



Neutral Citation Number: [2019] EWHC 1427 (QB)

Appeal No.: 8BS0043C
Case No: D00EX224

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
HIGH COURT APPEAL CENTRE BRISTOL
ON APPEAL FROM THE EXETER COUNTY COURT
(Order of HHJ Gore QC dated 20 April 2018)

Bristol Civil Justice Centre
2 Redcliffe Street, Bristol BS1 6GR
(judgment handed down at the Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL)

Date: 7 June 2019

Before :

MR JUSTICE ANDREW BAKER

Between :

(1) **GRAHAM FREDERICK JOHN AULIFFE**
(2) **MICHAEL COMPSON AULIFFE**
(3) **SYLVIA ELAINE AULIFFE**

- and -
SUSAN ELLIS

**Claimants/
Respondents**

**Defendant/
Appellant**

Rebecca Cattermole (instructed by Michelmores LLP) for the Claimants/Respondents
William Batstone (instructed by Foot Anstey LLP) for the Defendant/Appellant

Hearing dates: 27, 28 March 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. David John Ellis was a farmer in Chagford, Devon. He died on 19 March 2013. Susan Ellis, the appellant, is his widow, sued as executrix of her late husband's will. From 1968 until he died, the land farmed by Mr Ellis included c.50 acres known as Teign Marsh Farm, Chagford ('Teign Marsh'). The respondents ('the Auliffes') are the freehold owners of Teign Marsh and were Mr Ellis' landlord in respect of that land. I was told they are distant relatives of the Ellis family, although the precise relationship was not explained or in evidence.
2. Mr and Mrs Ellis' son, Richard John Ellis, who is now 45 and married with a family of his own, worked Teign Marsh with his father. Since father and son both feature in this judgment, I shall refer to them as 'Mr Ellis' and 'Richard' respectively.
3. At the time of his death, and since at least 1999, Mr Ellis' right to farm Teign Marsh was under a tenancy falling under, and protected by, the Agricultural Holdings Act 1986 ('the 1986 Act'). The tenancy therefore continued from year to year from each anniversary date (in fact, Christmas Eve each year), unless validly terminated by notice. A tenancy governed by the 1986 Act is sometimes referred to as a 'three generation' tenancy because in principle, pursuant to the Act, it is capable of being passed on within a farming family upon the death of the tenant, but not more than twice. This appeal ultimately concerns Mrs Ellis', and Richard's, desire to keep Teign Marsh in the family despite failing to do that which the 1986 Act required for the tenancy to pass to Richard. That failure, they say, was the fault of their land agent, Timothy Garratt FRICS of Rendells, surveyors in Chagford, because, so they claim, he gave them bad advice on what had to be done. Whether that is right or not, on no view was the failure to act in accordance with the 1986 Act the fault of, or anything at all to do with, the Auliffes.
4. After a trial in the County Court at Exeter, HHJ Gore QC concluded that the tenancy had been validly terminated by the Auliffes. By Order dated 20 April 2018 upon the judgment delivered on that date, the judge granted possession to the Auliffes and awarded them mesne profits. Mrs Ellis appeals against that Order, with permission granted on the papers by Murray J on 17 October 2018. By agreement, the order for possession has not been enforced, and Mrs Ellis has continued to pay mesne profits at the rate awarded by HHJ Gore QC, pending the outcome of the appeal.
5. The judge held, and it was accepted for the appeal, that the Auliffes, acting by a solicitor (Paul Horton of FBC Manby Bowdler in Shrewsbury), sent to each of Mrs Ellis and Richard, by both first class post and registered post:
 - i) a notice to quit Teign Marsh addressed to the personal representatives of Mr Ellis, under cover of a letter dated 3 September 2013; and
 - ii) a letter dated 16 September 2013 with a copy of the acknowledgment of receipt Mr Horton had received from the office of the Public Trustee of a letter, also dated 3 September 2013, he had sent to that office enclosing the notice to quit. (Sending the notice to quit to the Public Trustee served to protect the Auliffes in case Mr Ellis had died intestate so that the tenancy

vested in the Public Trustee. The Auliffes did not know whether Mr Ellis had left a will; and indeed probate was granted to Mrs Ellis only quite some time later.)

6. Pursuant to Case G in Part I of Schedule 3 to the 1986 Act, the Auliffes were entitled to require Mr Ellis' personal representatives to quit Teign Marsh, ending the tenancy, so long as their notice to quit was given within three months of service on them of written notice of Mr Ellis' death. Written notice of Mr Ellis' death was given in a joint handwritten letter from Mrs Ellis and Richard dated 14 June 2013. That letter has been referred to in the proceedings as the 'trigger letter', since it triggered the Auliffes' time-limited entitlement to give notice to quit pursuant to Case G.
7. It was common ground that the notice to quit was proper, in form and content, so as to terminate the tenancy on Christmas Eve 2014, that it was timely served if delivered in the ordinary course of the post, and that since Mr Ellis died testate (irrespective of whether the Auliffes knew or could have known that at the time), the service of the notice on the Public Trustee could not be effective to terminate the tenancy.
8. It was common ground on the appeal that by the letters to Mrs Ellis and Richard dated 3 September 2013, the notice to quit was sent to the proper address: Greatastone Farm, Chagford, Devon TQ13 8DJ. That had been a major issue at trial, and indeed a primary focus of the trial, but it was resolved in favour of the Auliffes and there was no appeal on that point. It was a major issue, and prime focus, in the County Court because it was Mrs Ellis' case that none of the eight letters referred to in paragraph 5 above was received by her or Richard *because they had all been wrongly addressed*, so that they knew nothing of any notice to quit until late 2014 when it was followed up by the Auliffes with the termination date looming. Mrs Ellis' case was that the family home was Greatastones, Chagford, Devon TQ13 8DJ, and that post addressed (wrongly, she said) to 'Greatastone Farm' could go astray.
9. HHJ Gore QC was not persuaded that the notice to quit had not been delivered in the ordinary course, so as to be timely served. It was common ground that Mrs Ellis bore the burden of proof in that regard, the judge having found that the notice had been posted, properly addressed. It is clear from the judgment delivered by HHJ Gore QC that he did not believe, and so did not accept, Mrs Ellis' and Richard's evidence that the notice to quit had not been delivered in early September 2013.
10. The appeal sought to challenge the finding that Mrs Ellis had not discharged the burden of proving non-delivery, and the judge's conclusion in that regard that Mrs Ellis' and Richard's evidence was not to be believed. It sought a substituted finding that non-delivery had been proved, alternatively a re-trial.

