

Neutral Citation Number: [2023] EWHC 641 (Ch).

Case No: PT-2021-BHM-000082

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS SITTING IN BIRMINGHAM
PROPERTY, TRUSTS AND PROBATE LIST (Ch. D.)
IN THE ESTATE OF ROSEMARY MARTHA GILL (DECEASED)

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 21 March 2023

Before :

HHJ RICHARD WILLIAMS
(sitting as a judge of the High Court)

Between :

Adrian John Gill
(As Executor of the Estate of Rosemary Martha Gill)

Claimant

- and -

Malcom Kirk Gill

Defendant

Andrew Charman (instructed by mfg Solicitors LLP) for the Claimant
The Defendant represented himself

Hearing dates: 21 November to 23 November 2022, and 21 March 2023
(Draft judgment circulated to the parties by email/post on 14 March 2023)

HHJ Richard Williams:

Introduction

1. Civil Procedure Rules (“**CPR**”) r.64.2 permits the Court to determine any question arising in the administration of the estate of a deceased person.
2. This is a claim originally brought under CPR r.64.2 by the executor of an estate for approval of final estate accounts.
3. The claim in essence involves a protracted family dispute where the key players share the same surname. Therefore, for ease of reference and with no disrespect intended, I shall in the course of this judgment use first names.
4. I acknowledge at the outset that this is an overly long judgment, particularly having regard to the amount of money now in dispute. However, it is over 10 years ago since the testator died. The resulting and ongoing dispute has been draining both financially and emotionally; the family desperately needs closure. I trust that this judgment will achieve that goal by finally enabling the administration of the estate to be completed.

Background

5. Adrian (the Claimant), Malcolm (the Defendant), Pamela and Nigel are siblings. Their parents were Rosemary and Gerald.
6. Rosemary and Gerald were farmers, who farmed at Upper Latherford Farm, Shareshill, Staffordshire (“**the Farm**”). They undertook their farming business as equal partners, initially, from 1959, as tenants of Rosemary’s parents and then, from 1982, as owners of the freehold of the Farm.
7. Rosemary’s mother, Martha, loaned Rosemary and Gerald £8,000 to help them purchase the freehold of the Farm and which sum was secured against the Farm by way of a legal charge dated 6 August 1982 (“**the Legal Charge**”).
8. Having obtained a degree in Mathematics from Cambridge University, Adrian pursued a career in banking eventually moving to live in Jersey.
9. Malcolm ran a motor vehicle repair business from the Farm.
10. Pamela emigrated to live in New Zealand.
11. Nigel ran (initially with his parents but later on his own) a plant hire business, Elford Plant Hire Limited, from the Farm.
12. In March 2009, Gerald died leaving his entire estate, including his share of the farming partnership, to Rosemary.
13. In May 2009, Pamela recorded in writing Rosemary’s wishes following the death of her husband as follows:

“[1] I want things to carry on as they are.

- [2] I want my farm to stay the same.
- [3] I want my farm to remain a working farm.
- [4] I don't want to have my farm dug up.
- [5] I want to live at home with help.
- [6] I don't want to be locked away somewhere.
- [7] I don't like my life being in the hands of others – that are not my family.
- [8] Malcolm will run the business as an equal partner with myself from now on – as I gave him half share of the business in April 2009.
- [9] I want Malcolm to look after my farm and carry on the farm business.
- [10] I want Malcolm to have the freedom to do what he thinks is best for my farm.
- [11] I want Malcolm to be secure in the business for as long as he wants to farm it.
- [12] I don't want anyone to take the farm away from Malcolm while he wants to farm it. I want Malcolm to be in charge of the farm business.

14. Adrian drafted partnership agreements dated April 2010, July 2010 and June 2012, which all stated:

“.....

Creation of a new Farming Partnership

[Rosemary] hereby gives Malcolm.. a 50% share in the farming assets and business with effect from 1st April 2009.

The gift includes 50% of the following farming assets;

Livestock
Feedstuffs
Agricultural Machinery
Tools & Equipment
Cash in the Farm bank account
Any farming debtors and creditors

The gifted assets are to be part of a new farming partnership “Mrs RM and Mr MK Gill” with effect from 1st April 2009. The partners hold equal 50% shares.

For the avoidance of doubt, the Freehold of Upper Latherford Farm, including the land, house and buildings remain in the sole possession of Mrs RM Gill. These assets do not form part of the farming partnership and are not part of the gift to Malcolm.....

.....”

15. Those draft agreements were never executed, but it is not disputed that Rosemary and Malcolm entered into a new partnership (“*the New Farming Partnership*”). Adrian emailed the New Farming Partnership accountants on 24 July 2012 in the following terms:

“My brother Malcolm has asked me to contact you to explain the basis of the new farming partnership between our mother and himself.

Having recently seen the accounts, that you prepared, to 31 March 2011, we can see some issues that need to be corrected and would ask you to restate the accounts accordingly.

As you will be aware our father sadly passed away on the 28th March 2009. Our mother gifted Malcolm 50% of the following farming assets with effect from 1st April 2009 to start the new partnership between the two of them.

Livestock
Feedstuffs
Agricultural Machinery
Tools & Equipment
Cash in the Farm bank account
Any farming debtors and creditors

For the avoidance of doubt, the freehold of Upper Latherford Farm, including the land, house and buildings remain in the sole possession of Mrs RM Gill. These assets do not form part of the farming partnership (hence we wouldn’t expect to see any farm buildings in the new partnership accounts).

The partnership has the following features:

There is no intention for mom to draw a salary from the partnership.

It is the intention that Malcolm draws a salary, initially set at £12,000pa, albeit subject to variation from time to time.

Any profit or loss remaining after accounting for such salary will then be divided equally between the partners.

Mom may make drawings from time to time to cover her living expenses but only to the extent that she has capital in the partnership and are not part of the gift to Malcolm. The farm account pays most of Mom’s household expenses (heating oil, Electric, Water, Insurance, Phone, car, general maintenance) which we estimate at £6,500pa.....

Whilst the new farming partnership does not own any of the farm buildings in existence as at 1st April 2009, any new buildings or significant improvements paid for from the new farming partnership after 1st April 2009 will be assets of the new partnership. (There haven't been any so far).

In summary, given the comments above, we would expect to see:-

Opening capital of £88,278 (£133,684 less Farm buildings) as at 1st April 2009, split equally.

A loss to have been recorded in each of 2010 and 2011 after accounting for Malcolm's salary.

Capital for both partners to have reduced due to losses, but Mom's capital to have reduced further through drawings for household expenses.

We would be grateful if the 2011 accounts could be restated on the basis described above and this methodology carried forward for the 2012 accounts in due course.

.....”

16. The New Farming Partnership's accounts were adjusted to increase Malcolm's capital account to reflect the assets gifted to him by his mother.
17. Rosemary died on 2nd September 2012. Her last Will, which was dated 8th April 1997, provided that, in the event that Gerald pre-deceased her,:
 - i) Adrian and Malcolm be appointed executors and trustees of her estate; and
 - ii) All her property be divided amongst the children in equal shares.
18. Fisher German were instructed to provide the executors with valuations of the Farm and the assets of the New Farming Partnership. Fisher German's report was dated 22 November 2012 and the Executive Summary stated:

ASSETS OWNED PERSONALLY BY ROSEMARY GILL:	Upper Latherford Farm Calf Heath Wolverhampton WV10 7DX (including the farmhouse, buildings and 67.33 acres)
ASSETS OWNED BY MESSRS G A & R M GILL (FARM PARTNERSHIP):	Single Farm Payment Entitlements Vehicles and Farm machinery Live and dead stock

SITUATION:	The property is situated to the south of the village of Calf Heath, Staffordshire.
DESCRIPTION:	A working farm with traditional brick-built farmhouse, traditional and more modern buildings and 64.89 acres of pastureland. The assets owned by the Partnership comprise vehicles, farm machinery, Single Farm Payment entitlements and live and dead stock.
BASIS OF VALUATION:	Market Value.
PURPOSE OF VALUATION:	For taxation purposes
DATE OF VALUATION:	2 September 2012
MARKET VALUE SUMMARY:	
Assets owned personally by Rosemary Gill:	Upper Latherford Farm: £900,000 (farmhouse, farm buildings and land)
Assets owned by Messrs GA&RM Gill (Farm Partnership):	Single Farm Payment entitlements: £5,250 Vehicles, farm machinery, tools and equipment: £54,250 Live and dead stock: £16,975

19. Probate of the Will was granted to Adrian and Malcolm on 18 January 2013.
20. Initially, there was no pressing need to complete the administration of the estate, and Malcolm continued in occupation of the Farm land, although the Farm house remained vacant.
21. On 22 October 2015, Fishers Solicitors (“*Fishers*”) wrote to Adrian in the following terms:

“Re: Proprietary Estoppel Claim by Mr Malcolm Gill

We have been instructed by Mr Malcolm Gill (herein referred to as "Malcolm") in relation to his proprietary estoppel claim for ownership of Upper Latherford Farm. We write this letter to you as the co-executor of the late Rosemary Martha Gill (herein referred to as "Mrs Gill").....

Background Facts

In September of 2012 Mrs Gill died leaving her entire estate, which previously had been co-owned with Mr Gerald Arthur Gill (herein referred to as "Mr Gill"), to her four children in equal shares, being Mr Adrian Gill, Malcolm, Mr Nigel Gill and Mrs Pam Robinson, Mrs Rosemary Gill's last will and testament being 8 April 1997.

It is our client's assertion that he is the only sibling within the family to become a professional farmer and the only sibling to support his parents in their farming business. Furthermore from around 2008 Mr and Mrs Gill relied heavily upon Malcolm's support as he was the only sibling capable of offering substantive support.

It is Malcolm's assertion that he has been working on Upper Latherford Farm (herein referred to as 'the farm') for in excess of thirty years. In approximately the year 2000 Mr Gill was diagnosed with prostate cancer and as a result of this Malcolm substantively increased his duties on the farm in order to help and support his parents.

Malcolm accepts that in the first instance his primary focus was his car business; however, by 2005 the farm had become his primary business focus and over the next number of years the car business greatly reduced.

From an early stage both Mr and Mrs Gill indicated their support for Malcolm to continue the farm as a working farm; for instance in the 1970s Mr Gill rented a second farm, being Landy Wood Farm for arable purposes. At this time Malcolm was 14 years of age and in order to support his father he regularly missed school to carry out the majority of tractor work on both farms.

