only act for both sides if both sides gave the same instructions as to what was to be done.

I infer from the fact that Mr Wilson asked this question and later continued to act in the transaction that Anthony did indeed confirm to Mr Wilson that Harry's instructions were correct. The only alternative is to find that Mr Wilson asked for this confirmation, explained to Harry why he needed it, and then without receiving it went on regardless. I think on the balance of probability that did not happen, so therefore I find that Anthony told Mr Wilson that he was buying the house and the garden only and was taking the other land for 1 a year.

The matter was completed, as I have described, on 3rd July 1998. On or about that date, the date on the copy is not legible, Mr Wilson sent to Anthony at the farm a document which identifies certain sums payable. Anthony accepts that he must have received this letter because he did pay the sums in question, indeed he gave me evidence as to his reaction to the mathematics contained in the letter. More significantly for present purposes is the fact that the letter states that there was enclosed with the letter a copy of the conveyance and a copy of the licence. Now, it is possible of course that the letter came but the enclosures were omitted. If that were so, one would have expected Anthony to communicate with the Solicitor and say, "Please send on the enclosures." There is no sign of that being done. It is more probable than not simply from the contents of the letter that the conveyance and the licence did accompany the letter. Anthony denied ever having seen the conveyance and the licence, but I reject that evidence.

Based on those documents and those findings, it seems wholly clear that Anthony and Karen appreciated in the period from March 1998 to July 1998 that the intention was that they would buy the house and garden only. They would take the remainder of the land, but not the land on the other side of the road where Primrose Cottage was situated, on a licence for 1 a year.

I can deal quickly with two further meetings between the family members. A week after the completion of the conveyance, that is on 10th July 1998, there seems to have been a further meeting, and this was an occasion when the 100,000 which had been paid by Anthony and Karen was divided between Harry, Judith, Maureen and Jeff. In the case of Jeff there was a contra charge of about 1,400.

The next note I have of a meeting relates to a meeting on 8th May 1999. For various reasons, I need not go into Marion and Joan, who lived in the United States, were visiting. They were concerned about the possibility of planning permission for Primrose Cottage, and the note deals with payments out of funds in the estate. There was some mystery as to how it was that the note refers to cheques being dated 8th May 1999 when, if one looks at the bank account, four out of six cheques had cleared through the bank before that date. Again, it is not necessary for the purpose of this judgment to come to a decision about how that came about, it can remain mysterious, it does not cause me to change or reflect further on any findings I have made as to the accuracy of the claimant's evidence, in particular of the accuracy of the evidence given by Judith.

That takes the position up to 1999. I heard evidence about the use which Anthony made of the courtyard and the barns and the land after 1999. I also heard evidence about suggested improvement work which was done to one barn in particular after he had bought the farmhouse and garden in 1998. I will refer to that again when I make further findings in relation to the rights of the various parties.

Before I go to those findings, I need to refer to one other event, or series of events. It will be remembered that the licence provided for 1 a year to be paid. In fact, Anthony did not pay 1 a year. I accept Harry Fitzhugh's evidence that he asked Anthony on a number of occasions to pay, but Anthony did not pay. There was a somewhat theatrical occasion in a public house in late 2005 when Harry made a point of confronting Anthony in front of witnesses about the unpaid rent, and having raised the question of unpaid rent, Anthony took himself off. There is a dispute about the circumstances, but I need not resolve it. I was also told by Karen Body that she had heard of this incident and she had rung the Solicitors who were thought to be acting for Harry and asked was this true, that rent was owing, and her understanding was that the Solicitors were going to get back to her. She would say that they did not get back to her.

In fact, that takes me conveniently to a letter that was written in February 2006 on this and other subjects. On 16th February 2006 on the instructions of Harry, one of the two administrators, the firm of Walker, Kerry & Wilson wrote to Anthony and Karen. I will read parts of the letter as it is material to the present legal position. The Solicitor writes, "I have been instructed to write to you on behalf of all the family members of the late Harry Fitzhugh Senior regarding his estate. In particular, there are concerns about the terms and conditions in the licence which was drawn up on 3rd July 1998 at the same time as the farmhouse and area marked red on the attached map was completed. As I am sure you are aware, the licence was personal to you and allowed you only to graze the fields on the farmhouse side of the road and park two motor vehicles in the farmyard. For this you were required to make an annual payment of 1, the licence fee. In breach of the terms of that agreement, you have let persons use the farm buildings, for which you have charged them rent, and you have failed to pay the licence fee, thus you are in breach of the agreement in both respects."

I break off reading at that point. There is a further paragraph dealing with Primrose Cottage which I need not read, and resuming later in the letter it provides, "As a matter of urgency therefore, the family require you to: (1) pay the arrears of 7 owing to the estate for the licence fee 1998 to 2006, such payment to be made within seven working days to this office; (2) clarify in writing the position regarding Primrose Cottage again within seven working days; (3) clarify in writing the position regarding the leasing of land and/or building to contracts again within seven days."

The letter continues, "The family have pointed out the breaches of the licence agreement and given you an opportunity to rectify matters. However, because of the various concerns, family members are now requesting that the executors organise an annual business meeting for family members regarding the estate at a mutually agreed time and place starting in July 2006, when the next rental payment is due. Finally, I am instructed that any further breaches of the licence would result in it being revoked, a course of action which we trust will not be necessary and we await an early response to this letter."

There were further communications between the parties, the Solicitors for the parties, between the date of that letter and the commencement of the proceedings. At one time I had thought that it might be necessary to look at the further correspondence to see if the later letters or other communications could be said to be notice for the purpose of Clause 4(b) of the licence. However, Mr Clarke, who appears on behalf of Harry, has made it clear that the only document he relies upon as being a notice for the purpose of Clause 4(b) of the licence is this letter of 16th February 2006. In those circumstances, I need not go through the other communications and describe their contents.

I will have to assess the legal effect of this letter later in this judgment, but I ought to comment on one or two parts of the contents. The first is that the letter states that Anthony and Karen have failed to pay rent. They are asked to pay rent within seven working days. The sum involved is a modest sum of 7. It has not been suggested that seven days was too short a period, an unreasonable period, within which that payment could have been made. The second comment is that the letter refers to other breaches apart from non-payment of rent. It seems to refer to persons other than the licensee using the farm buildings. It also refers to money being charged to those persons. However, when one comes to what the letter requires the licensee to do, the licensee is not asked to stop persons using the farm buildings, nor indeed to desist from use of the buildings otherwise than for keeping of animals. Instead what is required is that the licensee clarify in writing the position regarding the leasing of land and/or buildings to third parties. There is also a request for clarification in relation to Primrose Cottage.

One other point on the letter. On the facts, Anthony was the recipient of this letter, he had not given any express instructions to the Solicitors to send the letter, he had not authorised Harry to send the letter, and it has not been suggested that the office of administrator was such that one joint administrator has implied authority to act on behalf of both administrators in this respect. I am not going to give a ruling on whether that is the case or not, but it has not been put forward as the position in relation to this letter.