The Statutory Context

11. The possibility of succession to the tenancy following Mr Ellis' death was governed by Part IV of the 1986 Act. Richard would contend that he was an 'eligible person' within s.36 of the Act, i.e. a close relative of Mr Ellis' whose only or principal source of livelihood derived from his agricultural work on Teign Marsh (or a larger agricultural unit of which Teign Marsh formed part) for at least five of the seven years up to Mr Ellis' death (whether as one continuous period of at least five years or a number of discontinuous periods of at least five years in aggregate) and who was not

himself the occupier of a commercial unit of agricultural land (see s.36(3)). If Richard was indeed an eligible person, then by s.36(1) he was entitled to apply to (as it now is) the First-tier Tribunal (Property Chamber) ('the Tribunal'), under s.39 of the Act, for a direction entitling him to a 1986 Act tenancy of Teign Marsh in succession.

12. By s.37(1) of the 1986 Act, that right to apply for a tenancy in succession does not apply if (broadly stated) there had been two successive prior successions – hence the 'three generation' tag to which I have already referred. Various other excluded cases are provided for by s.38.
13. Critically for the present case, s.39(1) of the 1986 Act requires that any application to the Tribunal for a tenancy in succession "*shall be made within the period of three months beginning with the day after the date of death*". No exceptions to that strict rule are provided for by the 1986 Act and neither the Tribunal nor any court has any power to waive or extend time.
14. Supplementing that basic regime, by s.41 of the 1986 Act a close relative of the deceased tenant who does not satisfy fully the definition of eligible person may apply to the Tribunal – but only within the same, strict, three-month period following the death – for a determination that he is to be treated as an eligible person.
15. That brings me to Case G in Part I of Schedule 3 to the 1986 Act. By s.26 of the Act, in summary, a tenant under a tenancy governed by the Act may, in general, serve a counter-notice to any notice to quit, the effect of which is that the notice to quit has no effect unless the Tribunal consents to its operation, which in turn requires the landlord to have specified in the notice to quit his reliance upon one or more of the specific bases for terminating the tenancy set out in s.27(3) and the Tribunal then to be satisfied as to the existence thereof, but that protection for the tenant does not apply to the 'Cases' set out in Part I of Schedule 3. Case G is the case where:

"The notice to quit is given–

- (a) following the death of ... the sole (or sole surviving) tenant ..., and*
- (b) not later than the end of the period of three months beginning with the date of any relevant notice,*

and it is stated in the notice to quit that it is given by reason of that person's death."

16. By paragraph 12(a) of Part II of Schedule 3, 'tenant' in Case G does not include an executor (etc.) deriving title from a tenant by operation of law, which prevents the vesting of property in (e.g.) an executor from creating a surviving 'tenant' whose existence might be said to prevent Case G from applying. By paragraph 12(b) of Part II of Schedule 3, the 'date of any relevant notice' in Case G is the date on which the landlord is served with written notice by or on behalf of an executor or administrator of the deceased tenant's estate informing the landlord of the death, or the date on which the landlord is given notice of a s.39 or s.41 application, and is the earlier of those dates if they both occur.

17. Thus, whilst the trigger letter started time running against the Auliffes to give notice to quit under Case G, if they wished to do so, it did nothing for Mrs Ellis (or Richard), in terms of succession. If Richard wished to succeed Mr Ellis under the 1986 Act, and if he did have grounds for a succession application under s.39 (either on its own or if combined with an application under s.41), then he needed to make his application to the Tribunal by 19 June 2013.
18. Richard having not done so, (a) he lost any possibility of succeeding to a tenancy of Teign Marsh under the 1986 Act on that date, some 2½ months before the Auliffes' notice to quit under Case G, and (b) that notice to quit was valid and effective unless it was not delivered within three months of receipt of the trigger letter by the Auliffes. If the notice to quit was not timely delivered, then Mr Ellis' tenancy, as now vested in Mrs Ellis as his executrix, continues, potentially in perpetuity if Mr Ellis' estate is never formally wound up, unless a ground for termination within s.27(3) of the 1986 Act should arise or one of the other Cases in Part I of Schedule 3 should come to apply.
19. The 1986 Act, by s.93, makes provision for the giving or serving of notice as follows:
- “(1) Any notice, request, demand or other instrument under this Act shall be duly given to or served on the person to or on whom it is to be given or served if it is delivered to him, or left at his proper address, or sent to him by post in a registered letter or by the recorded delivery service.
- ...
- (4) For the purposes of this section and of section 7 of the Interpretation Act 1978 (service by post), the proper address of any person to or on whom any such instrument is to be given or served shall, in the case of the secretary or clerk of an incorporated company or body, be that of the registered or principal office of the company or body, and in any other case be the last known address of the person in question.”
20. The notice to quit under Case G in the present case, therefore, was duly given because it was sent, correctly addressed, by registered post, so by s.7 of the Interpretation Act 1978, it was “deemed ..., unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post”. The letter with the notice to quit, dated 3 September 2013, was timely delivered if delivered in the ordinary course of post, as that would have been within three months of the trigger letter. Hence the common ground that it was for Mrs Ellis to prove that it was not so delivered; and as I have already indicated, her case in that regard was that in fact it was never delivered.