At this stage Mr Gill had indicated to Malcolm that he was the farmer within the family.

In or around 1982 Malcolm built his workshop on the farm with reassurances from both Mr and Mrs Gill that he would always be part of the farm and the farm would be his.

During the 1990s Malcolm would regularly work at 2.00 am in relation to his car business so that he could finish early and go and work on the farm later on in the day.

Over the years and particularly since the early 2000s Mr and Mrs Gill made a number of assertions which directly promised the entirety of the farm to Malcolm or insinuated that the farm was to be his upon their deaths. For instance, between September 1997 and 2001 when Malcolm was back living at the farm various conversations occurred in which it was suggested that the tannery be converted into a live in property. Malcolm asserts that these conversations arose as Mr and Mrs Gill did not want Malcolm to leave. On one occasion Mrs Gill asserted to our client in relation to converting the tannery "*it will be yours one day, then you can do what you like with it*". Similar assertions were made by both our client's parents

during this period in the hope that our client would remain permanently on the farm.

In or around Autumn 2001 Malcolm was helping Mrs Gill plant trees in the far field and asked why the trees were being planted. She stated that she was not planning them for her *“they are for you. You are the next generation”*. Malcolm asserts that Mrs Gill was planting the trees for the benefit of the farm in years to come and accepting that the farm would then be in the hands of Malcolm.

In the early 2000s Sunday was a regular sheep sorting day for the butchers. Both Mr and Mrs Gill were fully aware that Malcolm was not keen on this work and not keen on working with sheep. As a result both Mr and Mrs Gill would regularly assert that *'when the farm is yours you can keep what animals you like.'*

Mr Gill had acquired a second hand farm building and in the summer of 2008 he requested that Malcolm promise to erect the barn. His reasons for doing so, according to Mr Gill, were that our client was going to need another cattle shed, stating that Malcolm will need *'more cattle if you are going to make a go of it'*. As a result of this promise planning permission was sought to erect the farm building on behalf of Malcolm.

By 2008 Mr Malcolm Gill's involvement in the farm was such that he was, in effect, a de facto owner of the farm. When asking his parents regarding finances they would regularly assert that the farm was his and he did not need their permission.

In or around Autumn 2008 Mr Gill and our client attended a viewing day at South and Stubbs dispersal sale at Teddesley Hall farm. Malcolm and Mr Gill attended the viewing day with the intention of purchasing a bailer and trailer. During the day Malcolm was cautious in purchasing any item and Mr Gill became frustrated asserting to Malcolm *'you don't have to ask me if you want something for the farm. You will have to make all your own decisions when I am gone'*. Our client believes this quote is a further indication that the farm was being passed to our client and that he has to make the decisions.

It is Malcolm's assertion that the above quotes or references were promises by his parents that when they died he would inherit the farm. Malcolm asserts that neither of his parents when talking about the farm made a distinction between the farm being the freehold interest in the land and the farm as a going concern.

After Mr Gill died attempts were made to create a partnership agreement, separating the farm activities from the farm itself. These agreements were never signed by either Malcolm or Mrs Gill as they did not reflect the promises that were made to Malcolm or the reality of the situation. It is Malcolm's assertion that such agreements were unnecessary as he was currently involved in the running of the farm, had for a number of years

been a signatory to the accounts, and Mrs Gill's intention with regard to the farm going forward was clearly known to our client.

.....

Relief Claimed

A declaration from the court that Malcolm is the sole legal owner of the farm due to proprietary estoppel.

.....”

22. Malcolm subsequently abandoned his proprietary estoppel claim and, on 16 February 2017, Fishers wrote to Adrian’s solicitors, MFG Solicitors, to confirm that:

“Re: Sale of Upper Latherford Farm

Please take note that we have taken instructions from our client which are as follows:

1. Our client will cease to hold himself out as an Executor or act as an Executor. Our client confirms he will sign any document necessary for the disposal of the Estate's assets as required by the remaining Executor, Mr Adrian Gill.. If necessary our client will sign an undertaking to this effect.

2. Our client agrees to the immediate sale of Upper Latherford Farm. He proposes that the sale proceeds on the basis of Bagshaws' recent report.

3. Our client intends to vacate the farm as soon as reasonably practicable. All personal items shall be removed within 21 days and our client will cease trading from the farm within 21 days. In relation to farm machinery and farm animals, these will be removed within 6-8 weeks.

4. Our client accepts he is financially liable to the estate in relation to partnership assets. In addition to this he agrees to pay any rent which is lawfully due. We propose you particularise in full the extent of the financial liability our Client has in relation to partnership assets, interim rent or on any other basis.

.....”

23. The report from Bagshaws referred to in Fishers’ letter was dated 6 February 2017 and stated as follows:

“.....

[28.1] Commentary

.....

In the event that I was requested to put the farm on the market with vacant possession I would recommend lotting of the holding so that the farmhouse, yard and buildings could be offered with a smaller acreage to make it a more manageable and appealing size to a larger sector of the market. It remains a strong market for country property with land, especially that which is realistically priced, offers scope for improvement or adaptation and additionally offers some scope for alternative use of modern buildings such as the subject property. The appeal of purchasing a rural smallholding generally is to take advantage of the rural setting but also the control of one's surroundings and the privacy and other benefits that can offer. The inherent value of Latherford Farm is that it is privately located down a driveway with no near neighbours and its land surrounding it in a ring fence. This offers considerable privacy and control, not only from a residential perspective but also from the perspective of wanting to run a business from the yard and building which might otherwise generate complaints from other near neighbours. For this reason, I would not recommend the lotting of the farmhouse away from the yard and buildings as the residential value of the house would be devalued by the separation of the farmyard and buildings from its control. The yard and buildings are in close proximity to the farmhouse and indeed the access way passes immediately past the gable end of the farmhouse and past the kitchen window. Potential unknown future uses and the previous history of the site for haulage, plant and machinery hire etc, would cause great concern to any residential buyer of the farmhouse that the yard may become noisy, busy, unsightly etc. In order to improve the attractiveness of the setting of the farmhouse, I would anticipate that a purchaser would in any event demolish the timber clad building which sits to the rear of the farmhouse and south of the traditional barn and also possibly the former pig shed which runs parallel to the farmhouse garden. This is particularly unattractive when in the garden, which otherwise has pleasant views to the south over the adjoining paddocks down to the brook. If a purchaser had a particular use for the pig shed, then it may well remain but be re-clad with timber boarding for example on the farmhouse side to improve its appearance.

In order to maximise the value of a holding of this nature it is vital to market the whole of the property at one time, for sale as a whole or in lots. This allows greater flexibility for purchasers to determine what they would prefer to purchase which in turn would usually maximise their offer for the amount of property they are wishing to buy. In my experience of marketing farms which have been lotted, it is common that the final arrangement of lots and boundaries are altered from those which are initially proposed following a response of offers from the market which might not be predicted from the outset. Flexibility to be able to rearrange the 'jigsaw' of the lots enables the value overall to be maximised. For this reason, it is essential that land is not sold off prior [to] marketing the remainder of the farm.

.....”

24. During the spring of 2017, Bagshaws marketed the Farm for sale in lots, and bids were accepted from Mr & Mrs Marshall for lots 1,2 & 5 and from Mr Davies for lots 3 & 4. The bids totalled £1.237m.
25. The title to the Farm was unregistered, and so voluntary registration was undertaken in anticipation of the proposed sales. During this process, the conveyancing solicitors acting for the estate on those sales, Willans LLP, identified the Legal Charge, which was protected by an entry at the Land Charges Registry.
26. On 29 September 2017, Willans wrote to Malcolm in the following terms:

“Upper Latherford Farm Wolverhampton

As you know the sale of Upper Latherford Farm cannot proceed until the question of the legal charge of Upper Latherford Farm by your parents to your grandmother dated 6 August 1982 has been resolved.

I have been discussing this with your solicitor, Kevin Lynch. He advised he held the original charge, and that you or he had access to other papers from your parents' business in the 1980's (which might contain evidence of repayment of the debts secured by the charge).

Kevin Lynch was also aware that you had a conflict of interest in that you are one of your parents' personal representatives together with your brother, Adrian, and also (in your capacity as deputy Nora Mary Kirk who in turn was one of your grandmother's personal representatives) you are effectively one of your grandmother's personal representatives by default. It was suggested this could be resolved by you applying to the court for you to be discharged as Nora Kirk's deputy.

I have attempted to resolve these issues with Kevin Lynch over the past month. The most email I received from him was that he was no longer instructed to incur any further time in correspondence or telephone conversations with me on these issues.

Notwithstanding that the issues need to be resolved urgently to allow the sale of Upper Latherford Farm to proceed. I would be grateful if you could address the following points as soon as possible:-

1. The original legal charge of 6 August 1982 (or a solicitor's certified copy) be supplied to me so I can update reference to it on the registered title of Upper Latherford Farm (currently only an uncertified copy has been produced). If the original is sent to me I will return it to you or whichever solicitors currently hold it once I have lodged a certified copy at the Land Registry
2. Confirm what papers you hold or have available from your parents' partnership and mother's estate and where these can be inspected.

3. Confirm what papers you have from Nora Kirk relating to your grandmother's estate;

4. That you agree that an application to the Court can be made by you and Adrian as your parents' personal representatives for the legal charge of 6 August 1982 to be removed from the registers of title to Upper Latherford Farm. This could be on the basis that the debts secured by the charges have been repaid; or if no such evidence can be found or the Court is unwilling to make such an order on the evidence available then the sum equivalent to the secured debt and accrued interest on it is paid into Court to be held as a fund to discharge the debt secured by the charge and reference to the charge can be removed from the title to Upper Latherford Farm. The monies paid into Court can be distributed once it has been ascertained whether the debt secured by the charge has been repaid or not.

5. What steps you are taking for discharge of you as Nora Kirk's deputy.

.....”

27. On 3 November 2017, Adrian, Nigel and Pamela applied to the Court for an order removing Malcolm as executor of the estate. Adrian's supporting witness statement dated 2 November 2017 stated as follows:

“[27] The legal title to the farm is unregistered. In preparation for its conveyance it became apparent that included with the deeds to the farm is [the Legal Charge]..... Mrs M Kirk passed away in January 1987. The underlying £8,000 secured loan is very old and has almost certainly been redeemed either before Mrs M Kirk's death or during the administration of her estate. Miss Nora Kirk (daughter of Mrs M Kirk and aunt to the Claimants and Defendant) is an executrix and the primary beneficiary to Mrs M Kirk's estate. However Miss Kirk is now elderly and no longer has mental capacity to conduct her own affairs so is unable to give receipt for it and enable the transactions for the sale of the farm to proceed.