**Discussion and decision**

That is a sufficient statement of the facts and it enables me to now begin to analyse the legal position insofar as that was contentious. I think that a convenient way to analyse the legal position is to discuss separately each of plots 1 to 6 and identify what issues arise in relation to such plots, if any issues arise. I will then consider the question of the administrators duty to account, and in particular Anthony's duty to account. I will then consider any surviving contention as to the removal of Anthony and/or Harry as administrators, and in the event of them being removed what should happen on the basis that there must be administrators appointed in their place.

So I will embark on that, beginning with plot 1. There is in fact no contention as to plot 1. The freehold of plot 1 has been conveyed to Anthony and Karen. Although there might have been an intention that they would be subject to an option in favour of the administrators or a right of pre-emption in favour of the administrators, that is not the position. I think I may not have read out Clause 5 of the licence. That provides in accordance with Harry's instructions to the Solicitors for an offer to be made to the licensee, but it does not oblige the licensee to convey unless the licensee chooses to do so. That might not have been fully understood and it may not have been intended, but there is no application in this litigation for rectification of Clause 5 of the licence, so Anthony and Karen are free to retain the farmhouse and garden as they see fit. Although the farmhouse and garden was conveyed to them at a time when Anthony was an administrator, there is no application for any of that transaction to be set aside for any alleged breach of the self-dealing rule. That is all I need to say about plot 1.

Then I go to plot 2. It is quite clear that plot 2 was not conveyed to Anthony and Karen. There is no possible way of reading the conveyance as including any part of plot 2. It is not said that there was a contract which obliges the administrators to convey plot 2 to Anthony and Karen. In particular, it is not said that the agreement of 11th February 1997 had contractual force at any time. In the course of argument, there was discussion as to whether the circumstances put forward by Anthony could give him something in the form of an equitable interest, not pursuant to a contract, but something possibly arising by way of a proprietary estoppel. It is useful to consider the ingredients of a proprietary estoppel, even though I think in the end Mr Howlett did not put his case quite this way.

If one was to investigate the existence of a proprietary estoppel in this case, it would be appropriate to consider Anthony and Karen's state of mind, their belief or alleged belief as to ownership of an interest in plot 2. It would be necessary to investigate the change in their position, for example by spending money on plot 2. It would also be necessary to investigate the state of mind of Harry as the other administrator, his awareness of the situation. And finally, one would ask whether it was inequitable for the administrators to proceed on the basis that Anthony and Karen had no equitable interest in plot 2. Anthony does indeed say that those ingredients should be found in his favour. He says he and Karen did believe they were the freehold owners of plot 2. He expended substantial sums on the buildings. He did it in the belief I have mentioned. He says that Harry knew of the work, Harry knew of the belief and Harry stood by.

I think it will be apparent that the findings of fact I have already made do not support much of that contention. On my findings, Anthony and Karen knew the true position. They knew they did not have ownership of the courtyard and barns at plot 2. They knew that they had a licence in the terms that I have described in relation to that land.

So far as expenditure on I think one barn in particular is concerned, the evidence is not wholly satisfactory as to how much was spent. It does seem that something was spent, and it may have been thousands of pounds, possibly tens of thousands of pounds. The evidence is not satisfactory as to who spent that money on the building. Admittedly on a hearsay basis there is evidence that most of the expenditure was by a company, All Foundations Limited. Anthony's interest in that company was not spelt out in detail in the evidence, although the suggestion was that it was a 50% interest. I have not however been given more information about the company. I can admit the possibility that Anthony is a shareholder in All Foundations Limited, will suffer a personal advantage if the company spends a substantial sum on the buildings and then does not derive a long-term benefit from that expenditure. I have to say that it would be difficult to make more confident findings in that respect.

Moving on with the other matters of fact, I find that Harry did know that work was being done in certainly one barn, but far from Harry standing by, I accept Harry's evidence that he told Anthony not to do the work. I make that finding because the parties had discussed and agreed at an earlier point that the barns were not to be converted. It is entirely believable that when Anthony went ahead unilaterally and started converting a barn that Harry objected, Anthony went on regardless. Harry said there was not very much he could do about it. I accept that evidence. He was not in a position, he felt, given the family relationship if nothing else, to be more active in preventing Anthony proceeding as Anthony was determined to proceed.

In all those circumstances, there does not begin to be any argument that there is anything inequitable in the administrators taking back the courtyard and the barns in the condition in which they take them back at the relevant time. If in due course plot 2 is sold, then in my judgment the full amount of the proceeds are owned by the estate at law and in equity and are to be distributed in accordance with the law of intestacy, whereby each surviving child of the deceased gets one ninth of the proceeds. I reject the suggestion that one should calculate whether the proceeds of sale were enhanced by some improvement work done to one barn and then that enhancement in value if one could determine it is to be regarded as belonging to or payable to Anthony alone.

I have dealt with the legal title to plot 2 and the equitable position. I record, so it is not overlooked, that there are easements over plot 2 granted by the conveyance, but about that there is no dispute.

The other matter which did exist at any rate in the past was there was a licence which extended to plot 2 and other land. There is a very live issue between the parties as to whether that licence has been determined. For this purpose I need to go again to Clause 4(b) of the licence. I have read that already, I summarise it by saying that, "The licensor is permitted to terminate the licence if the licensee commits a grave or persistent breach of the licence and the licensor gives notice to the licensee of such breach and that licensee fails within such period as the licensor may specify to rectify the relevant breach."

The particular breach which is relied upon by Harry in this litigation is the failure to pay rent prior to giving the notice on 16th February 2006, followed by the failure to rectify that breach within the period specified in that notice, namely seven working days.

Some matters are clear. First, rent was payable under the licence. Secondly, 7 was due by 16th February 2006. I accept Harry's evidence that he asked Tony for rent over the years, but Tony did not pay. I also refer to the non-contentious matter that in the public house in 2005, Harry confronted Tony and Tony did not pay. There was no challenge to Karen's evidence that she rang the Solicitors and did not hear back from them prior to receipt of the letter of 16th February 2006. The evidence was not wholly clear as to precisely what was said and the level of authority of the person to whom she spoke and the extent to which that affected the legal position. In my judgment, the rent remained due, it did not go away, there was still 7 owing on 16th February 2006.

I have to next deal with the question whether the breach by failing to pay the rent in the period from 1998 to 2006 could be described as a persistent breach or amounting to persistent breaches. There was discussion in the course of argument as to the meaning of persistent, whether it required continuation of a continuing breach or whether a repetition of a series of breaches could justify the description 'persistent

breaches.' My own view, having heard the argument, was that persistent in this context can be satisfied by a persistent continuation of a continuing breach or by a series of once and for all or once off breaches, such as failure to pay rent on the due date. That was the judgment I intended to give and I still intend to give it.

I am in fact encouraged to adhere to that view by a comment in a case to which I was not referred, but I do not need to invite Counsel to make submissions on it because it simply is supportive of the view I had independently reached. The decision is *Re: Arctic Engineering Limited* [1986] 1 WLR 686, a decision of Mr Justice Hoffmann. It concerned provisions in the companies legislation as to the conduct of liquidators and when they might be declared ineligible to be liquidators. That referred to them doing things or failing to do things persistently. What the learned Judge said at page 692(b) was this, "Persistently connotes some degree of continuance or repetition. A person may persist in the same default or persistently commit a series of defaults."