Appeals as to Primary Fact

21. I agree with Dingemans J's recent summary of the approach to appeals against findings of fact by trial judges, in *Walsh v Kirklees BC* [2019] EWHC 492 (QB), at [23]-[24]:

“23. It is well-established that appellate courts have to be very cautious in overturning findings of fact made by a trial judge, see *McGraddie v McGraddie*

[2013] UKSC 58; [2013] 1 WLR 2477. This is because trial judges have seen witnesses and take into account the whole "sea" of the evidence, rather than indulge in impermissible "island hopping", and because duplication of effort on appeal is undesirable and will increase costs and delay, see Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; [2014] ETMR 26.

24. Further appellate courts will only interfere if the trial judge was plainly wrong, Henderson v Foxworth Investments Ltd [2014] UKSC 41; [2014] 1 WLR 2600. This means making a finding of fact which had no basis in the evidence or, particularly relevant to this appeal, showing a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence so that the decision cannot reasonably be explained or justified."

22. Whilst this case does not turn on the precise formulation of the principles, I was referred to a number of other summaries, in particular in *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176 at [43], *Datec Electronics Holdings Ltd v UPS Ltd* [2007] UKHL 23, [2007] 1 WLR 1325 at [46] (referring in turn to *Manning v Stylianou* [2006] EWCA Civ 1655) and *Weymont v Place* [2015] EWCA Civ 289.
23. Mr Batstone also relied on a recent statement by Leggatt LJ, in a judgment with which Lewison LJ and Sir Colin Rimer agreed, in *R (SS (Sri Lanka)) v Secretary of State for the Home Department* [2018] EWCA Civ 1391 at [36], that "*Generally speaking, it is no longer considered that inability to assess the demeanour of witnesses puts appellate judges "in a permanent position of disadvantage as against the trial judge"*", because "*it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth.*" As Mr Batstone also noted, though, this is not a case in which the trial judge relied upon, or mentioned at all, matters of demeanour in concluding, as ultimately he did, that he did not feel able to trust the evidence of Mrs Ellis and Richard that the notice to quit letter was not delivered.
24. Demeanour in the witness box is indeed understood to be no general indicium of honesty. But that is not to say that judging issues of primary fact involves no element of reading witnesses as individuals, and one aspect of that is, or at least can be, evaluating the meaning or significance, if any, of variation in a witness's demeanour as between different topics or particular questions. Nor does treating demeanour as, in general, an unreliable guide to reliability mean that reading a written transcript is always, or even usually, as good as being at the trial.
25. For example, in the present case, a key part of the trial was cross-examination of Mrs Ellis on her claim that the wrong address had been used and therefore the notice to quit letter had gone astray. Reading that part of the transcript, I have no difficulty envisaging how it could have struck an impartial judge as rendering Mrs Ellis' evidence on the central factual issue quite unsatisfactory. Mr Batstone, who like Ms Cattermole appeared at trial as well as before me on the appeal, told me that was not how it struck him at the time; but he was not the judge. The submission on appeal would have to be that no impartial judge, considering the evidence rationally, dispassionately and as a whole, could have formed an adverse view as to the reliability of Mrs Ellis' claimed recollection that the notice to quit letter was never delivered.

26. It is also pertinent to bear in mind throughout that under our adversarial trial system, the task of the judge on disputed matters of fact is not, as such, to determine the truth (whatever might be meant by that anyway, an issue for philosophers perhaps as much as or more than for judges). It is to identify what needs to be proved, by whom, upon the basis of a correct identification and analysis of the legal rules governing the case; and then to form a judgment (doing so rationally, reasonably and impartially), for each such proposition of fact, as to whether the evidence presented at trial made what the party bearing the burden of proof says occurred appear – more probably than not – to be what occurred. The purpose of the court being to provide and manage a fair pre-trial process affording the parties a reasonable opportunity to formulate and present their cases, and to understand and respond to their opponents’, to conduct a fair trial, then to provide, upon the basis of that trial, an impartial, reasoned determination of the dispute on the basis of the cases presented at trial following that process, and not, as such, to discover, uncover, or declare ‘the truth’.
27. In this case, a correct identification and analysis of the legal rules governing the case meant that the Auliffes established their right to possession of Teign Marsh (and mesne profits for its continued occupation and use by Mrs Ellis as executrix of her late husband’s will) as from Christmas Eve 2014 by proving, as they did, the sending of the notice to quit, correctly addressed, in time to be received, if delivered in the ordinary course of post, by 14 September 2013, unless Mrs Ellis then proved in turn that, despite being so sent, it was not in fact so delivered. Her case to that effect, which therefore she needed the evidence at trial to persuade HHJ Gore QC to find, was that in fact the notice to quit never arrived. He was not so persuaded. However the test for an appeal against primary factual findings is expressed, it starts from the fundamental premise that it is not enough for Mr Batstone to persuade me that, unlike HHJ Gore QC, I would (or might) have been persuaded; I am not the trial judge any more than was Mr Batstone. For Mrs Ellis’ appeal to succeed, ultimately I must be persuaded to the view that there is something wrong with the process by which, or reasoning upon which, HHJ Gore QC found that he had not been persuaded by her case.

The Judgment

28. That naturally brings me to a summary of the judgment below.
29. After a brief introduction to the basic facts, HHJ Gore QC noted that the central and decisive issue was whether the notice to quit had been served, and that the legal framework in which that issue arose (and made it decisive) was common ground. The judge then set out that legal framework, under the 1986 Act and the Interpretation Act 1978. He summarised authorities to which he had been referred in respect of the latter, before accurately concluding:

- “16. Therefore, the questions I have to decide are:*
- a. Was the Notice to Quit addressed to the proper address ...?*
 - b. Was it sent [so addressed] in a registered letter or ... ordinary post ...?*
 - c. If the answer to both questions [is yes], which it is the burden of the claimants to prove on the balance of probabilities, given the presumption in Section 7 Interpretation Act 1978, am I satisfied, on the balance of*

probabilities, the burden now having shifted to the defendant, that the presumption has been rebutted?”