[28.] The Defendant is the court appointed deputy for Miss Kirk and has refused to give receipt on her behalf. Whether or not he was right to take that course, he has used the situation to cause yet more delay. On 17th August 2017 after the Defendant indicated that he would not give receipt on behalf of Miss Kirk, his solicitors indicated that the Defendant would apply to remove himself as her deputy and would allow inspection of relevant papers in their possession, to help determine whether the underlying loan had been repaid. Over two months later this has still not occurred, despite an offer from the Claimants that cash sufficient to cover the original loan and accrued interest can be held in escrow pending clarification as to whether the loan has already been settled or not.

[29.] As a result of this yet further delay there is now a very substantial risk that the sale of lots 1 and 2 will be lost.

[30.] The continued delay caused by the Defendant, his untenable position of occupation of an office as deputy for someone who at present is

maintaining a claim against the estate or will be the defendant to a claim that the Estate needs to bring, and the risk of losing the sale of the two most valuable parts of the farm, combined with the fact that the Defendant has already agreed to take no substantive actions as executor of the estate of the Deceased but simply to sign such documents as he is asked by me as his co-executor to sign, mean that he should be removed as an executor of the estate of the Deceased.

.....”

28. In his witness statement dated 1 December 2017 and filed in response to the application for his removal as executor, Malcolm stated:

“.....

[4] I do not agree that the Claimants' application should be granted in its current form. It is my opinion that the Court ought to remove Adrian as an executor as a result of his actions as set out below. I do accept that I ought to be replaced by another representative under Section 50 (1) (a) of the Administration of Justice Act 1985 due to a conflict of interest. If the Court is not prepared to make the above order it would be my opinion that the Court ought to exercise its discretion and have me replaced as an executor by a third party to ensure proper oversight of the administration of the estate. It would be my opinion that the appointed executor ought to be a solicitor.

.....

[16] In relation to the mortgage I have attempted to discover if it was paid off at some point by reviewing the partnerships historic accounts however the accounts in my possession do not go back to the 1980's and my oldest account in 1990 does not mention the loan.

[17] I believe that Adrian may have these historic accounts and may know whether the loan was repaid. The discovery of this mortgage has led me to believe that the Partnership has owned the entirety of the Farm since the 1980's. I am now convinced that Adrian knew this and has undertaken various acts over the years in order to hide this from me. The continuation of such actions are a clear violation of his duty as an executor and for this alone he ought to be removed. His actions include but are not limited to:

- a. The failure to disclose the facts behind the loan of 1982.
- b. The attempt to amend the Partnership accounts to remove the existence of the partnership owning the Farm. These accounts have now been reinstated.
- c. The various attempts to create Partnership accounts which remove the Farm from the Partnership's ownership.

[18] I am currently in the process of having my case passed to a barrister so that particulars of claim can be drawn up so that the Court can make a declaration as to the Partnerships interest in the Farm.....

.....”

29. On 19 April 2018 and following a contested hearing, District Judge Musgrave made orders that Malcolm (i) be removed as co-executor of the estate and (ii) pay his siblings’ costs of the application summarily assessed in the sum of £16,789.39.
30. On 29 November 2018, Adrian issued possession proceedings against Malcolm on the ground that, despite the assurances given in his then solicitors’ letter dated 16 February 2017 that Malcolm would vacate the Farm within 6 – 8 weeks, Malcolm had failed to do so.
31. On 20 December 2018, Malcolm gave an undertaking to vacate the Farm by 31 March 2019.
32. On 24 January 2019, Malcolm brought a counterclaim that the freehold interest in the Farm was a partnership asset and not a personal asset of Rosemary forming part of her estate. It was alleged as part of the counterclaim that Adrian had sought to manipulate the accounts for the New Farming Partnership by concealing the true ownership of the Farm. In his supporting witness statement dated 22 August 2019, Malcolm stated;

“[35] I believe that [Adrian’s] attempts to have me and my mother sign up to those partnership agreements, which attempted to separate the [Farm] from the rest of the business were motivated by [Adrian’s] knowledge and understanding, even at that time, that my mother believed that I had taken over my father’s half share in the business, and in particular, in the Farm.”

33. During the course of the trial, Malcolm abandoned his counterclaim. As a result, on 27 February 2020, HHJ McCahill QC made the following declaration/order:

“IT IS DECLARED THAT:

1. The property known as Upper Latherford Farm, Shareshill, Wolverhampton WV10 7DX and registered at HM Land Registry with the title number SF625094 is held by the Claimant legally and beneficially upon trust for the estate of Rosemary Martha Gill (Deceased) upon the terms of her last will dated 8 April 1997.

AND BY CONSENT IT IS ORDERED THAT:

2. The counterclaim is dismissed.
3. The Defendant shall pay the Claimant's costs of the action in the amount of the Claimant's budgeted costs of £76,606.87 + VAT, being £91,928.24.

4. The Claimant's said costs shall be paid by the Defendant by way of deduction from the Defendant's entitlement to share in the estate of Rosemary Martha Gill (Deceased).”
34. Once Malcolm had vacated the Farm and his counterclaim had been dismissed, Adrian says that he was then able, in his capacity as sole executor, to re-focus his efforts on selling the Farm. However, there remained the issue over the Legal Charge. That particular issue is summarised as follows:
- i) Following the death of Martha, any continuing benefit of the Legal Charge passed by her Will to Rosemary’s sisters, Nora and Patricia;
 - ii) Following the deaths of Nora (in December 2017) and Patricia, any continuing benefit of the Legal Charge passed to their beneficiaries;
 - iii) The residuary beneficiaries under Nora’s Will were Malcolm and Pamela, who were therefore entitled each to ¼ share in any potential proceeds under the Legal Charge;
 - iv) It was assumed that Patricia left the entirety of her estate to her husband, Geoff, who was also therefore entitled to ½ share in any potential proceeds under the Legal Charge;
 - v) The surviving co-executors of Martha’s Will were Messrs Frisby and Hampton, who had been respectively Martha’s solicitor and accountant;
 - vi) The co-executors of Nora’s Will were Ansons LLP and Malcolm;
 - vii) In the absence of any evidence that the secured debt had been repaid, Willans had recommended that a sum equivalent to the debt and accrued interest be paid into Court to discharge the debt so that the charge could be removed from the title. However, an issue then arose as to whether the secured debt attracted simple interest (giving a total redemption figure of some £40,000) or compound interest (giving a total redemption figure of some £400,000); and
 - viii) In the absence of agreement as to the correct method of calculating the interest, Messrs Frisby and Hampton were not prepared to release the Legal Charge.
35. By letter dated 26 May 2020, Adrian provided an update to his siblings on the administration of the estate:

“After such a long delay in the administration of the Estate I am delighted to be able to advise you that I have now agreed a sale of the Farm and will, as a consequence, be able to make distributions to beneficiaries.

You will be aware that the much needed sale of the Farm has been delayed due to the dispute over Estate property and also due to the existence of the legal charge (the Charge) which relates to a historic loan between our

parents and our grandmother. I have made repeated attempts to negotiate the release of the Charge with Messrs Frisby & Hampton, the surviving executors of our grandmother's estate. However, they have been unable to achieve a consensus amongst their beneficiaries and as a result continue to refuse to release the Charge despite my offer of cash placed in escrow.

Sale of the Farm

The Farm has recently been valued by Bagshaws at £1.175m on an "open market" basis. Naturally any such valuation is predicated on the assumption that the Charge has been removed as it is only then that the Farm could be placed on the open market.

Nigel has agreed to purchase the Farm at its full current open market value despite the fact that the Charge remains in place albeit with a small element of consideration deferred until the Charge is removed. That is a bold move on his behalf as it is not normal to purchase property with such an encumbrance in place. His willingness to do so allows me to break the current deadlock and progress the administration of the Estate which, I believe, is very good news for all of us as beneficiaries.

Nigel is entitled to a quarter share of the beneficial ownership of the Farm under the terms of Mom's will. The sale to Nigel of the balance has been agreed at a price of £881,250 representing three quarters of £1.175m and is made up as follows:-

- £82,500 deposit received on exchange of contracts
- £742,500 to be paid at completion
- £56,250 final payment from Nigel when the Charge is eventually removed from the Farm's registered title.

Contracts have been exchanged and I anticipate that completion will take place in the next few weeks.

It is good to know that the Farm will remain whole and not be divided up as may otherwise have happened. It is also very satisfying to know that the Farm will stay in the family for the next generation. I am sure that our late parents would have much appreciated both of these aspects. However, I should stress that any sentimentality carries no weight in my decision making with respect to the sale which has been negotiated at full market value, despite the Charge, in accordance with professional advice.

Furthermore, I believe the Estate is fortunate to have received Nigel 's offer and that he is ready and willing to proceed with the purchase of the whole Farm. Indeed previous potential purchasers have either moved on or in the case of Mr & Mrs Marshall have recently reconfirmed that their interest remains only in part of the Farm and then unsurprisingly strictly on the basis that the Charge has been removed.

By accepting Nigel's offer I am acting in accordance with my duty to advance the administration of the Estate and am also protecting it from significant potential market uncertainty at the present time. Specifically the risk that property values might fall in the economic aftermath of the coronavirus pandemic. Achieving a sale of the Farm also fundamentally improves the financial position of the Estate which has otherwise found itself in a precarious position.

.....”

36. The sale of the Farm to Nigel completed on 5 June 2020.
37. Following the death of Mr Frisby, the sole surviving executor of Martha's estate, Mr Hampton, took a more pragmatic stance regarding the Legal Charge. In a witness statement dated 5 August 2020, Mr Hampton stated:

“.....

[6] I understand that extensive searches have been made through family records but no specific record can be traced concerning repayment of the loan secured by the Legal Charge.....

[7] The majority and most persuasive opinion is that in all probability the loan secured by the Legal Charge was discharged before the Deceased died on 14 January 1987. Recent advice obtained by Mr A J Gill asserts that, in any event, the debt is now statute barred by the lapse of time.

[8] From the facts set out above, I believe it most likely that the debt secured by the Legal Charge has long since been repaid and even if not then it is no longer recoverable and therefore the Legal Charge should be discharged. Accordingly, I am happy to join in an application to the Land Registry to have the charge removed from the title to Upper Latherford Farm.”