It seems to me that it is accurate to describe Tony's breach by not paying 1 rent per annum over the period, indeed never paying it, even when the somewhat theatrical challenge to his non-payment occurred, as a case of there being a persistent breach or persistent breaches.

If it is a persistent breach, I do not have to separately consider whether the breaches were grave. At first blush, it is difficult to say that a failure to pay 1 a year is a grave matter. Harry in the letter to Tony's Solicitor himself describes the rent as a nominal rent and that must be right. However, it was expected to be paid, it was not a peppercorn rent. There was a reason for this rent being reserved and expected to be paid. Harry explained, and I find that Anthony well knew this, that the payment of rent was for the purpose of making it quite clear that Anthony was not in adverse possession of the land, so that as the years went by whilst planning permission was awaited Anthony could not say he had acquired a possessory title by adverse possession. That was why Harry got as agitated as he did about this non-payment. I cannot be clear why Anthony did not pay. There must be a suspicion that he did not pay because he did not want this 1 rent to operate in the way in which it was intended. Of course, it probably would not have mattered for the reasons which were explored in argument, but that is another matter.

I think in the circumstances I will not make a finding as to whether the breach was grave or not grave, having referred to the considerations which I have done.

So this is a case where there has been a persistent breach in that respect. It is also the case that Anthony and Karen did not pay the 7 within the period specified in the letter of 16th February 2006. In other words, they failed within the period the licensor specified to rectify the breach. It is also accepted that the court does not have any power to relieve against the operation of this provision. As is well known in the case of a tenancy, the court has power to relieve against forfeiture for non-payment of rent, and we are in a somewhat similar territory here. I think it is also right that in some contractual circumstances, there is a right to relieve against forfeiture of an interest provided that the interest can be described as a proprietary or as a possessory interest, but outside that area the operation of termination provisions in commercial contracts do not give the court a jurisdiction to grant relief against their operation.

Mr Howlett, who appears on behalf of Anthony, plainly having considered the matter, because he referred to one of the authorities by reference, does not ask me to assume any jurisdiction to grant relief against the operation of this provision. That means that the operation of this provision depends exclusively on a point to which I now come, which is not, I have to say, an entirely straightforward point.

Clause 4(b) refers to the notice being given by the licensor. The notice in this case was given on behalf of Harry. The licensor at the relevant time was not Harry alone, it was Harry and Anthony, Anthony was of course one of the persons to whom the notice was given but he did not give it, it was not given with his authority for the reasons I earlier alluded to. So the question is whether a notice in those circumstances satisfies or fails to satisfy the requirements of Clause 4(b).

Mr Clarke on behalf of Harry reminded me that where a reversion on a tenancy is held by joint owners, a notice to quit given by one such owner acting alone is a valid and effective notice to quit. He similarly reminded me that where a tenancy is held by joint tenants, a notice to quit given by one joint tenant acting alone is a valid and effective notice to quit. He referred me in particular to *Parsons v Parsons* [1983] 1 WLR 1390 and *Hammersmith & Fulham London Borough Council v Monk* [1992] 1 AC 478. His submission was that that being the long established position in relation to joint ownership of reversions and tenancies, I should effectively apply those rules by analogy to the requirement for notice under Clause 4(b).

However, I am not here dealing with a common law notice to quit, I am dealing with a contractual provision which requires the notice to be given by the licensor. Without referring to authority for the moment, it seems fairly plain that *prima facie* and, subject to a qualification which I will come to, the licensor means all of the persons who are the licensor. Put it this way, if the licensee had not been Anthony Fitzhugh but had been Karen Body alone, there would be no question but that the licensor meant all of the persons who were the licensor at the relevant time, that would have been Harry and Anthony. There is no easy way I think to treat the word licensor wherever it appears in this agreement as meaning any one of the licensors, although I will come to the qualification I mention.

It seems to me there is authority which guides me to that conclusion, notwithstanding the two cases to which Mr Clark referred, that is the decision which I mentioned yesterday, *London Borough of Hounslow v Pilling* [1993] 1 WLR 1242. In that case, the Court of Appeal distinguished the *Hammersmith v Monk* line of authority by pointing out that where a party relies upon a contractual entitlement to serve a notice to terminate and that notice on the face of the contract must be given by the landlord or the tenant as the case may be, the notice must be given by all persons who together represent that interest.

If one stopped at that point, the result would follow that the notice of 16th February 2006 was not a valid and effective notice. It seems to me to be unsatisfactory to stop the reasoning at that point. I think one has to take account of the fact that there is something of an overlap between the persons who are the licensor and the persons who are the licensee. One can generalise the point in this way by asking this question, if the licensor is A plus B and the licensee is B, can A act alone in giving a Clause 4(b) notice to B? If it is necessary for the notice to be given by A and B alone then it is very unlikely if not certain that B will not on a voluntary basis join in giving that notice. Does this mean that an effective notice cannot be given to B or is it the case that A must apply to remove B as a trustee? If A and B are joint owners then they will necessarily be trustees. In this case, did Harry have to apply to remove Anthony as administrator before the administrators could then serve notice under Clause 4(b)? Another alternative possibly would be instead of removing Anthony as administrator or removing B as a trustee, the other fiduciary owner can go to court and possibly obtain an injunction requiring B, or in this case Anthony, to join in the service of a notice.

It seems to me that to hold that no notice can be given is an unsatisfactory contractual result which the parties cannot have intended. It also seems to me that a requirement in my example of A and B that A gets B removed or A gets an injunction requiring B to serve a notice on himself is equally a cumbersome, slow, expensive proceeding which I hesitate to think the parties intended. There is in my judgment a solution to these difficulties. The solution is to construe the reference to the licensor in Clause 4(b) as referring to all persons who together are the licensor apart from any person who is also the licensee. If that is the construction of the word licensor in Clause 4 (b) then the notice can be given by Harry alone, and this notice, being so given, was an effective notice.

It seems to me there are two lines of argument which bear on this question. The first line of argument is suggested by the decision of the Court of Appeal in *Featherstone v Staples*. This is a well known case and it is in the line of cases which led from *Parsons v Parsons* to *Hammersmith v Monk*. It did not consider a contractual notice between a landlord and a tenant or between a licensor and a licensee. It was concerned with the service of a counter-notice by a tenant of an agricultural holding under the relevant legislation. The legislation required the counter-notice to be given by the tenant. Where there were joint tenants, all the joint tenants generally speaking had to join in giving the counter-notice. However, the question was raised, what if one of the joint tenants was also the landlord or one of the joint landlords? That very question was considered by Lord Justice Slade in an *obiter* passage at page 876(f) to 877(c).

In the end, the Lord Justice did not have to decide the point, but he expressed a strong inclination to a conclusion similar to that which I have suggested as a qualification that where you have someone on both sides of the divide who is both landlord and tenant, the notice can be given by the others excluding that individual and still be a valid notice to, amongst others, that individual. As I say, the passage is *obiter*, but Lord Justice Slade's judgment was agreed by the other members of the court.