30. The judge summarised the cases advanced by the parties: for the Auliffes, that the notice to quit was duly sent by their solicitors, by both registered and first class post, to both Mrs Ellis and Richard, in good time to be received within 90 days of their having been notified of Mr Ellis’ death, that the Public Trustee’s confirmation of receipt of the notice to quit notification was also duly sent, by both registered and first class post, to both Mrs Ellis and Richard, and that none of those eight items of post was returned as or otherwise notified as having been undelivered; for Mrs Ellis, that none of the eight items of post was received by her or by Richard because they were all incorrectly addressed to ‘Greatstone Farm’, the proper address being ‘Greatstones’.
31. Mrs Ellis and Richard supported that case in their evidence. As the judge summarised at [19], *“She protests that [the property] was, and always was, Greatstones, and that it has been so ever since she lived there from 1983. Her son supports that contention.”* That evidence was rejected, upon cogent grounds rooted in the available documentary evidence. In particular, the judge found at [20] that far from ‘Greatstones’ being the (only) proper name for the Ellis’ home, Mrs Ellis herself had *“when it suited her”* specified ‘Greatstones Farm’ as her proper address, as had Mr Ellis. He found that only three properties had the postcode correctly used by the Auliffes’ solicitors when addressing their eight letters, one of them being the Ellis’ home, and that ‘Greatstones’ and ‘Greatstones Farm’ were two descriptions of the same address, used interchangeably, including by Mr Ellis, Mrs Ellis and Richard.
32. Thus, the factual case Mrs Ellis (and Richard with her) had advanced in the proceedings, and at the trial, to seek to persuade the judge to find that eight separate items of post sent to them in September 2013 had all gone astray, was not merely unpersuasive, on a balance of probabilities. It was rejected as untrue. Mrs Ellis’ and Richard’s evidence in support of it was rejected as untrue. None of that is challenged on appeal.
33. The judge next considered with care whether the Auliffes had proved that the key letters by which the notice to quit was intended to be served had in fact been sent, notwithstanding Mrs Ellis’ and Richard’s insistence that they had not been received. He concluded, on the balance of probabilities, that they had been sent. That too is not now challenged.
34. The judge reviewed a substantial body of indirect evidence he had received about the postal service, and the possible impact in fact of the use of ‘Greatstone Farm’ rather than ‘Greatstones’ in addressing the letters, irrespective of his finding that it was a proper address to use for the purposes of the 1986 Act. No reason emerged why no fewer than eight separate items might have gone astray, not even the fact that one of the properties nearby was a Mr Young’s similar-sounding ‘Great Easton Farm’.
35. At [35]-[45], the judge summarised and assessed the competing submissions advanced by Mr Batstone and Ms Cattermole why the proposition that the notice to quit was not received was plausible, respectively implausible. His final decision, at [48], was that *“... I do not accept [Mrs Ellis’ and Richard’s] evidence of non-receipt of registered and ordinary post on the scale contended for. That renders the*

submission of the claimants altogether more plausible and it renders those of the defendant altogether less plausible. Accordingly, I am not persuaded to find ..., on the balance of probabilities, that the Notice to Quit was not served.”

36. The critical reasoning in the judgment for my purposes, therefore, is at [46]-[48] explaining that conclusion. That is the critical reasoning for my purposes because only that conclusion is challenged on appeal; but as Ms Cattermole submitted, it would be wrong to focus on those few paragraphs in isolation when assessing the adequacy, as a judgment on the trial over which he had presided, of the judge’s decision not to accept Mrs Ellis’ case. Subject to that *caveat*, in summary:
- i) The judge first commented at [46], upon the submissions he had reviewed at [35]-[45], that “*With the greatest of respect to both sets of submissions that I have now set out in detail, they are just that and not evidence. There is a lot of speculation. There are suggestions for which there is in fact no evidence, or evidence that is very thin.*” Mr Batstone criticised this, but the criticism was not warranted. HHJ Gore QC was correct to say the submissions he reviewed were submissions, not evidence (of receipt or of non-receipt of the material letters). The judge was not saying, as I read him, that where the submissions were (said to be) founded upon points of fact, those points of fact were in no case evidenced.
 - ii) The tenor of that first comment – confirmed or reinforced by his next – is that, in the judge’s view, the competing submissions did not enable him to say, upon balancing the inherent probabilities as advocated by the parties, that they favoured Mrs Ellis’ case (or, for that matter, the Auliffes’). To my mind, this was rather a favourable view to take (that is to say, favourable to Mrs Ellis). If I were balancing the inherent probabilities, taking into account the parties’ submissions about them, I should have thought it substantially more likely than not that the notice to quit had indeed been timely delivered. But it was HHJ Gore QC’s task as the trial judge, not mine sitting on appeal, to assess that balance, and I could not say it was not open to the judge to take the view more favourable to Mrs Ellis that he took. Of course, more favourable to Mrs Ellis though that view was, it was still insufficient for her case to carry the day. She bore the onus of persuasion, so an evenly balanced cause was for her a lost cause.
 - iii) The judge’s final conclusion, however, was that the balance was decisively tipped against Mrs Ellis; she did not lose just on the burden of proof. The judge’s next comment introduced the factor that would have, in his judgment, that decisive effect on the balance: “*Into that mix, I shall also add my views about the veracity and credibility of the defendant and her son I am afraid I was not impressed with either as witness*” ([46], immediately after the sentences quoted in (i) above).
 - iv) The judge, continuing, then explained why Mrs Ellis and Richard had not impressed him as witnesses whose evidence he could trust, before articulating his final conclusion, as quoted in my paragraph 35 above. His explanation was as follows:-