38. By way of letter dated 20 October 2020, Adrian wrote to his siblings with a further update regarding the administration of the estate:

“Further to my previous letters relating to the sale of Upper Latherford Farm (the Farm) I am pleased to advise that the historic loan has now been resolved and the Charge has been removed. Consequently the Estate has now received the deferred consideration which completes the sale proceeds for the Farm. With that matter cleared up we can now progress towards winding up the Estate.

Resolution of the historic loan

You will recall that in 2017 we discovered a historic loan which had been created in 1982 as part of the family arrangement when our grandmother assented the Farm to our parents. The loan, originally in the sum of £8,000 from our grandmother to our parents, was secured by a puisne mortgage otherwise known as the Charge against the Farm.

The Estate has always maintained that it was most likely that the historic loan had been settled in the distant past but that the removal of the Charge had unfortunately been overlooked. There are many factors which lead to that conclusion not least that our mother would not have failed to repay a loan to her own mother and sisters. Despite considerable efforts the Estate has not been able to locate any directly relevant historic documents. Our parent's historic papers, which may well have shed some light on the matter, went missing from the farmhouse sometime in the period between October 2012 and January 2017.

The Estate had been in dialogue with Mr Frisby and Mr Hampton, the then surviving executors of our grandmother's estate, in an attempt to resolve the loan and release the Charge. However, despite their efforts they were unable to achieve a consensus amongst their beneficiaries and as a result had refused to release the Charge despite the Estate's offer of cash placed in escrow with solicitors pending a determination of the loan.

We recently learned that Mr Frisby had sadly passed away which left Mr Hampton as the sole surviving executor of our grandmother's estate.

Mr Hampton reviewed the situation and concluded that the loan was most likely settled long ago and even if not it was in any event now irrecoverable. He agreed that there is no outstanding liability for any payment from the Estate to our grandmother's estate and the Charge was therefore obsolete and should be removed. Furthermore, as it is now agreed that no principal liability outstands the vexed question of what type of interest (simple or compound) should apply to the loan is no longer pertinent. That will be welcome news to the beneficiaries of the Estate.

Removal of the Charge

Mr Hampton signed the release document which has been filed at the Land Registry and they have now removed the Charge from the Farm's registered title.

It is pleasing that the historic loan and Charge have been resolved in this way without all the additional expense and delay that would otherwise have been inevitable had the Estate needed to approach the Courts for a determination.

Consequently the final £56,250 tranche of the Farm's purchase price has been paid to the Estate as previously agreed and as detailed in my letters dated 26 May and 8 June 2020. Those proceeds are to be allocated equally between Pam, Malcolm and Adrian by way of additional entitlements of £18,750 each.

Pam and Adrian have received their additional entitlements by way of a second interim distribution. Given that Malcolm has already disputed the calculation of his previous interim distribution and has also declined to present the cheque issued to him in that respect his additional £18,750

entitlement will be attributed to him but held in suspense pending agreement of his account with the Estate.

Winding up the Estate

All of the Estate's assets have now been realised with the balance held in cash. The net cash position is currently approximately £146,000 and will reduce to a projected final balance of approximately £116,000 when all pending transactions are processed. Please see the table at Appendix 1 which reconciles the current cash position to that as at 30 June 2020 as recorded in the most recent Estate accounts.

In principle that final balance can be divided equally and paid out to the 4 of us as residuary beneficiaries and the administration of the Estate will then be complete.

However, we first need to reach an agreement with Malcolm as to his account with the Estate. It would not be appropriate to make any further distributions until that matter has been resolved and the above mentioned cash balance will therefore be held in reserve within the Estate for the time being.

Agreement of Malcolm's account with the Estate

The Estate notes the contents of FBC Manby Bowdler's letter dated 15 June 2020 and Malcolm's letters received on the 25 July and 26 August 2020. In FBC's letter Malcolm disputes various amounts deducted from his interim distribution. In his own letters he goes further and claims significant additional payments due to him from the Estate. The Estate has responded to Malcolm's letters seeking clarification on the points he raises and asking for copies of receipts where relevant. Hopefully that dialogue will lead to an agreement of his account with the Estate.

The removal of the Charge significantly reduces Malcolm's potential liability on that matter as the Estate has been able to mitigate what otherwise would have been significant additional costs. The previously shared schedule of his potential additional liabilities has been updated accordingly and is attached at Appendix 2.

The Estate will use its best endeavours to resolve this matter amicably and efficiently and has no desire to incur further significant legal fees which would otherwise erode value within the Estate. However, all beneficiaries should be aware that the potential for such costs continues to exist and very much depends on the nature of Malcolm's response.

.....”

39. Malcolm failed to agree the final estate accounts, and so Adrian issued the present proceedings on 5 July 2021.

40. On 10 September 2021, Adrian issued Particulars of Claim alleging losses caused/monies owed by Malcolm to the estate in the total amount of £167,083 (subsequently reduced to the amount of £166,983). The claim largely comprises:
- i) £56,300 – being the difference in value between the net proceeds realised by the sale of the Farm to Nigel in 2020 and the net proceeds of sale that would otherwise have been achieved had the sales to Mr & Mrs Marshall and Mr Davies completed in 2017;
 - ii) £25,362 – being the outstanding balance of the value of Rosemary’s share in the New Farming Partnership at the time it was dissolved on her death;
 - iii) £73,200 – being rent due to the estate as a result of Malcolm’s occupation of the Farm from 1 April 2013 to 31 March 2019; and
 - iv) Interest of £10,349 on items ii) and iii) above.
41. On 29 September 2021, Malcolm issued a counterclaim in the amount of £421,328, which included loss of earnings of £169,000 for the period from 2 September 2012 to 31 March 2019. However, the counterclaim was automatically struck out as a result of Malcolm having failed to pay the correct court fee in breach of an unless order made by District Judge Rich TD on 14 December 2021.
42. Malcolm has represented himself throughout these proceedings, and at the Pre-Trial Review hearing, on 28 September 2022, I told Malcolm that in order to reinstate his counterclaim he would need to make an application to the Court supported by evidence for relief from sanctions. Malcolm said that he intended to seek legal advice upon making an application not only for relief from sanctions but also for permission to amend his counterclaim. However, no such applications were made. As a result, this is a trial of the claim only.

The evidence

43. The trial bundle extended to 2969 pages. The length of the bundle reflected the fact that the parties were unable to agree the contents, and so all or virtually all the disclosed documents were included. The bundle was not very easy to navigate, and there was a good deal of duplication.
44. I heard evidence from Adrian, Pamela, Nigel and Malcolm over the course of the whole 3 listed days. As a result, there was not enough time for closing oral submissions. Therefore, I directed the sequential serving/filing of written closing submissions with counsel for Adrian going first so that Malcolm was given the opportunity of addressing the points that he needed to respond to.
45. I am unable in the course of this judgment to refer to all the evidence/argument relied upon by the parties, but I have taken it all into account in reaching my decisions.

Assessment of the witnesses

Indicators of unsatisfactory witness evidence

46. In *Painter v Hutchinson [2007] EWHC 758 (Ch)* at [3], Lewison J (as he then was) identified a non-exhaustive list of indicators of unsatisfactory witness evidence including:
- i) Evasive and argumentative answers;
 - ii) Tangential speeches avoiding the questions;
 - iii) Blaming legal advisers for documentation (statements of case and witness statements);
 - iv) Disclosure and evidence shortcomings;
 - v) Self-contradiction;
 - vi) Internal inconsistency;
 - vii) Shifting case;
 - viii) New evidence; and
 - ix) Selective disclosure.

Malcolm

47. I accept that Malcolm must have found it very difficult and challenging giving evidence whilst also representing himself. In addition, and even after arrangements were made for a volunteer from Support Through Court to attend the trial and provide Malcolm with some support, I was struck by how isolated he was when sitting in court with his siblings ranged against him. However, after making due allowances for those difficulties/challenges, I did not find Malcolm to be a reliable witness. There is, at the very heart of Malcolm's case, a striking internal inconsistency.
48. He claimed throughout his evidence and submissions that he is the innocent victim, who has been deprived of his true inheritance as a result of the machinations of Adrian, who in particular has deliberately delayed and manipulated the administration of the estate so as to assist Nigel in acquiring the Farm at a substantial undervalue, which does not properly reflect the true development potential of the Farm.
49. However,:
- i) The professional surveyors instructed to value the Farm were agreed that any development potential was extremely limited. South and Stubbs, instructed by Malcolm, were of the opinion that "the benefit of obtaining planning consent was marginal", whilst Bagshaws, instructed on behalf

of the estate, were of the opinion that there was “only nominal hope value”;

- ii) Why would Adrian be motivated to benefit Nigel, not only at the expense of Malcolm, but also at the expense of Pamela and indeed Adrian himself? It makes absolutely no sense; and
 - iii) There was a total lack of acknowledgment, acceptance or indeed insight shown by Malcolm that the substantial delay in completing the administration of the estate has in very large part been attributable to his own repeated and unsuccessful claims that he was entitled to the whole of the Farm or a substantially greater share of the Farm than his siblings.
50. Malcolm’s unjustified sense of victimhood and entitlement strongly influenced and tainted his evidence.

Adrian, Pamela and Nigel

51. At times when giving oral evidence, Adrian had a tendency to give long speeches, which was perhaps unsurprising bearing in mind the very serious allegations of misconduct that have been made against him by Malcolm not just in these proceedings, but also in the previous proceedings. As a result, I had to intervene to direct Adrian to focus on answering the specific question that he had been asked. That said, I did not find that either his evidence or that of Pamela and Nigel was tainted to any meaningful extent by indicators of unreliable witness evidence.
52. However, I am very conscious of the fact that all the witnesses were seeking to recall events and conversations that took place over, and going back, many years, which necessarily gives rise to particular problems. Apart from the fact that, quite understandably, it is often difficult for witnesses to remember accurately what happened or what was said so long ago, witnesses can easily persuade themselves that the accounts they now give are the correct ones.
53. In *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm), Leggatt J, as he then was, made the following observations about the interference with human memory introduced by the court process itself:

“[19.] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party’s lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.”

[20.] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."

54. I consider that there is a risk of interference with the memories of Adrian, Pamela and Nigel bearing in mind that they cannot be regarded as detached or objective observers, since:
- i) They have a direct financial interest in the outcome of the proceedings; and
 - ii) Inevitably they must have felt a degree of anger, frustration and resentment as a result of Malcolm's repeated, prolonged and ultimately failed attempts to disinherit them.