In my judgment, it was quite a bold suggestion in *Featherstone v Staples* to read in to a statutory provision the qualification which Lord Justice Slade suggested might be appropriate. It is somewhat easier in my assessment to imply into a contractual arrangement a qualification if one applies established principles as to the implication of contractual terms. That subject as to implying contractual terms has recently been the basis of the decision of the Privy Council in *Attorney General of Belize v Belize Telecom Limited*, to which brief reference was made in the course of argument yesterday, that is reported at [2009] 1 WLR 1988. Although it is a decision of the Privy Council, it has repeatedly been followed by courts in this jurisdiction ever since. Lord Hoffmann in that case stressed that when one applies terms, one tries to consider how the parties must have expected, considering matters objectively, their contract was to work.

There is one further argument which seems to me to be worthy of consideration. I revert to my example of A and B being the licensor and B being the licensee. A and B will be joint owners and necessarily trustees. In a case where the facts permit a notice to be given under 4(b), that is a case of grave or persistent breaches by the licensee, there must be a very strong argument that B's duty as trustee, assessing him in that capacity, is to join in a notice to himself under 4(b). If he fails to join in that notice he is acting in breach of trust, he is committing a wrong to his fellow trustee A and the beneficiaries under the trust. If he then receives a notice from A alone and is able to challenge that notice on the ground that it is given by A alone and not by A plus B, he is in a real sense taking advantage of his own breach. There is a principle, whether it is a general principle of law or a principle of interpretation it matters not, that one should not take advantage, the court should not permit one to take advantage, of one's own breach. That is a powerful argument for holding that when one comes to the word licensor in Clause 4(b), one should interpret it as referring to everyone who is not also a licensee.

I do not rely upon the taking advantage of own breach argument as a self standing argument in this case, because of course the licensee is not just Anthony (or B in my example) but also is Karen Body, who is not a trustee, but that reasoning does encourage me to imply the qualification to which I have referred.

By that process of reasoning, I do reach the conclusion that the notice given on 16th February 2006 was valid and effective under Clause 4(b). The non-payment of rent was a persistent breach, it was not rectified within the period permitted. The consequence is that the licence was indeed terminated.

Having dealt with that necessarily at some length, I can deal quite briefly with one or two other points, simply so they are not overlooked. The letter of 16th February 2006 referred to matters such as third parties being in occupation of parts of the land, possibly the letter referred to the user which was being carried on, which was not the permitted user under the licence. In fact my ultimate conclusion is that the letter of 16th February 2006 did not give written notice of those breaches and did not require them to be rectified, but I will make brief findings in case it is material.

So far as third parties are concerned, there had been a third party in the yard and the barns, that was All Foundations Limited, but on the evidence they had gone out of occupation some months before 16th February 2006. One could say that the new company First Foundations Limited was also a third party, but the evidence was not clear that that company had gone into occupation by 16th February 2006.

So far as user is concerned, I have indicated that the letter does not squarely refer to the fact that the user was inconsistent with the licence. On the facts, when the licence was entered into, Anthony was using part of plot 3 as his business, which traded as Derby Recon, there was a container on plot 3, there were engine parts in the container, possibly around the container. It also seems that by 3rd July 1998 when the licence was entered into, Anthony was engaged in a piling business in some way. My conclusion is the piling business expanded significantly after July 1998. My conclusion is that the move from the office in the farmhouse to the barn was after July 1998, but I think it is more probable than not that Anthony parked a vehicle or vehicles in the yard before July 1998, and I would hesitate to hold that that user was not permitted. He was not permitted in terms by the written licence, it may be that there was an informal permission. It is also clear that after July 1998 Harry did acquiesce in the user for the piling business, although he had objected to the conversion works to the barn. That is all I need say about the facts. They do not go to the issue of whether the notice is effective or not effective.

To conclude on plot 2 therefore, the licence was terminated in the way I have described. That conclusion then carries the day on plots 3, 4 and 5 also. The only rights which Anthony and Karen could at one time have asserted in relation to those plots was pursuant to the licence and I have made my finding about that.

As to Primrose Cottage and plot 6, Anthony and Karen never did have any rights in relation to that, it was in the possession of the administrators, which brings me to the next topic, which is the duty to account. In the course of his submissions, Mr Howlett said that I should order an account as against Harry, requiring Harry to account for any sums he had received qua administrator which should go into the estate and be divided.

In principle, if Harry had received sums then there would be a liability to account. I am not clear however that there was evidence that he had received those sums. It may be that accounting generally is called for because monies have come and gone in the quite lengthy period since the death of the deceased, but I do not myself detect any evidence that Harry has taken sums and refused to account for them, so that should be reflected in any order that is made.

The position is different in relation to Anthony. Anthony has received sums of money for which he must account. He has received a sum from All Foundations Limited. He has received money from the Hudsons in relation to plot 6. He may have received money from his son and step-son who carry on a logging business. Obviously if the logging business is operated out of the farmhouse that is one thing, he is not liable to account for that, but insofar as it is pursued on the land, which is the land of administrators, then he should account for that. That refers to monies which Anthony has received. There is a separate question as to monies that he could have had or should have paid.

During the time that the licence continued, he used plots 2 and 3 for his piling business. He was able to use plots 2 and 3 for 1 a year, but for keeping animals only. In my judgment, he should pay a reasonable sum for his use of the yard and buildings for the piling business. However, in his favour, it is right to record that the reasonable sum should be assessed by reference to the unimproved buildings. The administrators are not entitled to ask for a sum which reflects any enhancement in the physical condition of the buildings or indeed any planning benefits that that might have indirectly brought about.

So that is the position during the licence. After the termination of the licence, Anthony must pay for his use of the land and buildings. Of course, it is not a case where he has to pay for the use of the land and buildings by himself and others and then in addition account for receipts. There will have to be an appropriate election made as to the basis on which he should be held liable to make payments, whether it be accounting or whether it be a sum for his own and others use and occupation.

So far as interest is concerned, insofar as Anthony has received monies, then he should pay interest from the date he received the monies until the date of his payment to the administrators. I will not specify the rate having specified the period. The rate will be determined by the court when it takes the account, in the absence of agreement.

So far as monies which Anthony ought to pay are concerned, I am less clear about the period during which he ought to pay interest. I will leave the question of the period and the rate to be determined on the taking of the account. The court at that point will have a deeper understanding of just how the case is put, what the effect of any election might have been, and it will decide on a fair response to those facts.

That brings me I think finally to the future of this administration. Harry asks me to remove Anthony as an administrator, Anthony asks me to remove Harry as an administrator. I could therefore remove one or both of the present administrators. If I remove one I will have to appoint one new administrator. If I remove two I will have to appoint two new administrators. The position of Anthony and Harry is quite different, although the net result is, largely because of the realistic attitude adopted by Counsel advising their clients, that both Anthony and Harry should no longer continue as administrators. I think it is only right to say that I do however see a very big difference between the two cases.