- “46. ... Each of them [i.e. Mrs Ellis and Richard] sought to cultivate the impression that they were not sophisticated in matters of property and money. Thus, the defendant described herself as ‘hairdresser and farmer’ and her son described himself simply as ‘farmer’. Included within the trial bundle, and therefore the authenticity of which is admitted, are documents that paint a different picture. ... the land in dispute is some 50 acres but is only part of a larger property portfolio that included jointly owned freehold land in Chagford, yet more jointly owned land at Moretonhampstead and there are references to live and dead stock plant and machinery as well. There is also another business, InputDisk Limited, about which I heard very little. There are tantalising references to yet further property at Forder Farm, ..., And even more tantalising still, references to the interest of well-known national housebuilders and others in developing Chagford Cross and Bradford Meadow into a mix of what was described as ‘Open market high grade housing’, together with some self-build plots and some affordable housing. ...
47. In cross-examination, the defendant admitted to me that she was heavily involved in the management of the land before her husband’s death. Family interests were clearly both complex enough and large-scale enough to have resulted in close and long-standing advisory relationships with the land agent, Mr Garrett, and the NFU representative Shirley Smith. I was therefore surprised, and frankly not convinced, by her professed lack of understanding for example, of the difference between forms of agricultural tenancies. She and her son were vague and lacking in detail about dealings both before and after her husband’s death. There are internal inconsistencies in some of her evidence. For example, between paragraphs 27 and 29 of the witness statement. There were inconsistencies between her evidence and that of her son examples of which I have given. I have explained that unsatisfactory evidence concerning use of addresses and with the post. She was demonstrably wrong when she insisted in cross-examination that when referring to farm matters, all documents used the address of Greatastones Farm [sic., Greatastones].
48. For all those reasons, where their evidence conflicts with others, I prefer the evidence of others and, for the avoidance of doubt, that includes Mr Butler and his assertion of the stated reason for the attendance at what I have called the NFU meeting.”

The Challenge

37. It will be apparent from that summary and analysis of the judgment that for Mrs Ellis’ appeal to succeed, I would have to be persuaded that the judge was not entitled to take the view he did that her and Richard’s evidence insisting that the notice to quit letter was not delivered was not sufficiently trustworthy to tip the balance in favour of such a finding. By Amended Grounds of Appeal (the amendment being to add a sixth ground of appeal, permission for which I granted during the hearing), Mr Batstone sought to persuade me that the judge was not entitled to take that view because:

- “1) *The judge rejected [Mrs Ellis’] evidence that she did not receive the notice to quit ... partly on grounds that she had not been given the opportunity to answer, either in cross-examination or in questioning by the Judge, which deprived [Mrs Ellis] of a fair trial.*
- 2) *The reasons the Judge gave for not being impressed with the evidence of [Mrs Ellis] and ... Richard were inadequate.*
- 3) *The Judge misdirected himself to the effect that facts upon which [Mrs Ellis] relied in support of a finding that the notice to quit had not been served were submissions and not evidence and so failed to consider all the evidence in rejecting [her] evidence that she did not receive the notice to quit.*
- 4) *The Judge failed to identify, let alone consider, evidence that [Mrs Ellis] relied upon in support of a finding that the notice to quit had not been served that was probative of the notice to quit not having been served.*
- 5) *The Judge misdirected himself to the effect that ... where [Mrs Ellis’] evidence conflicted with the evidence of others he preferred that other evidence because in truth there was no other evidence in conflict with that of [Mrs Ellis] and the perceived conflict did not provide a reason for rejecting [her] evidence that she did not receive the notice to quit.*
- 6) *The Judge accepted oral evidence of [Mrs Ellis’] witness Mr Butler that he had been called to attend a meeting with [Mrs Ellis] and her son Richard in June/July 2014 to discuss tenancy issues when that was not foreshadowed in Mr Butler’s witness statement and in closing submissions the Judge had informed [Mrs Ellis’] Counsel that he was prepared to accept that the pre-meeting communicated reason for that meeting was not tenancy issues.”*

38. It is possible to dispose of most of those Grounds very briefly. Thus:

- i) HHJ Gore QC’s expressed reasons for being unimpressed by Mrs Ellis’ and Richard’s evidence were succinct, but they were clear and plainly adequate. If his conclusion, that their evidence was not to be trusted, is to be challenged, it cannot be because it was insufficiently explained. It must be because one or more of the reasons given was, or was the product of, some appealable error, or because of a failure to consider some material matter the judge was bound to consider. Ground 2) in the Amended Grounds of Appeal is unfounded.
- ii) I have already indicated (paragraph 36.i) above) that the first part of Ground 3) is an unwarranted criticism of the judge. It therefore adds nothing to Grounds 4) and 6). I disagree that the judge’s review of the submissions at [35]-[45] involved any failure to consider the evidence upon which those submissions were founded (to the extent they depended on matters of fact and were not just comment). Rather, the judge fairly identified, and accepted (subject only to the point now separately raised under Ground 6)), such matters of primary fact as were relied on by Mrs Ellis in relation to those submissions or were used as the springboard for those submissions. His evaluation, though, was that those submissions were not persuasive and, in particular, did not outweigh (in persuasiveness) the submissions put forward by the Auliffes. There is no basis

for interfering with that evaluation. I shall therefore give Ground 3) no further consideration.