They were, in my judgment, subject to powerful biases.

55. In all the circumstances, whilst I found Adrian, Pamela and Nigel to be honest witnesses, I have nevertheless treated their evidence with a degree of caution.

Overall approach

56. The party who asserts a disputed fact must prove that, more likely than not, it is true. In making my findings of disputed facts, I have placed particular reliance upon (i) the undisputed facts (ii) the contemporary undisputed documents in the case, and (iii) the overall probabilities.

The issues for determination at the trial of the claim

Is Malcolm liable for the losses allegedly suffered by the estate by reason of him preventing the removal of the Legal Charge?

Evidence

57. It was the evidence of Adrian, Pamela and Nigel that the loan underlying the Legal Charge would undoubtedly have been settled long before Martha died. Malcolm also knew that to be true, but instead he chose to use the existence of the Legal Charge, when discovered, to “hold the Estate to ransom.” By way of illustration, Pamela stated the following in her written evidence:

[6] I have never understood the Defendant's motives for his actions over the last 6 years, effectively trying to overturn our mother's Will and take everything for himself. He was always set to benefit from a larger share of our family's wealth than anyone else. He was entitled to a quarter share of our mother's Estate, to a half share of our aunt's estate and was given a half share of the farming business. He was always destined to be generously treated but has presumably now wasted much of his inheritance on unnecessary legal costs whilst pursuing his own misguided agenda.

[7] His stance in relation to the Charge is a good, albeit painful, example of his mischief. I have no doubt that if the Defendant were being honest that he would agree with the rest of us i.e. that it is inconceivable that our mother, who was a most principled lady, would have failed to repay a loan to her own mother and sisters.

[8] I recall how hard our parents worked in the 1980's in order to raise every penny they could so that they could meet the agreement they had reached with our grandmother over the transfer of the Farm. It is also inconceivable that our Aunt Nora and Aunt Pat wouldn't have mentioned that money was still owing to them after our grandmother's death had that have been the case. The Defendant knows that just as well as I do.

[9] The Defendant's stance in relation to the Charge has been an utter disgrace and he ought to be reprimanded for insulting our mother's memory just to pursue his own selfish agenda of blocking the sale of the Farm. In the process he has wilfully held up the administration of both this estate and our aunt's estate at a significant cost to all involved. He continues to abuse his position as an executor of our aunt's estate which has been ongoing since 2017 and I fear that might yet end up in court too.

[10] The fact that we cannot find any documentary evidence for the repayment of the Charge is no surprise given that the Defendant took possession of all of our mother's and our aunt's historic papers. I suspect that he has concealed anything that doesn't suit him.

.....”

58. It was the evidence of Malcolm that:

- i) In the 1990's Rosemary told him about the loan from Martha, although she did not want to discuss the details. Nevertheless, Malcolm knew at that time that something was still owed;
- ii) However, Malcolm only became aware of the Legal Charge when told about it by Mr Marshall on 14 August 2017 whilst visiting the Farm.

Malcolm told Mr Marshall that he must be mistaken and that he would look into it. Malcolm telephoned Adrian and Willans to discuss the issue, but they would not talk to him;

- iii) Malcolm then checked Nora's papers and there located the original Legal Charge. On 17 August 2017, Malcolm went to see his solicitors, Fishers. On their advice, he signed the sale contracts. Thereafter, he remained neutral as to (i) whether the loan had been repaid and (ii) the amount of interest payable on the loan;
- iv) It now transpires that Adrian had known about the existence of the Legal Charge in 2009 when he checked the title and boundaries of the Farm on the register, but he concealed it from Malcolm;
- v) In addition, as recent events have shown, Adrian was able to remove the Legal Charge very easily when he wanted. The whole charade surrounding the Legal Charge between 2017 and 2020 was completely unnecessary and was entirely intended to cost Malcolm money and to place the blame on him for the lost sales; and
- vi) Many letters were sent to Adrian by the prospective purchasers chasing completion, but he failed to respond until finally telephoning Mr Marshall in 2020 to tell him that he had sold the Farm to Nigel.

Analysis and conclusion

59. The Particulars of Claim allege that:

“[66] In refusing to agree to the removal of the Charge from the Land Registry and/or in refusing to accept that any interest due under the loan secured by the Charge was simple and could be covered by setting aside the amount of the capital and simple interest from the proceeds of sale pending determination of the issue, Malcolm acted in breach of his duties as an executor of [Rosemary's] estate by;

- (a) Failing to preserve the assets of the estate;
- (b) Failing to deal properly with the assets of the estate;
- (c) Failing to apply the assets of the estate for the benefit of the beneficiaries in accordance with the terms of the Will;
- (d) Seeking to profit from his office, save as permitted by the terms of the Will; and
- (e) Placing himself in a position where his interests conflicted with the interests of the estate.”

60. Irrespective of Adrian's date of knowledge, Malcolm on his own evidence was aware by 14 August 2017 at the latest (a) of the existence of the Legal Charge and (b) that the registration of the Legal Charge was preventing the proposed sales from completing.

61. However, I do not consider that Malcolm can reasonably be criticised for refusing to agree to the removal of the Legal Charge when first discovered by the conveyancing solicitors. The difficult position that Malcolm then found himself in, and through no fault of his own, is demonstrated by the exchange of correspondence between the respective solicitors at the time:

i) On 17 August 2017, Fishers emailed Willans in the following terms:-

“.....

In relation to the mortgage, however, we do have a problem. I note in your email yesterday you assert Mr Malcolm Gill will have a conflict of interest if he was to attempt to sue the estate on behalf of his aunt, who he is deputy for. In my view this conflict of interest has already arisen as if he was to sign any indemnity, or acknowledgment that the debt is not payable or indeed do nothing, he would be acting in a conflict of interests in relation to his duty to his aunt.

.....

As far as I can see my client has little or no option but to apply to the court to remove himself as deputy and seek the court to appoint a new deputy on behalf of his aunt. This newly appointed deputy can then sign any indemnity or acknowledgment that the debt has been paid in full or indeed bring legal action against the estate.

.....

In relation to Mr Adrian Gill's assertion that the debt was paid some time prior to 1987, we recognise his assertion. However, I am sure you can appreciate that this is not sufficient to allow Mr Gill to sign an indemnity or an acknowledgment that his aunt has no claim against the estate in his capacity as the deputy.

.....

As stated above, my client, going forward does not intend to deal with the debt that may or may not be owing to his aunt due to the conflict. However, I am not convinced as much as Adrian Gill is that the debt has been repaid in full.

.....

Considering the above and our client's continuous duty both as an executor and a deputy to his aunt, I am authorised to release the signed contracts and transfers on the condition that Willans provides an undertaking that all sale proceeds are retained in an escrow account...until the matter regarding the repayment of the mortgage is settled with a soon to be appointed deputy.

.....”

ii) On 18 August 2017, Willans responded:

“.....

There is no objection on Adrian Gill’s part to the proceeds of sale being placed in an escrow account as you suggest.....

The difficulty is that the legal charge will remain in place on registers of title to the property and the buyer will acquire the property subject to that charge. As the personal representatives of the late [Martha] cannot be traced, or unwilling to act (or in the case of Malcolm Gill are conflicted) release of that charge cannot be obtained nor a binding agreement not to enforce it against any of the purchasers of the property.

.....

You mentioned the possibility of applying to the court for an order that the legal charge be removed from title to the property, but I assume it will be contingent upon evidence being obtained that the sums secured by it have been paid.....

I foresee it may be difficult to achieve a sale of any part of [the] Farm.....

.....”

62. In summary, Malcolm was quite properly unable, in his capacity as Nora’s deputy, to agree to the removal of the Legal Charge in circumstances where (i) there was an absence of any evidence that the underlying loan had been repaid and (ii) there was a clear conflict of interests when also acting as executor of Rosemary’s estate. Malcolm was simply acting in accordance with the clear legal advice that he had then received.

63. On 22 September 2017, Fishers wrote to Willans in the following terms:

“I understand you would like to speak to me in relation to the sale of the farm. I have contacted my client for an update and have been asked by Malcolm.... to request that all future contact with you ceases and if you have any concerns or questions relating to the sale then please do that directly through my client.....”

64. Therefore, on 29 September 2017, Willans wrote directly to Malcolm inviting him to confirm urgently, and in order to allow the sales to proceed,:

i) What steps he had taken to discharge his appointment as Nora’s deputy; and

- ii) That he was agreeable, in his capacity as co-executor of the estate, to joining with Adrian in making an application to the court to remove the Legal Charge from the title of the Farm, but subject to paying into court an amount equivalent to the secured debt and accrued interest thereon.
65. However, Malcolm failed to respond to Willans' letter of 29 September 2017. As a result, Adrian, Pamela and Nigel applied on 3 November 2017 for an order removing Malcolm as co-executor of the estate.
66. In my judgment, Malcolm's failure (i) to resign as Nora's deputy as he had promised thereby removing the source of his conflicts of interest and (ii) to join Adrian in making an application to the Court to discharge the Legal Charge, did constitute breaches of his duties as executor of Rosemary's estate (failing to deal properly with the assets of the estate and placing himself in a position of conflict). However, I do not find that those breaches were causative of the lost sales, since Malcolm was removed from office some 3 months later thereby enabling Adrian in his capacity as sole executor to seek to progress the proposed sales.
67. However, there then arose the thorny issue of the applicable method for calculating the interest payable on the secured loan. By that time, Nora had died and:
- i) Malcolm had been appointed co-executor of Nora's estate alongside Ansons; and
 - ii) Malcolm and Pamela were the residuary beneficiaries under Nora's estate and as a result each entitled to 25% of any proceeds due under the Legal Charge.
68. It was Malcolm's evidence that he did not stand in the way of the proposed sales. He remained entirely neutral as to the calculation of interest and simply left it to the legal experts to resolve.
69. On 9 July 2018, Adrian wrote to Messrs Frisby and Hampton in the following terms:

“.....

Loan Interest

I have taken legal advice on the loan and charge document and am advised that the loan can only attract simple interest and not compound interest due to the absence of any compounding language in the loan document.

With an 11% per annum interest rate over 36 years we arrive at a redemption figure of £8,000 capital plus £31,680 interest totalling £39,680.