On any view, Anthony must be removed. He has persisted for a lengthy period in allowing his duty as administrator, a duty owed to the beneficiaries, to conflict with his private interests. Indeed, I regret, but I have to say, that he has given untruthful evidence in this litigation with a view to obtaining advantages for himself at the expense of his brothers and sisters, the other beneficiaries. He is not a fit and proper person to be an administrator.

As to Harry, the position is rather different. There is hostility to him and he shows hostility to some of the beneficiaries. It is not helpful for me to go into how that situation has come about. This litigation has been very divisive. It is better for him that he no longer acts as administrator and he has himself, no doubt having taken sensible advice, recognised that fact. He is prepared to resign as an administrator. On that basis, I will make an order to give effect to that readiness to resign.

As to the new administrators, they plainly cannot be appointed today because they have not been identified, certainly by the time I give this judgment. Some matters have apparently been agreed. It is agreed that they should not be family members, but they should be professional persons. It is also contemplated I think that they will probably be Solicitors, but that is not entirely settled. It is also inevitable they will charge a reasonable fee. That is the price the family will have to pay for the failure of the previous arrangements.

I will give the parties a short time to agree on the identity of new administrators. It should only be a short time because I will necessarily leave the current administrators in post until the new arrangements are in place. I do not wish there to be a gap when there are no administrators in post. If the parties cannot agree on the identity of the new administrators then the matter must come back to court without undue delay. If the dispute is a narrow one, the matter can be dealt with on a paper application. If the matter is more contentious, there will have to be a hearing. If the matter can be agreed, and I am sure it is in everyone's interests that the matter is agreed, and the legal advisors will do everything they can to guide their clients in these respects, then a draft order should be submitted for the court's approval.

I believe that I have now dealt with all the matters that need attention. I will hear Counsel as to the order that should be made to give effect to this judgment.

Right. Who wants to go first?

MR CLARKE: My Lord, there is the question of costs.

MR JUSTICE MORGAN: Yes, right. Let me just clear some things out of the way. Right.

MR CLARKE: My Lord, in my submission there are three questions to be addressed in relation to costs, given that both parties are administrators of this estate.

MR JUSTICE MORGAN: Yes.

MR CLARKE: The first question is whether the claimant should have his costs from the estate.

MR JUSTICE MORGAN: Yes.

MR CLARKE: The second question is whether the defendant should have his costs from the estate.

MR JUSTICE MORGAN: Yes.

MR CLARKE: And the third question in essence is if the answer, or depending on the answer to two, should the defendant pay the estate for the claimant's costs?

MR JUSTICE MORGAN: Right, yes.

MR CLARKE: In relation to the first question, I say that on the basis of your Lordship's findings there can be no question but that the claimant should have his costs out of the estate.

MR JUSTICE MORGAN: Yes.

MR CLARKE: In relation to the second question, I say that given your Lordship's findings the defendant should not have his costs out of the estate.

MR JUSTICE MORGAN: Yes.

MR CLARKE: In relation to the third question, given the answer to two, I say that again on the basis of your Lordship's findings that the defendant should reimburse the estate for the costs that have been incurred in this litigation.

MR JUSTICE MORGAN: Yes.

MR CLARKE: Does your Lordship

MR JUSTICE MORGAN: No, I will hear Mr Howlett and see what divides you and then we will see how to take the matter further forward. Mr Howlett, that is the application for the claimant.

MR HOWLETT: Yes, my Lord, and clearly in view of your Lordship's findings as to the truthfulness or otherwise of the defendant's evidence, I am in some difficulty.

MR JUSTICE MORGAN: Yes, I think that

MR HOWLETT: And effectively, if I may put it this way, your Lordship has found that in his personal capacity he has not acted well. On his trustee capacity he has simply failed. That being so, I have to recognise the near inevitability of an inter-party costs order, and clearly the estate should not lose out.

MR JUSTICE MORGAN: Yes. Well, that is

MR HOWLETT: Your Lordship may prefer to put it in terms that the defendant indemnify the estate rather than that there be any process whereby the money actually or nominally passes through Harry, but in the net result I cannot properly resist the application.

MR JUSTICE MORGAN: Well, let me say at once that I think your position is realistic, maybe it is inevitable, but certainly the conclusion I would almost certainly have reached, so I say that. Now, as to the mechanics of it, Anthony has to pay, he has to pay the costs incurred by the other administrator. Whether he pays that sum to the new administrators for them to reimburse Harry, whether he pays it to Harry direct, so Harry does not call on the new administrators, should not matter in mathematical terms, although it might matter in other respects. Your preference is that Harry identifies what his costs are, he tells the administrators, the administrators then call on Anthony to pay those costs, or a credit is provided in any accounting, is that the way

MR HOWLETT: That is my preference, yes, my Lord.

MR JUSTICE MORGAN: I do not think you would have difficulty with that way of putting it. If Harry gets his money and the burden falls on Anthony.

MR CLARKE: The reality is, the difference may be this, in realising the money out of the estate as matters stand at the moment, there may be some time delay.

MR JUSTICE MORGAN: Yes.

MR CLARKE: In enforcing an order against Anthony, that could be done rather more simply and more swiftly perhaps. Nevertheless, in essence it is right to say that the correct approach in the sense, given the administration situation, is that what Harry is entitled to as a fundamental is an indemnity out of the estate, and clearly the concern must be that the estate is not out of pocket at the end as a result of this litigation. It is a question (inaudible).

MR JUSTICE MORGAN: I mean, the only difference would be if the estate does not have enough money to reimburse Harry

MR CLARKE: Yes, and that would (inaudible)

MR JUSTICE MORGAN: either immediately or in due course.

MR CLARKE: That appears to be unlikely.

MR JUSTICE MORGAN: Right.

MR CLARKE: We have got a valuation of the estate at 600,000.

MR JUSTICE MORGAN: Right.

MR CLARKE: Well, that includes the farmhouse, but

MR JUSTICE MORGAN: So when it is all wound up, so this advantage for Harry would be if he has to pay his Solicitor's bill, because they pursue them, before he is able to correct out of the assets.

MR CLARKE: Yes.

MR JUSTICE MORGAN: Well, you say to me that the correct approach is for Harry to have his costs out of the estate and then for Anthony to be ordered to pay to the estate the costs which the estate has had to bear.

MR CLARKE: I think that is the correct analysis.

MR JUSTICE MORGAN: Right. Although given that Harry and Anthony are both litigants themselves, I could simply make an order that the defendant pays the claimant's costs.

MR CLARKE: Yes.

MR JUSTICE MORGAN: So that the claimant then does not have to go to the estate and say, "I'm out of pocket", because

MR CLARKE: Indeed. Well, that would avoid the estate being put at any risk I suppose, it would mean that Harry bears in a sense the risk that Anthony is unable to pay, although of course that is the risk that any litigant takes, that the costs orders

MR JUSTICE MORGAN: Well, technically what I should say is that Harry can collect from Anthony, if Anthony does not pay then the burden will fall on the estate, all the children, and Harry should have a second opportunity to be paid, if not by Anthony, then by, it all depends how the shares work out, how much money is involved.

