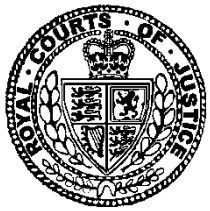

Neutral Citation Number [2019] EWHC 95 (Ch)

Claim no. E90BS036

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS AT BRISTOL
CHANCERY DIVISION

Bristol Civil Justice Centre
1, Redcliff Street,
Bristol BS1 6NP
Tuesday 29 January 2019

Before: Mr Recorder Richard Meade QC sitting as a Deputy Judge of the High Court

- -

Between:

(1)MILO KERR AS TRUSTEE OF THE HAIE ESTATE
(2)PAMELA TRAVIS AS TRUSTEE OF THE HAIE ESTATE
Claimants/Defendants to Counterclaim

and

CHRISTIAN MAASS
Defendant/Counterclaimant

- -
- -

Oliver Ingham (instructed by **Willans LLP**) for the Claimants/Defendants to Counterclaim
Charles King (instructed by **Gloucester Law Centre**) for the Defendant/Counterclaimant

Hearing dates: 9, 10, 11 and 12 October 2018

- -

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

Introduction

1. The Haie Estate is an estate in the Forest of Dean. This case concerns of one many buildings on the Estate, called Arams Farmhouse.

2. It is no longer in issue that the First Claimant ("Mr Kerr") is a trustee of the Estate and that he has acted as such throughout (and so where I refer to the First Claimant in this judgment I mean in that capacity). There was previously an issue about this, arising from the fact that the Defendant ("Mr Maass") did not know of any trust and always assumed that Mr Kerr was the outright owner of the Estate and of Arams Farmhouse.

3. In 1993, when the Claimant was a teenager, the Claimant's mother and step-father, Mr Dirk Rohwedder ("Mr Rohwedder"), who gave evidence at trial, moved in to Arams Farmhouse. An oral agreement was made with Mr Kerr to permit them to stay there. The terms and nature of the agreement are in issue but it is not in dispute that the understanding on both sides was that Mr Rohwedder would undertake repairs and maintenance to the property. A rent of £155 per month was agreed.

4. Over time, Mr Rohwedder did indeed make repairs and carry out maintenance and, indeed, improvements. I will return to the details below.

5. Mr Rohwedder's relationship with Mr Maass' mother ended and he moved out in 2002 but he visited and had some possessions at Arams Farmhouse.

6. Meanwhile, Mr Maass grew up, went to university and made a marriage and career of his own, during which time he bought and rented other properties, but still, he said, considered Arams Farmhouse his "family home". Various other family members and friends lived there during these years, and for some of the time Arams Farmhouse was

used as a business property for the running of a residential home for adults with special educational needs.

7. As Mr Maass grew older he took on more responsibility for Arams Farmhouse and undertook work there. Again, I return to the details below.

8. In 2010, Mr Kerr and Mr Maass met and discussed the terms on which Mr Maass and his family might occupy Arams Farmhouse for the future. There is some dispute about this, but it is agreed that the rent was kept at £155 per month, and the same understanding was reached about maintenance and repairs.

9. Mr Maass carried out some further maintenance following this agreement, but says that nonetheless the property fell into some disrepair.

10. There were intermittent contacts between Mr Kerr and Mr Maass in 2014 and 2017.

11. Then, in 2017 Mr Kerr served a notice under s. 21 of the Housing Act 1988 on Mr Maass and claimed possession of Arams Farmhouse.

12. Mr Maass met this claim by asserting rights arising from the circumstances of the possession of Arams Farmhouse by him and Mr Rohwedder before him, on a variety of equitable bases, most significantly proprietary estoppel by acquiescence. Mr Maass says that this defeats the claim for possession and he counterclaims for declarations of his rights. This is disputed by Mr Kerr on all fronts.

13. In the alternative, Mr Maass says that if he has no proprietary right and is simply a tenant under an assured shorthold tenancy, then Mr Kerr is in breach of his obligation under s. 11 of the Landlord and Tenant Act 1985 to keep the property in repair, and he counterclaims for damages, not exceeding £10,000. Mr Kerr accepts the premise that

if there is an assured shorthold tenancy he has such an obligation, but denies liability on the ground that he was never made aware of any disrepair.

Procedural matters

14. Mr Maass originally pleaded his defence on a variety of grounds: proprietary estoppel, a constructive trust, "other like right" and a general estoppel against the Claimant from asserting his right to possession. There was also a plea that the claim was precluded by Articles 1 and 8 of the European Convention on Human rights ("ECHR").

15. During opening submissions there was a discussion about these various heads of defence and Mr King, who appeared for Mr Maass, dropped the EHCR point, and said that the various equitable ways of putting the defence other than proprietary estoppel did not add anything to it. He said that Mr Maass intended to narrow the issues by limiting the proprietary estoppel argument to estoppel by acquiescence. This was necessitated by the fact that there was a plea in the Defence that Mr Kerr had actually represented to Mr Rohwedder that he and his family could stay at Arams Farmhouse for as long as they wanted, but no factual basis for this in Mr Rohwedder's witness statement. So proprietary estoppel by representation, which was on any view the main thrust of the pleadings, had to be abandoned.