Clearly if compound interest were to apply that total would be much greater. I understand that Anson's have also sought counsel's opinion on the loan document and they too believe that only simple interest can be applied.

Obviously that is a matter for them to confirm with you and no doubt you will have your own opinion and take your own advice.

Way Forward

As surviving executors of Martha Kirk's estate I need your decision as to whether you believe said loan remains due from my mother's estate.

More pressing I need to agree the release of the charge at the land registry to enable the sale of the Farm to proceed.

I am happy for an appropriate sum, in the order of £40,000, to be placed in suspense between respective firms of solicitors if that will help secure the release of the charge to enable the sale to proceed.

We can then undertake whatever further research is required to finally determine whether the loan is still outstanding or not and release proceeds to the relevant parties in due course.

.....”

70. On 20 July 2018, Mr Frisby emailed Adrian in the following terms:

“.....

[Willans] has now put forward a practical proposal. His proposal is that simple interest is applied to the principal sum and that the calculated amount is held in escrow pending resolution of the repayment or otherwise of the mortgage.

Neither myself nor Mr Hampton wish to be obstructive. However, it is clear that neither of us have the benefit or protection of professional indemnity insurance and in the circumstances it would be foolish to make any decision without professional advice.....

.....”

71. On 11 September 2018, Ansons, in their capacity as co-executors of Nora's estate, emailed Adrian to confirm that they “were entirely satisfied with Counsel's written opinion” and “Malcolm has seen a copy of that advice.”

72. On 21 September 2018, Ansons emailed Adrian to confirm that:

“.....

As far as the way ahead is concerned I have not – as yet - been able to obtain our co-executor's express agreement on the position with interest on the loan. Ansons have no doubt that the principal sum is subject to simple interest. I have asked the co-executor for his final instructions and told him to return to me no later than Thursday 27 September.....

If Malcolm is ultimately of the view that compound interest is applicable here (at this point I must emphasise that Ansons does not share that view and that he has not expressly stated that compound interest should apply) then a declaration of the Court will be necessary to determine the position with interest on the principal sum.....

.....”

73. On 21 October 2019, Messrs Frisby and Hampton, in their capacities as executors of Martha’s estate and upon legal advice, wrote to the ultimate beneficiaries of the estate in the following terms;

“.....

Going forward

We are now being pressed (understandably) by Mr Gill in his capacity as the executor of his late mother’s estate to make a decision about releasing the legal charge so as to enable the sale of the farm to proceed. It is our opinion that we cannot reasonably object to removal of the legal charge, subject to the estate not being prejudiced by its removal.

As you will see from Mr Gill’s letter, he is convinced for the reasons he clearly sets out, that the loan has been repaid. However, pending the determination of that issue his estate is offering to hold back from the sale proceeds of the farm, sufficient to cover the repayment of the original loan and a further sum to cover the interest element of the loan. The figure suggested is circa £40,000.

We are aware that there have been some discussions as to whether the loan would be subject to compound interest or simple interest. For the avoidance of doubt the suggested figure of £40,000 is based on a simple interest calculation. Mr Gill makes clear in his letter, that he believes that the simple basis is the appropriate way of calculating the interest, if the loan remains outstanding. We agree. However, if you disagree can you please inform us and provide the basis/ authority for stating that it should be compound interest.

Subject to your comments (if any) on interest we would propose to release the charge on the basis that the original loan and an appropriate amount of interest (calculated on a simple basis) be held on a solicitors suspense account pending the issue of the loan repayment being resolved.

Your views as to how the issue of whether the loan has been repaid or not would be welcome and actively sought. However, it does appear to us that in the absence of actual evidence (written or oral) or agreement between all the ultimate beneficiaries, then this is a matter which will have to be resolved by a court and all the costs/time associated with a court application. This in our opinion is not the preferred way forward.

Alternative way forward

If all the ultimate beneficiaries are satisfied that the loan has in fact been repaid, then this matter can be resolved fairly quickly and without the need of a suspense account or a court application. We would suggest that the ultimate beneficiaries enter into a deed of settlement and release in respect of the legal charge. This would resolve the issue. However, all the ultimate beneficiaries would need to agree.

Our request from you

We have been informed that a purchaser for the farm has been found and therefore it is now important for this issue to be resolved swiftly. This means that we must make a decision in respect of the request by Mr A Gill to release the legal charge on the farm to facilitate its sale.

We have set above what we believe to be the current position, the options open to you and our views.

In the circumstances we would ask that you let us have your views on the situation and your preferred way forward. Given that a purchaser for the farm has been found can we please have your response to this letter within the next 28 days.”

74. Therefore, it is clear that:
- i) It was the issue over the applicable method for calculating interest that prevented the removal of the Legal Charge and thereby completion of the proposed sales. In his written evidence, Adrian stated that he had maintained a continuing dialogue with Mr & Mrs Marshall, who confirmed as late as March 2020 that they remained interested in purchasing lots 1, 2 and 5, which were the most valuable parts of the Farm, but strictly on the basis that the Legal Charge had been removed; and
 - ii) The proposed sales were lost despite all the legal experts being in agreement that simple interest, and not compound interest, applied to the underlying loan.
75. On balance, and for the following primary reasons, I find that rather than being neutral and led by the legal experts, Malcolm exploited this issue as a means to frustrate the proposed sales:
- i) In September 2018, Ansons had confirmed to Adrian that (a) they had no doubt that the principal sum was subject to simple interest, (b) Malcolm had seen counsel’s opinion to that effect obtained on behalf of Nora’s estate and (c) Malcolm had been asked in his capacity as co-executor of Nora’s estate to confirm his final instructions regarding the method of calculating the loan interest. On 5 October 2018, Ansons emailed Adrian by way of update as follows (with my emphasis added):

“

Unfortunately, I have still not been able to make any progress following my discussion with Malcolm yesterday evening. I do not propose to obtain any further opinions from Counsel. Ansons' position is clear.

One issue that I do need to address once again is Ansons relationship with Malcolm. You have questioned that relationship once again in your email. Ansons and Malcolm are co-executors in your Aunt's Estate. Malcolm is not therefore a client as such and he has willingly carried out his duties as an executor of that estate..... Ansons have little choice but to act with Malcolm in our capacity as a co-executor..... Currently, there is a difference of opinion between Malcolm and Ansons in connection with the loan and I trust that you will accept that there is very little that Ansons can do to progress matters at this stage. I have been open and honest at all times. Certain matters are of course governed by legal privilege, but both Tracey and I have been more than open with both you and your sister. We were in a position to make progress some time ago. Sadly, that is not the case for others. I hope that clarifies our position once again.”;

- ii) On 3 June 2019, the solicitors appointed to represent the surviving executors of Martha’s estate emailed Adrian in the following terms (with my emphasis added):

“Both Mr Frisby and his co-executor are agreed upon writing to the beneficiaries in the terms of our telephone conversation.

I am awaiting approval of the draft letter from Mr Frisby. However, on Friday of last week your brother visited Mr Frisby at his home unannounced and made clear to Mr Frisby that he believed that the loan was not repaid and that he had received counsels advice indicating that interest on the loan amount should be compound. Clearly, this was not something that Mr Frisby was expecting or indeed wanted. I understand the conversation was short and my contact details were given to your brother. As yet your brother has not contacted me.

Do you have any correspondence passing between your solicitor and your brothers solicitor dealing with the issue of how interest is going to be treated and/or the repayment of the loan. If so, it would be helpful if that could be disclosed to Mr Frisby so that he can have a better understanding of the position your brother is taking via his lawyers.”

- iii) In October 2019, Messrs Frisby and Hampton wrote to Malcolm in his capacity as one of the ultimate beneficiaries of Martha’s estate asking, “if you disagree [that the simple basis is the appropriate way of calculating the interest] can you please inform us and provide the basis/ authority for stating that it should be compound interest.” Malcolm responded by letter dated 14 November 2019, but without actually

addressing that specific question. Rather Malcolm appears to have seen it as yet another opportunity to criticise Adrian;

- iv) It is clear from Malcolm's past conduct that he was desperate to retain for himself at least part of the Farm. That past conduct included –
 - a) Raising, pursuing and then abandoning a claim for proprietary estoppel;
 - b) Raising, pursuing and then abandoning a claim that the Farm was a partnership asset; and
 - c) Despite assurances given in his then solicitors' letter dated 16 February 2017 that Malcolm would vacate the Farm within 6 – 8 weeks, Malcolm continued in occupation for another 2 years.
- v) In my judgment, it is inherently likely that in maintaining that the loan underlying the Legal Charge was subject to compound interest, Malcolm was solely motivated by a desire to prevent the sale of the Farm. It is striking in my judgment that in purely monetary terms Malcolm was no better off even if compound interest was payable. By way of illustration, assuming that the proceeds of sale of the Farm were £1 million. If simple interest applied, so that the amount to redeem the Legal Charge was £40,000, then Malcolm would receive £250,000 being 25% of his mother's net estate (25% of 960,000 = £240,000) plus 50% of his aunt's estate (50% of ½ share in £40,000 = £10,000). If compound interest applied, so that the amount to redeem the Legal Charge was £400,000, then Malcolm would still only receive £250,000 being 25% of his mother's net estate (25% of £600,000 = £150,000) plus 50% of his aunt's estate (50% of ½ share of £400,000 = £100,000).

76. However, the issue over the method of calculating the loan interest and the unsuccessful attempts to resolve that issue pending the proposed sales arose only after Malcolm had been removed as an executor of Rosemary's estate on 19 April 2018. Therefore, whilst I have found that Malcolm exploited that issue as a means to frustrate the proposed sales, he did so in his capacities as either co-executor of Nora's estate or as an ultimate beneficiary of Martha's estate, but not at a time when he continued to act as executor of Rosemary's estate. In those circumstances, the pleaded claim, which is that the lost sales were caused by alleged breaches of Malcolm's duties as executor of Rosemary's estate, must fail.

Is Malcolm liable to the estate for a further sum in respect of Rosemary's share in the New Farming Partnership?