MR CLARKE: It does. It may be that

MR JUSTICE MORGAN: Well, what I might do is say this much, that I will say that Harry is entitled to his costs out of the estate, I will say that the defendant is ordered to pay to the estate the sum which the estate has to bear to reimburse Harry, and I will give you liberty to apply for an order direct that Anthony pay Harry, and if there then is a difficulty with the earlier parts of the order, that part of the order can be considered.

MR CLARKE: Yes.

MR JUSTICE MORGAN: I think Mr Howlett for whatever reason, and it may be bad feeling, I must recognise that, he does not want there to be a direct order pronounced today, and I think I may go along with that, but not shut you out from obtaining it if the need arises hereafter.

MR CLARKE: Yes.

MR JUSTICE MORGAN: So shall we take that course? Are you quite clear what I have been proposing?

MR CLARKE: Yes, I better just turn my back if I may just to check that that is

MR JUSTICE MORGAN: Yes, yes. Right, is that satisfactory then?

MR CLARKE: Clearly the concern is to make sure that Harry does actually receive his money. I think that the way we are going should protect him.

MR JUSTICE MORGAN: Right. Any other matters that need attention? Can you two put your heads together and draw an order which reflects what has been said or if you need further discussion as to what the order might provide?

MR HOWLETT: My Lord, there is one matter outstanding on costs I think, and that is the question of the assessment of costs.

MR JUSTICE MORGAN: Yes.

MR HOWLETT: In my submission, the costs award should be subject to detailed assessment.

MR JUSTICE MORGAN: Oh yes. What is the basis of the assessment?

MR CLARKE: It would be an indemnity.

MR HOWLETT: If the intention is that the estate were the ultimate beneficiary of the award, that must be right.

MR CLARKE: I think Part 48.4 states that personal representatives are entitled (inaudible).

MR HOWLETT: Yes, I am not resisting that.

MR CLARKE: No.

MR JUSTICE MORGAN: It does seem that in a case like the present, and maybe the rule helps one enormously, but even without the rule I think one would have to say that is the correct even-handed position. I mean, the costs still have to be reasonable costs reasonably incurred, but the question of proportionality does not apply, it is the indemnity basis. Right.

MR HOWLETT: My Lord, the other matter which might assist is whether your Lordship is willing to give a ruling on how the 111,000 should be treated, and indeed whether 111,000 was the price for the farmhouse or whether it was in fact 138,800 and whatever, because of course the money has in fact not been distributed neither ways.

MR JUSTICE MORGAN: No.

MR HOWLETT: And my submission in closing was that it should be in the event that we lost, which we clearly have.

MR JUSTICE MORGAN: It should be, which one?

MR HOWLETT: That it should be a nine way division.

MR JUSTICE MORGAN: Oh yes. Well, and what figure is distributed? It is 138,000 or 111,000?

MR HOWLETT: I am not sure that your Lordship has said what the price was.

MR JUSTICE MORGAN: No, I mean the

MR HOWLETT: And clearly in answering that question, I am making submissions on a basis that was not my case, and of course your Lordship has given judgment, but the note will suggest 138,000, but the instructions to the Solicitor were 111,000 and that is the figure on which stamp duty was paid and no doubt that is the figure which the Solicitor understood the consideration to be.

MR JUSTICE MORGAN: Well, the

MR HOWLETT: I am not sure that I can properly make further submissions about that, but it does need to be dealt with.

MR JUSTICE MORGAN: Just jogging back. On my findings, Anthony and Karen do not have to pay any more money to become freeholders. They have acquired the freehold, there is no outstanding debt qua purchaser.

MR HOWLETT: But in that case, the purchase price must be 111,000.

MR JUSTICE MORGAN: Well, it is certainly not 250,000, if we start there.

MR HOWLETT: No.

MR JUSTICE MORGAN: I am not, you know, I will hear if anything else is said, but, and although your case was you would pay the extra, that was on a very different basis and that is not the basis of the decision, so the price is not 250,000. Let us say the price is X before we determine X. The administrators have received X and they are obliged to distribute X nine ways.

MR HOWLETT: Well, my Lord, the administrators have not received X.

MR JUSTICE MORGAN: Well, all right, the

MR HOWLETT: Four of the beneficiaries have received X over four, that is the point.

MR JUSTICE MORGAN: Well, the administrators, they have received 111,000, the administrators have received it first, before they distribute they receive.

MR HOWLETT: Yes. It cleared through the administrator's account, yes.

MR JUSTICE MORGAN: And it may be that in substance they have received 138,000, but then they have given 27,000 straight back to one beneficiary. So whether they have received 111,000 or received in a more notional sense 138,000, go to the next stage next, the people who have received 27,000 did very well, but they did too well, because on the face of it each one of the nine should get one ninth, so that for example the four who got nothing out of this, if that is the case, should get their one ninth. So the question then is, well, what is the figure which is divided in nine?

MR HOWLETT: Yes.

MR JUSTICE MORGAN: If it is 111,000 then I would have to give Anthony one ninth of 111,000. That was never envisaged. What was envisaged was that he would get his share by reducing 138,000 to 111,000.

MR HOWLETT: Yes.

MR JUSTICE MORGAN: But that was on the basis that the 138,000 would be split five ways. I mean, a fair result might be to say that 111,000 represents eight ninths, the 111,000 should be divided eight ways. Anthony has got his share by not being charged more than 111,000. I am very much thinking aloud, and none of this I have given any real thought to. Well, let us rule out a number of things, because that way we might hit the target. It is not a case of there being a liability to pay the balance of 250,000.

MR HOWLETT: No.

MR JUSTICE MORGAN: Whatever the administrators receive in cash or in, notionally received, should be split nine ways. It cannot be right that four or five benefit and four do not, that cannot be right, for administrators to act that way. So the question is whether 111,000 is considered as four fifths grossed up to five fifths 138,000 or whether it is considered eight ninths grossed up to nine ninths, one ninth goes to Anthony, so you would divide 111,000 by eight. That is beginning to appeal to me as the solution. Do you want to add anything further? I will have to hear Mr Clarke.

MR HOWLETT: I would not oppose to (inaudible).

MR JUSTICE MORGAN: No. Mr Clarke, this, I have not addressed this at all. You might not have thought it through either for all I know. Are you able to help?

MR CLARKE: Well, my submission would be that there is a danger that we are making this more complicated than it needs to be.

MR JUSTICE MORGAN: Well, let us not do that.

MR CLARKE: In the administration of the estate, the administrators receive sums of money and they pay out sums of money to beneficiaries.

MR JUSTICE MORGAN: Yes.

MR CLARKE: In this case, not only have sums of 27,000 odd been paid out to some of the beneficiaries, sums of 1,000 were paid out to some beneficiaries.

MR JUSTICE MORGAN: Yes.

MR CLARKE: The estate is not as yet fully realised and there will be further sums to be paid out to all of the beneficiaries.

MR JUSTICE MORGAN: But the question is, plainly receipts they have had they give credit for, and if there has been an unequal distribution that is all resolved in a final equal distribution.