- iii) It is convenient to take Grounds 5) and 6) together. There was no direct evidence in conflict with Mrs Ellis' basic evidence that she had not received the notice to quit only in the very limited sense that there was no witness testimony or documentary record of her receiving it. Mr Batstone's submission that because there was no such evidence, i.e. no direct evidence witnessing receipt, Mrs Ellis' and Richard's evidence of non-receipt should have been accepted is a simple *non sequitur*. Of course, witness testimony that something happened (or did not happen) cannot only be rejected where there is directly contradictory documentary evidence or witness testimony. Here, there was important evidence that conflicted with Mrs Ellis', on matters relevant to the likelihood of her basic evidence being accurate, most notably as to the importance or likely impact of the fact that the key letters had been addressed to 'Greatstone Farm'. Mr Butler's evidence that it became apparent when he met Mrs Ellis in about June 2014 that one reason for the meeting was to discuss tenancy issues, was another such conflict. That evidence, accepted by the judge, was not inconsistent with the proposition the judge indicated in closing that he would accept, namely that discussing tenancy issues was not communicated to Mr Butler prior to the meeting as the reason for it. There was nothing unfair in the judge's acceptance of that evidence, there is no basis upon which I could second-guess that acceptance on appeal, and the judge was perfectly entitled to regard it as creating one of the difficulties with Mrs Ellis' testimony that meant he did not feel able to treat it as reliable.

39. By reference to the Amended Grounds of Appeal, therefore, this appeal turns on Grounds 1) and 4).

Ground 1)

40. To understand this Ground, it is necessary to set the scene a little. Ms Cattermole fairly accepted that she did not direct specific cross-examination, either of Mrs Ellis or of Richard, to any positive case for the Auliffes that they had come to court to present a misleading impression of their sophistication, or lack thereof. The trial was conducted with admirable efficiency. It was heard in a single day, albeit sitting long hours, with judgment delivered a week later. There is no challenge to the fairness of the trial process generally on account of the time constraints that inevitably created, for cross-examination in particular. Operating within those time constraints, Ms Cattermole rightly concentrated her fire in cross-examination on the central problems with Mrs Ellis' (and Richard's) account; and rightly did not cross-examine Richard at the same length as Mrs Ellis, she having given evidence first.
41. As I mentioned in paragraph 25 above, a key part of that cross-examination was of Mrs Ellis' claim that the eight letters had been addressed incorrectly and that explained everything. Reading the trial transcript, to my eye the cross-examination rather convincingly demonstrated that claim to be a false claim and Mrs Ellis to be an unsatisfactory witness, as the judge indeed concluded. On no view could I say that his conclusion to that effect was not warranted. It is in that context that, in closing argument, Mr Batstone prayed in aid Mrs Ellis' unsophistication. He asked HHJ Gore QC "*not to judge [Mrs Ellis] too harshly and to conclude that she's a ... hairdresser*

and a farmer". In that, Mr Batstone was demonstrating (if I may say so) the well-honed forensic instincts of an experienced advocate, even if his own view (contrary to the judge's and mine, to the extent I can form one from the transcript) was that the cross-examination had not been so damaging. In those circumstances, I do not accept that fairness required the suggestion that the 'simple, unsophisticated farming folk' impression advanced jarred with the available evidence needed to be separately or specifically explored with Mrs Ellis in cross-examination. I agree with the submission of Ms Cattermole, namely that "*In effect, [Mrs Ellis] is seeking to rely on the lack of opportunity to respond to a point which had only been made by her counsel in closing to [seek to] minimise the damage caused by her answers in cross-examination*".

42. Uninformed by the course the trial took in that respect, there might have been some force in Mr Batstone's submission to me that it was unclear why or how the judge made a connection between, on the one hand, Mrs Ellis' relative sophistication and level of understanding of tenancy matters (as assessed by the judge), and, on the other hand, the reliability of her claim not to have received the notice to quit. Setting the point in its scene from the trial, as I did above, makes the connection plain, however. It was a connection Mrs Ellis chose to make, through counsel, in the hope it would persuade the judge to say that the central cross-examination in the case did not undermine her credibility as a witness and, therefore, the credibility of her factual case.
43. The judge was entitled to reject the point advanced by Mrs Ellis in that way and there is no room for criticising Ms Cattermole, or for claiming unfairness at trial, because there was no separate cross-examination specifically directed to it. The rejection of the point left unmitigated the major damage done to Mrs Ellis' credibility (as the judge saw it, and was entitled to see it) by the primary cross-examination. It was not unreasonable – and so it was open to the judge – to take the view, further, that the willingness to rely on what he found to be a bad factual point, in an attempt to bolster the case, itself went to credibility.
44. This appeal therefore does not succeed by reference to Ground 1).

Ground 4)

45. The Amended Grounds of Appeal did not identify the evidence said not to have been considered by the judge but said to have been relied upon by Mrs Ellis and to have been probative that the notice to quit was not served. That omission was cured by Mr Batstone's skeleton argument for permission to appeal, filed with the Appellant's Notice. The evidence in question was there identified as the evidence that when Mrs Ellis received a letter from the Auliffes dated 21 November 2014 reminding her of the notice to quit, asking for confirmation of when she intended to quit possession of Teign Marsh, if she had not already done so, and indicating that possession proceedings would be issued if she had not vacated the land by Christmas Eve (when the tenancy ended under the notice to quit, if it had been served), she promptly (within days) consulted her solicitor. That, Mr Batstone submitted, "*was potent evidence pointing to non-receipt of the Notice to Quit the year before which the Judge failed to identify let alone consider*".
46. It is right that the November 2014 letter is not specifically mentioned by the judge in the judgment. It is however clear that he had well in mind, and gave due consideration

to, the point made by reference *inter alia* to that letter. It is one of the submissions as to the probabilities advanced at trial and reviewed by the judge at [35]-[45]. Thus:

“36. *Secondly, it is asserted, and submitted, that if the Notice to Quit was received threatening, as it did, recovery of possession on 24 December 2014, there was no reason to do nothing about it and the evidence is that the defendant and her son would have consulted their trusted land agent of 40 years, Mr Garrett, or solicitors. At least that is what they say.*”