77. It is not disputed that:

- i) The New Farming Partnership was automatically dissolved on the death of Rosemary – s.33 of the Partnership Act 1890 (“*the 1890 Act*”);

- ii) As the surviving partner, Malcolm was responsible for winding up the New Farming Partnership – s. 38 of the 1890 Act;
 - iii) The amount due to Rosemary’s estate in respect of her interest in the New Farming Partnership is a debt owed by Malcolm to the estate – s.43 of the 1890 Act; and
 - iv) A payment of £16,000 was previously made by Malcolm into the executors’ bank account in respect of Rosemary’s interest in the New Farming Partnership.
78. It is Adrian’s case that the value of Rosemary’s interest in the New Farming Partnership at the date of dissolution was £41,362 leaving a balance due of £25,362. It is Malcolm’s case that Rosemary’s interest was valued at £22,000 leaving a balance due of £6,000.
79. It is submitted by Malcolm that Adrian’s figure is not reliable because:
- i) Adrian, in December 2012, produced retrospective accounts on accountants’ headed paper using his altered accounts for the revenue;
 - ii) The partnership accounts that Adrian had altered with the accountant on 24 July 2012, just before Mr Owen retired, were concealed from Malcolm;
 - iii) Those accounts had to be corrected by the newly appointed accountants, Baldwins;
 - iv) The capital accounts for 2 September 2012 prepared by Baldwins record £51,361 for Rosemary and £68,364 for Malcolm;
 - v) Drawings calculated by Baldwins for the period of Malcom looking after the Farm from 2013 to 2018 for maintenance and repairs totals £21,539; and
 - vi) The amount Adrian is claiming for machinery is incorrect because it was never agreed or even discussed what was owned by Malcolm personally, or Elford Plant Hire or the New Farming Partnership. The only account of machinery done by Adrian and disclosed into these proceedings was from December 2012 and it is completely incorrect.
80. I found Malcolm’s submissions in this regard to be irrelevant, confused and/or confusing.
81. Malcolm claimed that Adrian had sought to alter the accounts for the New Farming Partnership, but this was essentially an attempt by Malcolm to relitigate his earlier claim that the Farm was a partnership asset, a claim that was ultimately dismissed by the Court.
82. Malcolm claimed that following Rosemary’s death, he maintained the Farm on behalf of the estate and in his capacity as executor. However, it is quite clear from the contemporary documents that, following the death of Rosemary,

Malcolm continued farming as a sole trader for his own benefit whilst using the estate's share of the New Farming Partnership assets to do so. By way of example, on 24 October 2012, Malcolm completed and signed as "accurate" a New Business Questionnaire to be submitted to the Rural Payments Agency in which he expressly and variously confirmed that:

- i) The "new business was formed" on "02/09/2012";
- ii) The "trading status of the business" was "SOLE TRADER";
- iii) "Death of Mrs R.M. Gill (Mother) on 2.9.12. Business will continue with Mr MK Gill as Sole Proprietor"; and
- iv) "Mrs R.M. Gill's Death. Mr M K Gill will continue with 100% share".

83. *Lindley & Banks on Partnership*, Twenty-First Edition, states that:

"[26-03] Section 43 of the Partnership Act 1890 provides that the amount due to the personal representatives of a deceased partner in respect of his share is a debt accruing at the date of death. Although the application of this section is not open to doubt where it is recognised, either expressly or by implication, that the partnership will continue notwithstanding a partner's death, the position is less clear where the death brings about a general dissolution.

In my judgment, as Malcolm undoubtedly elected to continue the business following the death of Rosemary, rather than winding-up the business by way of a sale of the New Farming Partnership assets, then this had the effect of crystallising a statutory debt owed by Malcolm to Rosemary's estate and calculated by reference to the value of Rosemary's interest in the New Farming Partnership accruing at the date of her death.

84. Therefore, the issue to be determined is what was the value of Rosemary's interest in the New Farming Partnership at the date of her death. Adrian has calculated the value as follows:

Capital attributed to Mrs RM Gill	£22,602 (1)
Adjustments	
plus Single Farm Payment Entitlements	+£5,250 (2)
plus adjusted value of Plant & Machinery	+£48,950 (3)
less book value of Plant & Machinery	<u>-£16,680 (4)</u>
Net Adjustments	£37,520
Mrs Gill's 50% share of uplift	<u>£18,760</u>
Value of the Estate's share of Partnership assets	£41,362

Notes:

- (1) Partnership accounts dated 31 March 2013
- (2) Probate valuation prepared by Fisher German

(3) Partnership accounts dated 31 March 2013

(4) Partnership accounts dated 31 March 2013

85. In my judgment, Adrian's calculation is reliable based as it is upon both (i) the Probate valuation prepared on the joint instructions of Adrian and Malcolm and (ii) the New Farming Partnership accounts for the year ended 31 March 2013, which were prepared on the instructions of Malcolm. I am reinforced in that view by the fact that Fishers, presumably on instructions from Malcolm, wrote to Adrian's solicitors on 10 April 2017 attaching a list of the machinery owned by the New Farming Partnership and confirming that the amount of "£41,102 [was] payable to the estate relating to the partnership." That figure is almost precisely the same figure calculated separately by Adrian.
86. In the circumstances, I find that the balance outstanding of the debt owed by Malcolm to the estate in respect of Rosemary's interest in the New Farming Partnership is £25,362.

Is Malcolm liable to the estate for rent by reason of his occupation of the Farm?

87. It is not disputed that Malcolm occupied the Farm from the death of Rosemary until 31 March 2019.
88. It is submitted by Malcolm that:
- i) Adrian made it very clear to Malcolm that his duties as executor were to look after the Farm and to receive no wage for doing so but only the cost of repairs and maintenance;
 - ii) No rent was ever agreed or even considered by Malcolm as it would not have been possible to make such payments in the circumstances;
 - iii) It became clear in 2014 to Malcolm that Adrian had no intentions of selling the Farm or letting Malcolm have his share of the Farm. In Adrian's letter of 2 May 2015 he stated that he did not want to sell or rent any part of the Farm due to the costs and practical challenges of doing so; and
 - iv) On 22 May 2015 because Adrian was doing nothing towards selling or renting the Farm, Malcolm instructed South and Stubbs to start the sales process but Adrian disagreed and made Malcolm pay the bill. Adrian then went on to market the Farm in 2017 with the same firm.
89. In my judgment Malcolm's submissions are a misguided attempt to rewrite history.
90. I have already determined that Malcolm chose to continue the farming business as a sole trader for his own benefit, and not in some form of representative capacity on behalf of the estate.
91. On 20 August 2014, Adrian wrote to his siblings in the following terms:

“I have been back in touch with Charles Meynell of Fisher German who completed the original probate valuation. He has reviewed his file and reassessed against current market conditions. He has just called me with his views.

He came to an overall value of c.£1,050k which compares with the £900k valuation from September 2012. He said that, in his view, the main reason for the increase is the improvement in land values whereas the house will not have changed much (he says residential transaction volumes have picked up but values haven't moved significantly for this type of property).

.....

His strong advice is that if we are going to put it on the market then we should move quickly to get the photos taken and initial marketing done asap whilst it is looking at it's best in the summer months.

Please let me know your views – so that we can try to agree on next steps.

.....”

92. On 21 December 2014, Adrian again wrote to his siblings in the following terms and in an attempt to progress the administration of the estate:

“.....

It is important that the four of us can agree on the next steps in relation to the Farm. I have had conversations with each of you and there has been some discussion as to the way forward.

In an attempt to summarise the options, I thought it might be helpful to put the following in writing:-

Some options have already been discussed and discounted:-

A. Sell the farmhouse and attached brick barns alone. Agents have indicated values (£450-500k) that we find unacceptable.

B. Prepare the house for letting. Need to spend £5-£10k and rental returns not particularly attractive.

Options to be considered:-

1. Market the whole Farm in Spring 2015. Market it in lots and be prepared to sell whatever combination attracts best value. Guide Price £1.2m. (albeit Fisher German indicated £1,050k)

2. Market the house + significant other land and buildings in Spring 2015. Agents have indicated that we need to achieve good separation from any

residual farmyard if we want to maximise the potential of the house site.....

.....

3. Keep the Farm whole for the next 3 years and agree to market it as a whole at that future time. During that 3 year period a lease would be agreed for the farmland, with rental being paid into the executors account. The rent would need to be negotiated and agreed.....

It is to be expected that each of us might have different views. From recent conversations I think it is fair to say that Pam and Nigel have a clear preference for Option 1, followed by Options 2 and 3 in that order. Malcolm has previously indicated that he is not keen on selling the whole Farm at this time as he would prefer to keep farming for the time being.

I am flexible and will aim to fit in with the consensus.

I would ask each of you to confirm your preferences, so that we can attempt to agree a way forward.

.....”

93. Malcolm responded by letter dated 7 April 2015 in the following terms:

“Comments and clarification as requested on the 21 December 2014

Agreement made at the farm in October 2012, all four of us present.

1. House to be rented by April 2013.
2. Planning for buildings and development to maximise value.
3. Malcolm to continue farming.
4. House expenses, Malcolm to pay heating, water, Executors to pay council tax and insurance.
5. Malcolm not to use or live in the farm house, Pam and Adrian were concerned about me becoming a squatter.

Liabilities

1. Adrian - care
2. Pam - services, this wasn't ever discussed.
3. Nigel - Elford Ltd had a settlement in 2009. Nigel, I believe had a settlement in 2012.
4. Malcolm - out of pocket expenses and wages as agreed.
5. Farm business was previously agreed, Clearly this needs to be discussed again.

Concerns

1. I did make a practical suggestion with regard to the land that would have enabled Pam to have her money straight away but this was discounted without discussion

2. I personally have no wish or time to raise extra money as I am currently looking after our auntie, I can pay for house expenses as I have done for many years, but I have no objections if others wish to raise money.

Suggestions.

Sell farm house, Rent the farm house, Rent 8 stables, Grazing or stewardship scheme, car repair workshop, buildings passed for plant hire and HGV operating centre all could make a considerable income

Advice

1. Things tend to attract market values when they are for sale, I must advise against inflating professional values with hope value as this can only lead to disappointment.
2. We may find it beneficial to consult a solicitor. Knowel and Mellor we're trusted by mum and dad and currently hold the farm deeds, to over see that things are done correctly and for the sale of property.

Urgent jobs

1. Insurance, we have technically had no house insurance what so ever for the past two years, this could have far reaching consequences.
2. Put the deeds into all four names. The executer's job is then finished. As executer, I was not paying attention. I will now address these matters. Hope these comments are helpful and clarify everything that has been asked.”

94. In his letter, Malcolm failed to address any of the 3 realistic options put forward by Adrian in order to deal with the Farm going forward, but instead took the opportunity to raise a number of past grievances including, very sadly, the payment of £11,500 made to Pamela for Rosemary’s care. It is not disputed that Pamela made a very significant financial sacrifice by taking early retirement in order to travel back to the UK and care for their mother in her final months. It was of course Rosemary’s expressed wish that she be cared for at home by her family.