MR CLARKE: Yes.

MR JUSTICE MORGAN: But what do you do with the 111,000? What figure are the administrators going to put in as a receipt? Are they going to put in

MR CLARKE: No, no, that is an important point, I accept that.

MR JUSTICE MORGAN: Is it 111,000 to be divided nine ways or is it 111,000 to be divided eight ways, Anthony having had his share by not paying more than 111,000, or is it 138,000 to be divided nine ways, whereby Anthony then has to pay another 27,000 and gets back one ninth of 138,000, which is obviously far less? At the moment it seems to me it is 111,000 divided eight ways and Anthony's share has been taken.

MR CLARKE: Well no, I would say that the correct, the purchase price that was envisaged was 138,000

MR JUSTICE MORGAN: But that is when it was envisaged that there would be an inappropriate distribution to five people.

MR CLARKE: Well, I am not sure that that is necessarily the case because there was an agreement that some of the parties would wait for their shares.

MR JUSTICE MORGAN: Yes.

MR CLARKE: The difficulty is of course that none of them is represented before you. What I would submit at this stage is that in a sense this is a matter for the administrators in terms of how it is to be accounted for.

MR JUSTICE MORGAN: Yes.

MR CLARKE: The important point for your Lordship is to determine what the purchase price is, because that would be something the administrators may be struggling to do, and if, as I think in fact your Lordship has already indicated in the judgment, that the purchase price was to be treated as 138,000, then that is the important point for the administrators to know. They can then form a view as to that part having come into the estate and it having been paid out in a particular way, albeit that that was not an even distribution at that point.

MR JUSTICE MORGAN: No. That of course would mean that Anthony and Karen as purchasers are liable on some basis or other to make a further payment of the purchase price.

MR CLARKE: No.

MR JUSTICE MORGAN: It would not?

MR CLARKE: No. They bought the house for 138,000 and they paid that, and that has been received by the estate.

MR JUSTICE MORGAN: I see, so

MR CLARKE: When it comes to a distribution

MR JUSTICE MORGAN: It is almost as if 138,000 went into the administrator's bank account and they then distributed five ways, giving 27,000 back to Anthony.

MR CLARKE: Yes, and 27,000 to other people, some people they gave nothing to with those people's apparent consent.

MR JUSTICE MORGAN: So 138,000 you say has to go on the plus side of the account, five people have had distributions, Anthony has had a distribution of 27,000, others have not had a distribution

MR CLARKE: At all.

MR JUSTICE MORGAN: so when we get to the final account, the evening up is to be done then.

MR CLARKE: Yes. And whether some of the beneficiaries seek some form of interest or some other reconciliation on the basis that some of their siblings may have had more money than they have or had money in advance, that is a matter on which they ought to be able to make representations to the administrators, and they are not here to say that, and I am concerned that

MR JUSTICE MORGAN: Well, it may be I have to leave it and not decide this, because it is really, it is not for the purpose of resolving any of the issues before me today, it is really for a future issue as to the final administration accounts.

MR CLARKE: Indeed. And the only

MR JUSTICE MORGAN: I cannot appoint any one of the litigants as a representative of the beneficiaries for this purpose because they are not appropriate representatives of the beneficiaries, they have a conflicting interest.

MR CLARKE: Indeed. So I think the only important point is the finding that I believe your Lordship did make, which was the purchase price was intended to be 138,000

MR JUSTICE MORGAN: I do not think I did.

MR CLARKE: Did you not?

MR JUSTICE MORGAN: No, now you have pressed me on that. I think all I explained was, but I think I did not read very much from the note of 22nd March about the 138,000 and I recorded the transaction going through on the basis that it was 111,000. Mr Howlett says correctly that the stamp duty was paid on 111,000. I would not necessarily regard that as conclusive I have to say, because of course the parties may have done it in a way, presenting it for stamping in the most favourable light, but the financial substance may between themselves have to be treated differently, so the stamp duty is not conclusive.

MR CLARKE: An adjustment could of course be made

MR JUSTICE MORGAN: I think the two candidates for entry into the plus side of the account is either 111,000 treated as eight ninths and grossed up or 111,000 treated as four fifths and grossed up, and then, as you say, the distribution side of it sorts itself out, we know what each side has got, and I (inaudible) know what each side should have got.

MR CLARKE: Yes. And my submission in that is that the clear evidence is that the purchase price of 111,000 was four fifths of the amount for which the estate should be treated as having received, if that makes sense.

MR JUSTICE MORGAN: Mr Howlett, there is plainly a gulf between the two arguments. I am not sure I should actually pronounce on it today. I do not want to leave unfinished business, but

MR HOWLETT: Well, in my submission now your Lordship really has two options. You can either make a finding on what the purchase price was

MR JUSTICE MORGAN: I do not think I have made that finding, no.

MR HOWLETT: Well, you have not so far in my submission.

MR JUSTICE MORGAN: I did not consciously make it and I think particularly in terms of how the administrator should treat the figure for the purpose of distribution I have left undecided.

MR HOWLETT: Or your Lordship could expressly leave it open. What I am concerned about is not in the accounting process to be met with something akin to a *res judicata* argument.

MR JUSTICE MORGAN: No, I am leaving it open.

MR HOWLETT: Well, if your Lordship says that then I am content with that.

MR JUSTICE MORGAN: Unless I decide within the next half hour, I have not yet decided it.

MR HOWLETT: No.

MR JUSTICE MORGAN: I am ruling that it is not *judicata*, if you want Latin.

MR HOWLETT: That would be very helpful, my Lord. Thank you.

MR JUSTICE MORGAN: Yes, right. And I do leave it open. As I see it at present, if you want a reaction rather than a judgment, you either gross up the 111,000 treating it as eight ninths or as four fifths, those are the candidates.

MR HOWLETT: Yes, I agree that those are the candidates, my Lord, yes.

MR JUSTICE MORGAN: Right. The drafting of the minute, do you see any difficulty in that?

MR HOWLETT: No, I am sure my learned friend and I can reach a form of (inaudible), it may not be a particularly straightforward order, but I am sure we can do it.

MR JUSTICE MORGAN: I think it is probably better if you try to do it and hope to agree. If there are insoluble difficulties then you will simply have to apply on paper for them to be resolved.

MR HOWLETT: I do not see why there should be.

MR JUSTICE MORGAN: No, and I think it is better to do that then to have an unfocused debate here

MR HOWLETT: Yes, I agree, my Lord.

MR JUSTICE MORGAN: until the drafting throws up problems, if any problems. Right. Is that everything in that event for today?

MR CLARKE: I believe so.

MR JUSTICE MORGAN: I think it is now. Now, there are five bundles here

MR HOWLETT: My Lord, no.

MR JUSTICE MORGAN: Right.

MR HOWLETT: May I, purely so that I am in a position to consider the position and know where I stand, seek permission to appeal on the point as to whether the notice was validly served by one only of the licensors.

MR JUSTICE MORGAN: Right. Well, let me hear Mr Clarke on that. Mr Howlett has to have a real prospect of success in the Court of Appeal, would you say he has none?