47. So in my judgment, it is not correct to say that the judge failed to consider this aspect of the evidence. In any event, I do not agree that what happened in November 2014, a month before vacant possession was required (and demanded), is potent evidence, or evidence at all, of whether, 14 months before, a long forward-looking initial notice to quit was or was not received. As was the substance of the Auliffes’ submission in response on this point, Mrs Ellis’ reaction to the letter in November 2014 is, in truth, no more consistent with the notice to quit having not been received (and therefore not reacted to) than with the notice to quit having been received but ignored or thought to be something Mrs Ellis could do nothing about (and, either way, not reacted to at the time). The Auliffes’ submission on this aspect of the case was summarised by the judge at [45] as follows: “... *not everyone responds to, or acts upon, a Notice to Quit. Some simply wait and see whether it is followed up by legal proceedings ... [and] the fact that the defendant was given incorrect advice about relevant matters concerning the tenancy until that was corrected by Mr Butler [at the meeting in about June 2014] suggests the reason why the registered correspondence was ignored namely that ... Mr Garrett had apparently asserted that the land was held on a ... farm business tenancy in respect of which succession under the [1986 Act] was not possible ... [so] there would be nothing to do in response to a Notice to Quit.*”
48. The logic of the latter part of that submission in fact applies also if Mrs Ellis understood the succession requirements when the notice to quit was delivered, if it was, in September 2013. For in truth all possibility of succession under the 1986 Act became precluded when three months from Mr Ellis’ death passed without any application to the Tribunal being made. The judge did not make a finding as to why that occurred and was not well placed to do so in the absence of disclosure and witness evidence from Mr Garrett, who was being pursued by Mrs Ellis alleging negligent advice. Fairly to Mrs Ellis, the judge said he would not draw any adverse inference against her from the fact that there was no evidence from Mr Garrett; but that does not mean he could or should simply accept what Mrs Ellis said about him. As picked up by the Auliffes’ submission I quoted, the contemporaneous documentary evidence such as it was indicated that Mr Garrett thought the tenancy to be a farm business tenancy not covered by the 1986 Act. It is therefore plausible, on the evidence before HHJ Gore QC, to suppose that Mr Garrett so advised Mrs Ellis and Richard, and I note that had he done so it would explain both the failure to apply for a 1986 Act succession and the failure to react to the notice to quit when received, if it was.
49. In my judgment, considerably less plausible was Mrs Ellis’ and Richard’s evidence as to Mr Garrett’s advice, namely (to quote Mrs Ellis’ evidence – Richard’s was to similar effect) that “*all I needed to do was to notify the Claimants of David’s death within three months of the date of death and there was no more to do with regard to Richard taking over the tenancy*” (Mrs Ellis’ paragraph 27), or that “*if and when the*

Claimants responded ... we had three months to challenge that. If they did not respond ... the tenancy simply passed to Richard" (Mrs Ellis' paragraph 29). In that regard, I do not agree with a submission of Mr Batstone's that advice by Mr Garrett that Teign Marsh as held by Mr Ellis was a farm business tenancy of little or no enduring value (because it could not be passed on) is inconsistent with notifying the Auliffes of Mr Ellis' death (or advice that such notification should be given). Although that notification was referred to in the litigation as the 'trigger letter' because it did in fact trigger the Auliffes' time-limited entitlement to serve a Case G notice to quit, it made no mention of the 1986 Act, or succession, but just gave simple notice to the landlords, as would be appropriate for a farm business tenancy, that the tenant had died.

50. In somewhat similar vein, though not relied on as particularising any of the Grounds when this appeal was filed, there was evidence that Mrs Ellis had not said to any of her advisers prior to November 2014 (when she instructed solicitors to assert in reply to the Auliffes' 21 November letter that no notice to quit had been received) that a notice to quit had been received. Equally, and the judge took care during Mrs Ellis' evidence to clarify this, her evidence was that she had never informed her advisers that no notice to quit had been received, although the importance of that, if true, would have been clear to her after the June 2014 meeting with Mr Butler at the very latest. As Ms Cattermole put it in her submissions to me, on Mrs Ellis' case as to what Mr Garrett had originally advised (and then as to the non-receipt of the notice to quit) she and Richard believed they had secured succession to Teign Marsh via the absence of any response from the Auliffes to notification of Mr Ellis' death; yet that was not mentioned to Mr Butler at the meeting, although (in particular) the meeting was, in part, to discuss tenancy matters (whether or not that was communicated in advance as a reason for meeting) and although (according to Mr Butler) the focus of that part of the meeting was a review of the succession process that had to be followed under the 1986 Act.
51. I mention, as an aside and for completeness only, that because non-receipt of the notice to quit was asserted for the first time only in late November 2014, over a year after it had been sent, it was by then too late for the Royal Mail to be able to provide definitive proof of delivery. With hindsight, it is unfortunate that the Auliffes' solicitor did not check online (as would have been possible at the time) that at all events the registered letters had been delivered. Had he done so, and kept a record of any confirmation of delivery he obtained, if indeed they had been delivered, perhaps litigation might have been avoided (although not necessarily entirely, as other points were also taken, and pleaded, by Mrs Ellis originally, but not pursued to trial).
52. In those last observations, I have gone into rather further detail on the facts than did the judge in his judgment. To see that Ground 4) does not succeed it is enough to have said what I did in paragraph 47 above and that the judge was not required to make a finding as to why the basic error occurred (i.e. the failure to apply to the Tribunal). I have taken the point at greater length because, as I develop further below, Mr Batstone did not confine his argument on the hearing of the appeal to the Grounds, but in substance reargued the case generally on the facts (but of course without the benefit of hearing from any of the witnesses), so that the appeal (though confined to argument in relation to one of the three key issues at trial) took as long as the entire trial (c.7 hours of sitting time, but spread over two days whereas HHJ Gore QC sat for a single,

very long day). Taking this point at that greater length, I cannot fault the judge's conclusion that Mrs Ellis' failure to contact her advisers when the notice to quit would have been delivered, if it was delivered, does not evidence non-delivery but is, at best for Mrs Ellis, neutral.