95. Nevertheless, Adrian wrote again to Malcolm on 2 May 2015 in moderate, conciliatory and constructive terms including:

“- Malcolm, I am aware that you have an aspiration to own some land and buildings long term and I have, previously, indicated my willingness and flexibility to help you achieve that provided we can, at the same time, ensure all four beneficiaries are treated fairly. However, it is frustrating that we still don't have a proposal that seems workable.

Perhaps we have ended up where many people in the same situation would have started which is:-

- Invite any family member who wishes to own all or part of the Farm to put an offer, in writing, to the other 3, with the expectation that such an offer will be given full and respectful consideration.
- If such an offer is agreeable (presumably with some confidence of achieving our collective goal of £1.2m) then proceed accordingly.

- Should such an offer or offers be unacceptable then put the whole Farm on the market (suitably lotted) to establish it's full value.
- If our target price is achieved then proceed to sell.
- If not then back to square one and reconsider all options at that time.

Both Pam and Nigel have also responded to your letter and made it pretty clear that they now wish to see the whole Farm put on the market. In the absence of any other workable proposals, I agree with them.

I look forward to your responses to the questions above and your view on the way forward.”

96. Malcolm did instruct Stubbs & Stubbs to prepare a valuation, which was dated 22 May 2015. It is beyond coincidence that this was only some 3 weeks after Adrian’s letter seeking agreement on the way forward. Indeed, Malcolm admitted in his oral evidence that the purpose behind him obtaining the report was to try to get some values to see if the Farm could be divided so that Malcolm could make an offer to purchase at least part of the Farm. However, Malcolm did not then put forward any offer to purchase part of the Farm, as invited to do so by Adrian in his letter dated 2 May 2015. Malcolm’s response to Adrian’s letter was not to seek to agree a way forward, but rather, on 22 October 2015, to launch a proprietary estoppel claim for ownership of the whole of the Farm.
97. After Malcolm had finally abandoned his proprietary estoppel claim, his solicitors, Fishers, confirmed by letter dated 16 February 2017 that Malcolm would vacate the Farm within 6 to 8 weeks. However, Malcolm broke that promise and remained in occupation of the Farm forcing Adrian to issue possession proceedings against Malcolm on 29 November 2018. Contrary to Malcolm’s narrative that Adrian forced Malcolm to remain on the Farm in order to look after it on behalf of the estate without pay in some form of indentured servitude, the reality was that Adrian was compelled to take Court action to remove Malcolm from the Farm.
98. On balance, I find that:
 - i) Malcolm, while executor of the estate, was under a duty not to profit or otherwise benefit from estate property;
 - ii) Malcolm is liable to pay rent by reason of his occupation of the Farm whilst continuing the farming business as a sole trader for his own benefit. Indeed, in their letter dated 16 February 2017, Fishers admitted on behalf of Malcolm that he was liable to pay such rent;
 - iii) Adrian accepts that Malcolm ought to be afforded a grace period such that the claim for rent begins to run from 1 April 2013;
 - iv) However, in his letter dated 2 May 2015, Adrian acknowledged that “No one was in a rush to distribute Mom’s estate immediately after she passed away” although “from all our discussions and correspondence.. the weight of feeling is that something now needs to be agreed and done.” In his earlier letter dated 21 December 2014, Adrian had set out

the 3 options to be considered as the way forward, including “keeping the Farm whole...with rental being paid into the executors account.” Therefore, I find that the claim for rent ought fairly and properly to run from the date of that letter;

- v) Malcolm ceased to be an executor some 11 months before he finally vacated the Farm, but he nevertheless remained liable as a trespasser for damages in the form of mesne profits (being compensation payable by a trespasser for wrongly using another person’s land);
- vi) Bagshaws, on the joint instructions at the time of both Adrian and Malcolm, valued the market rent for the Farm, excluding the Farm house, at £12,200 per annum to 31 December 2016 and £12,000 per annum thereafter; and
- vii) Malcolm is therefore liable to the estate in the sum £51,644 (4.27 years).

Is Malcolm liable to account to the estate for the wayleave payments which he received in respect of the Farm?

- 99. It is not disputed that Western Power Distribution Limited (“**WPDL**”) were liable to make wayleave payments in respect of electricity poles supporting cables running across the Farm.
- 100. It is also not disputed that Malcolm received wayleave payments for the period 2 September 2012 to 31 March 2019 totalling £1,512. Those payments are evidenced by the payment advices issued by WPDL and copies of which are contained in the trial bundle.
- 101. In my judgment, Malcolm is liable to account to the estate for those payments.

Are any sums due to Malcolm from the estate in respect of the matters referred to in the draft final accounts?

- 102. Whilst Malcolm’s counterclaim has been struck out, Adrian has nevertheless accepted that Malcolm is entitled to be credited for certain items of expenditure, although the amounts to be credited for those items remain in dispute.

Plumbing and building repairs

- 103. Malcolm claims:
 - i) £2,900 for the cost of “repairs to stables in 2013...[which] consisted of roof stable doors new fascia and guttering, fit new lintel above window and repair brickwork. And to put new roof on the Dutch barn that was unusable and dangerous.”; and
 - ii) £950 in respect of 3 leaks, which required Malcolm to “remove skirting boards and plaster to repair heating pipes” and “remove the floor boards in the bedrooms”.

104. Adrian accepts that Malcolm carried out some repairs, although not to the extent claimed. In the absence of any receipts, Adrian has offered to credit Malcolm the combined sum of £300 for the cost of materials.
105. On balance, and for the following reasons, I find that Malcolm's claim is essentially for his time in carrying out any such repairs:
- i) The absence of any receipts for materials;
 - ii) The absence even of any itemised list of materials; and
 - iii) In an earlier handwritten note, which is headed "EXPENDITURE SINCE MOTHER'S DEATH", Malcolm was only claiming the cost of his "services", including in respect of the plumbing repairs, based upon a charge out rate of "£10 per hours". There was no claim for the cost of any materials, since "most of the materials...needed I could lay my hands on around the yard."
106. The relevant legal principles in relation to executors charging for their services is helpfully summarised in *Williams, Mortimer and Sunnucks*, 21st edition, at paragraphs 51.02, 51.03 and 51.09 as follows:
- i) In the absence of the Will containing a charging clause an executor is not entitled to be remunerated other than to be reimbursed out of pocket expenses. This rule is based upon the duty of an executor not to place himself in a position of conflicts of interest. If an executor was entitled to claim remuneration for his services, his personal interest would be in conflict with his duty to ensure that no improper charges were made; and
 - ii) There are exceptions to that general rule including, so far as relevant to the present claim, that the Court, even in the absence of a charging clause, may authorise remuneration. However, this power is to be exercised sparingly and in exceptional circumstances. The Court should, when deciding whether to exercise the power, have regard to all the circumstances of the case including the gains made by the beneficiaries as a result of the services provided.
107. In my judgment, it would be wholly unjust to authorise payment to Malcolm for the time he spent carrying out any repairs to the Farm house and/or buildings in circumstances where I have already determined that he put the estate to considerably greater expense by deliberately frustrating the proposed sales of the Farm. In those circumstances, I find that Malcolm is only entitled to be credited for the amounts offered by Adrian.

The workshop

108. Malcolm claims that, in 1985, he built at his own expense a steel framed workshop at the Farm. He further claims that he should be paid the replacement cost "now approx. £28,000" for the workshop and he invites the Court "to decide on a value."

109. However, there are a number of insurmountable problems with this particular claim as follows:

- i) Malcolm has produced no valuation evidence. Therefore, I am unable properly to value a workshop built some 40 years ago; and
- ii) Malcolm was given every opportunity to remove the workshop from the Farm in order to sell or relocate it. On 4 March 2020, shortly after Malcolm's counterclaim that the Farm was a partnership asset had been dismissed, Adrian served notices upon Malcolm pursuant to the Torts (Interference with Goods) Act 1977. In his oral evidence, Malcolm confirmed that he received those notices, which having confirmed that Adrian was an "involuntary bailee of the workshop" gave Malcolm two options -

"[1.] If you wish to keep the workshop then the Estate will arrange for it to be dismantled, loaded onto a trailer and delivered to a location of your choice, within a 10 mile radius of the Farm, where you will be responsible for offloading it. The Estate will charge you £1000 + VAT to contribute towards its costs of dismantling, loading and delivery.

[2.] Alternatively if you do not wish to keep the workshop or otherwise fail to respond to this notice within 4 weeks of the date of this notice then the bailee intends to sell or otherwise dispose of the workshop after that date. The full cost of any sale or disposal will be deducted from any sum accrued."

- iii) As Malcolm failed to respond to the notices, Adrian was then entitled to sell the workshop. He obtained an independent third party quote dated 2 June 2020 for the removal of the workshop at a cost of £6,380 plus vat. In his evidence, Adrian stated that he took the view that the cost of removal far outweighed any salvage value, and so he decided to accept in the alternative a cash offer from Nigel of £600 to keep the workshop on the Farm. I consider that was a reasonable and proper course of action for Adrian to have taken in the circumstances. The estate then paid the £600 proceeds of sale to Malcolm.

110. For all these reasons, I find that Malcolm has not established any entitlement to be paid any further sum in respect of the workshop.

Overall conclusion

111. The following sums are due from Malcolm to the estate:

- i) £25,362 being the outstanding balance of Rosemary's interest in the New Farming Partnership;
- ii) £51,644 in respect of rent of the Farm land and buildings;
- iii) £1,512 in respect of the wayleave payments; and

- iv) Interest on items i) and ii) above as claimed at 2% simple to the date of the sale of the Farm.
- 112. The above sums shall be deducted from Malcolm's entitlement to a share in the estate.
- 113. The estate's liability to Malcolm for the following sums shall be discharged by crediting to Malcolm in the estate accounts:
 - i) £240 (the agreed sum) in respect of heating oil;
 - ii) £100 in respect of repairs to the Farm house;
 - iii) £200 in respect of repairs to the Farm buildings; and
 - iv) £600 in respect of the workshop.
- 114. The draft final estate accounts are approved, subject to the adjustments required to give effect to:
 - i) This judgment; and
 - ii) Any order made in respect of the costs of these proceedings. At the hearing listed for the formal handing down of this judgment, I will hear costs arguments and then make a determination on that issue.