MR CLARKE: Your Lordship I think, as I recall, referred to authorities which are Court of Appeal and higher.

MR JUSTICE MORGAN: Yes, but they do not bind me to that result, they are part of a process of reasoning which, my impression is Mr Howlett is entitled to go to the Court of Appeal and say I approached it in the wrong way, but tell me why I should refuse permission and make a Lord Justice grapple with it.

MR CLARKE: I believe that proportionality is at least one test in

MR JUSTICE MORGAN: Yes, assume that. If I thought it was a tiny little point that did not matter, is that this case, about the licence?

MR CLARKE: Well, if the licence continued, it would be a matter for the administrators taking on this

MR JUSTICE MORGAN: Well, they could start again and

MR CLARKE: to start again.

MR JUSTICE MORGAN: But they may not be able to get rid of it so easily. Say they serve a notice for how much, 12, Anthony pays, that is that gone, you cannot terminate.

MR CLARKE: (Inaudible)

MR JUSTICE MORGAN: They will have to find other current breaches.

MR CLARKE: to the user.

MR JUSTICE MORGAN: Well, user is tricky, is it not? Because I think I indicated that there was some user at 3rd July and then there was at least a corroboration of other users, and anyway Anthony is being forced by the planners to go elsewhere. By the time you are ready to throw a notice at him, he might be compliant with the user. It strikes me that it might matter, and it might matter as regards to the account, because there is a difference in my assessment between the period up to termination of the licence and the period after termination of the licence. Up to the termination of the licence, he has got quite a lot of land for 1, after the termination of the licence he does not. Tell me if that is wrong, I am not here to jump to conclusions, I am here to consider what the parties say and then reach a decision. My instinct is to say that this is a case where I should give permission. I am not encouraging the parties in any sense, but it is a legal point, it is not straightforward, I said it was not straightforward. Mr Howlett may feel a little aggrieved that I developed the argument a little bit myself which was not ventilated for him in court. He might want to go to the Court of Appeal when he has had time to think about it. My assessment is that it would be fair to give him permission.

MR CLARKE: Well yes, one of the cases I looked at, and perhaps I should have brought it with me, last night was the most recent decision of the Supreme Court in, I am trying to remember what it was called, something like *Sky View v*

MR JUSTICE MORGAN: Oh, *Rainy Sky*?

MR CLARKE: *Rainy Sky*.

MR JUSTICE MORGAN: Yes.

MR CLARKE: Yes, which is also about interpretations of contracts and how they are to be construed

MR JUSTICE MORGAN: Well, that might help you, that might help you uphold my decision

MR CLARKE: It might, yes.

MR JUSTICE MORGAN: when it comes under strenuous attack.

MR CLARKE: So there is not only the cases to which your Lordship referred, there are cases on contractual interpretation which do tend to support an interpretation based on efficacy rather than rendering contracts inefficacious.

MR JUSTICE MORGAN: Well, that is very much how I structured my reasoning, I looked at the alternatives and thought, well, they would not have, objectively speaking, have intended it to work that way, so one then came up with the solution.

MR CLARKE: Yes.

MR JUSTICE MORGAN: Yes, you can

MR CLARKE: Whereas there are no cases of which I am aware where, recently, where courts have made contracts ineffective or difficult to work, and in my submission that would be my learned friend's difficulty if he takes this case further.

MR JUSTICE MORGAN: Well, he might think he will lose, but I am asked to say he has no real prospect of winning, which is a lower standard.

MR CLARKE: Well, I might go that far if pressed based on the absence of any authorities appearing to be in his favour, but ultimately it is a matter for your Lordship.

MR JUSTICE MORGAN: Well, let me hear Mr Howlett. It is said to be disproportionate for you to go to the Court of Appeal and I think it is being said that the Court of Appeal would take a very poor view of the argument that allows you to say, "This licence cannot be terminated until Anthony is removed or injuncted to joining in the notice." Now

MR HOWLETT: Well, my Lord, it may take a poor view, but it may nevertheless be right.

MR JUSTICE MORGAN: It might. I think I am going to give you permission. This is an unfortunate dispute, it has cost a lot of money, it has been divisive, more of the same is going to be worse, but it is not my function to provide social services, it is my function to decide points of law, and I think that point of law merits an appeal.

MR HOWLETT: My Lord, I am obliged.

MR JUSTICE MORGAN: I will give you permission to appeal on that point only.

MR HOWLETT: That is all I am asking for.

MR JUSTICE MORGAN: Right. Well then, there are five bundles, I do not think I need to retain them to look at any minute (inaudible) then, do I?

MR CLARKE: No. I am just wondering whether in the light of the permission, whether your Lordship has any views on what provision we should put in the order as to the taking of the account, because normally it would be effectively the matter is referred to a District Judge for directions as to the taking of the account. I suppose it is right to say that we can maybe incorporate something to say that if a notice of appeal is lodged then the taking of such account is to be stayed pending that appeal.

MR JUSTICE MORGAN: Well, that does sound like it is inevitable, because the basis of the account will depend to some extent, maybe not massively, but to some extent on the outcome of the appeal, so the account should not go forward.

MR CLARKE: Yes.

MR JUSTICE MORGAN: I mean, if that massively disadvantages someone then there should be some form of interim payment on account then that is another matter.

MR CLARKE: Well, that is what I am concerned about in the sense in relation to costs.

MR JUSTICE MORGAN: Yes. Well, the appeal will not operate as a stay of the order for costs.

MR CLARKE: No, and indeed the majority of the costs will not be related to the small matter under appeal.

MR JUSTICE MORGAN: But even if they were, the standard rule is that there is no automatic stay of a money judgment like a costs order, and

MR CLARKE: But there is no other money judgment it is right to say, so.

MR JUSTICE MORGAN: Yes. Obviously it could be said that if the appeal were successful, it would not be 100% of the costs, it might be some other arrangement.

MR CLARKE: Well, it would be a question of the costs of the appeal I think, perhaps as

MR JUSTICE MORGAN: Well, it could impact on the costs of the trial, but even then if it is not 100% recovery, it will be done by a percentage, the assessment process need not be held up is my reaction, and the payment under any assessed process should also not be held up is my reaction. Let met ask Mr Howlett, is there any reasoned argument you can put forward to oppose that? I am minded to stay the taking of the account, but not stay the assessment of costs.

MR HOWLETT: My Lord, in my submission, I cannot ask for more.

MR JUSTICE MORGAN: Right. Well, there you are. That is for you then to draft.

MR CLARKE: Yes, that assists.

MR JUSTICE MORGAN: I have been given original documents, I will leave them at the top of the papers so that whoever should have them will take them, I suspect it is the claimants have to remove the bundles.

MR CLARKE: Yes, I suspect I am going to have to get one of my Clerks to come in given the

MR JUSTICE MORGAN: I am sure the court will be understanding about storing them for a very brief period, but I am not going to keep them.

MR CLARKE: Yes, I will endeavour to get one of my Clerks to come over and collect them this afternoon.

MR JUSTICE MORGAN: Right. Well, thank you both very much.