Conclusion on Grounds 1) to 6)

53. For the reasons I have now set out, none of the Grounds raised by the Amended Grounds of Appeal succeeds. Subject to consideration of the rather wider-ranging argument developed by Mr Batstone at the hearing, this appeal stands to be dismissed.

Wider Argument

54. Mr Batstone's wider argument was introduced at paragraph 53 of his skeleton argument for the appeal, by which he formulated an appeal submission in these terms: "*the judgment does not contain a fair and balanced consideration of all the evidence and there was no proper evidential basis for concluding that the evidence of [Mrs Ellis] and her witnesses [sic., in truth just Richard] about receipt of the Notice to Quit should not be accepted*". In my judgment, that is different from, and as I say wider than, anything raised by the Grounds. However, I can see that the view might have been taken that it was merely the development of those Grounds, especially Ground 2), and it did not embarrass Ms Cattermole to have to respond, so I did not get side-tracked into a separate argument over whether this way of putting the appeal argument was open to Mr Batstone and I deal with it on its substance.
55. This wider attack on the judgment was developed, firstly, by a submission that the judgment disclosed "*no consideration ... by the Judge at all*" of Richard's evidence to the effect that Mrs Ellis had not received the notice to quit. This was said to be "*the most striking omission from the judgment*". The argument was bolstered by a submission that Ms Cattermole made no adverse submission about Richard's credibility at trial and did not challenge him in cross-examination as untruthful. That additional submission did not withstand the scrutiny of reviewing the trial transcript, and indeed Mr Batstone accepted as much in argument. The basic submission that the judgment fails to consider Richard's evidence does not withstand the scrutiny of reading the judgment. The judge considered his evidence, not just Mrs Ellis' own evidence, on Mrs Ellis' side of the central factual issue. He rejected it, as he did Mrs Ellis' evidence; and there was ample basis for doing so and for the judge's conclusion that Richard's evidence was not to be trusted.
56. Secondly, Mr Batstone expanded Ground 2), as regards Mrs Ellis' evidence, to a submission that the judge's reasons for not accepting her evidence were "*not proper reasons*". The argument in support of this submission, concluding that there was "*no good reason for the Judge not to have accepted [Mrs Ellis'] evidence*" was three-fold:
- i) The argument under Ground 1) was invoked. I have already explained why, in my judgment, that argument was not well-founded.
 - ii) It was submitted that the judge was wrong to see an inconsistency between paragraphs 27 and 29 of Mrs Ellis' witness statement. The judge did rely on that inconsistency (as he saw it), within his stated reasons for not trusting Mrs Ellis' evidence on the key point, albeit he cited it only as an example of one

kind of inconsistency he had observed. To my mind, there is force in this criticism of the judge. The witness statement evidence in question is that quoted in paragraph 49 above. It can be seen that the judge is in fact making a rather subtle point: “*there was no more to do*” (paragraph 27) was in unqualified terms; but then “*if and when the Claimants responded ... we had three months to challenge that ...*” (paragraph 29) introduced a qualification. I think it was a mischaracterisation or overstatement to call that an inconsistency going to Mrs Ellis’ credibility. But it was not a dominant or even a substantial element of the judge’s reasoning. Without it, there was ample good reason for the judge’s overall conclusion. This minor error does not, in my judgment, provide sufficient basis for interfering with that conclusion.

- iii) Finally, a submission was made that the judge was wrong to view Mrs Ellis’ cross-examination over the proper address as damaging to her and that he “*failed to analyse why what he saw as [her] unsatisfactory evidence on the topic led him to conclude that her evidence of non-receipt of the Notice to Quit was unreliable*”. As I have mentioned several times already, this was the central cross-examination in the case. The assessment of its impact – how damaging, really, was it? – was pre-eminently a task for the trial judge that it is very difficult to second-guess on appeal. I have already indicated that, were I required to judge the point on the documentary evidence and the trial transcript, I would say it was indeed damaging and that Mrs Ellis seems to have been an unsatisfactory witness. On no view could I say the judge was wrong to come to that conclusion. The second part of this submission, criticising the judge for not ‘analysing’ why Mrs Ellis’ evidence on this topic rendered unreliable her evidence of not receiving the notice to quit, is quite unreal. The evidence on which the judge found Mrs Ellis badly wanting *was* her evidence of non-receipt, or at least it was the central foundation of that evidence.

57. Thirdly, Mr Batstone relied on the wider aspects of the argument he developed around the fact that Mrs Ellis did not get her advisers involved in relation to the notice to quit until November 2014 that I found it convenient to deal with when considering Ground 4) (see paragraphs 48 to 52 above).
58. Therefore, the widening of the challenge to the judgment by the way the appeal was argued did not enable the appeal to succeed.

Conclusions

59. In my judgment, none of the Grounds advanced on behalf of Mrs Ellis is well-founded; and the wider-ranging challenge to the judgment (whether that went beyond the Grounds or was just part of a full development of them) has no real substance. The judge’s reasoning contains one minor error, reading into paragraphs 27 and 29 of Mrs Ellis’ statement an inconsistency of possible significance. But that one error does not justify overturning the result of this trial.
60. HHJ Gore QC conducted, and his judgment discloses, a fair and balanced consideration of the evidence and of the submissions upon that evidence advanced by the parties at trial. There was ample evidential basis, and ample good reason, for rejecting Mrs Ellis’ and Richard’s evidence that the notice to quit had not been

delivered in September 2013, in time to be effective, as by s.7 of the Interpretation Act 1978 it was rebuttably presumed to have been.

61. Mrs Ellis, through the evidence and argument she presented at trial, did not persuade the judge to find it more probable than not that the notice to quit was not delivered. There is no basis upon which, sitting on appeal, I could say that the judge, to the contrary, should have been so persuaded. If I had to judge the matter on the documentary record (including now the trial transcript), I would also not be persuaded by Mrs Ellis' case. The judge having conducted the trial, certainly I cannot say he was wrong not to be so persuaded.
62. This appeal therefore fails and is dismissed.