16. After submissions from both sides I ruled that proprietary estoppel by acquiescence was not pleaded, but I allowed Mr Maass to amend to add it in, because it seemed to me that although the application to amend was egregiously and inexcusably late, it was likely that the additional evidence that Mr Kerr would need to adduce would be small, and achievable overnight between the first and second days of the trial. So it proved: Mr Kerr put in a short third witness statement and the oral evidence was able to be completed on the second day of the trial.

17. The amendment to add proprietary estoppel by acquiescence was as follows:

> 7A The said Mr Milo Kerr acquiesced in the Defendant and his predecessor Mr Rohwedder's belief that they had a more substantial right in or over the property than they would have had as tenants under an assured shorthold tenancy in the following ways:
>
> (a) by allowing the Defendant and Mr Rohwedder to conduct, or standing by whilst the Defendant and Mr Rohwedder conducted, repairs and improvements to the property whilst himself knowing or believing that the property was subject to an assured tenancy which in fact imposed a repairing obligation on the Claimant;
>
> (b) by encouraging the said belief of the Defendant and Mr Rohwedder by asserting that the liability for repairs was that of Mr Rohwedder;
>
> (c) further or alternatively by wilfully shutting his eyes to the true incidence of liability for repairs under the tenancy which he believed existed.
>
> Further, such acquiescence amounts to unconscionable conduct sufficient to give rise a right in favour of the Defendant deriving from proprietary estoppel based upon the said acquiescence.

18. This asserts that Mr Rohwedder and Mr Maass believed they had a more substantial interest than an assured shorthold tenancy. This is the basis for resisting possession and for claiming rights in the property. But unlike a conventional proprietary estoppel by acquiescence situation, it is not alleged that Mr Kerr knew of their belief, or even should have done so. Instead it is alleged that he knew (or believed, or turned a blind eye) that the property was in fact subject to a tenancy that imposed a repairing covenant on him. So there is a mismatch between what he is alleged to have believed, that he had a repairing obligation, and the estoppel said to arise, which would result in the property passing to Mr Rohwedder or Mr Maass outright. Mr Ingham (who appeared for Mr Kerr) submitted that this made Mr Maass' case unarguably bad so that amendment should not be allowed at all, but it seemed to me better to have all the facts before trying to decide that.

Legal principles

19. The parties were agreed on the basic elements required for proprietary estoppel by acquiescence, as identified in Megarry and Wade (9th Ed.), 12-0.34:

> "The principle … applies where B adopts a particular course of conduct in reliance on a mistaken belief as to B's current rights and A, knowing both of B's belief and of the existence of A's own, inconsistent right, fails to assert that right against B. If B would then suffer a detriment if A were free to enforce A's right, the principle applies. It therefore operates in a situation in which it would be unconscionable for A, as against B, to enjoy the benefit of a specific right."

20. This formulation certainly states a requirement that A (in this case, Mr Kerr) must know of a mistaken belief by B (Mr Maass) as to the *relevant* right, by which I mean the right that B asserts (in the present case, a proprietary right in relation to Arams Farmhouse) to meet the right that A is seeking to assert.

21. So as it turns out I think Mr Ingham was right to say that the amended case raised no arguable cause of action. The challenge having been squarely made when the amendment was sought and allowed, it was incumbent on Mr King to point to some authority that A's knowledge of a belief by B as to some other issue altogether (in the present case, a contractual obligation to keep in repair) could found a right based on a belief by B of which A was not aware. But no such authority was identified and certainly Megarry and Wade provides no basis for such an argument.

22. The difficulty for Mr King's argument is exacerbated by the fact that Mr Maass relies on *proprietary* estoppel, but the issue in relation to which Mr Kerr is said to have had the relevant state of mind is merely the *contractual* obligation to repair.

23. The parties also agreed that unconscionability was an overriding requirement in addition to belief, reliance and detriment; but that unconscionability in the absence of those other requirements being met was not enough. Thus, Megarry and Wade 12-044 says:

"[unconscionability] cannot be used as a substitute for the specific requirements of proprietary estoppel. It may however have a 'very important part to play' in proprietary estoppel, by

'*unifying and confirming, as it were, the other elements. If the other elements appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again*.'[1]"

24. It seems to me that it will be very rare, if it ever happens, for it to be unconscionable for A to enforce a right because of a belief on the part of B in relation to that right of which A had no knowledge at all, merely because B was under a misapprehension as to something significantly different.

25. I do not mean that there has to be perfect alignment between the right of A, the countervailing right of B, the parties' beliefs, and A's knowledge of B's belief. Given the complexities and subtleties of the types of proprietary interests that can exist and the fact that these cases tend to arise where communication has been far from perfect, there may well be some difference. But where there is a substantial mismatch of the kind here (even assuming the facts in Mr Maass' favour), and B's state of belief that is alleged does not even relate to the proprietary rights in issue, I think proprietary estoppel by acquiescence cannot have a role to play.

26. This analysis is not essential to my decision, however, because I find below that Mr Maass' case under proprietary estoppel by acquiescence fails on the facts in any event.

[1] Citing Cobbe v. Yeoman's Row Management Ltd [2008] UK HL 55 at [92] per Lord Walker.

27. Finally in relation to proprietary estoppel by acquiescence, the parties also agreed that detriment is to be assessed broadly and not by a mathematical, spreadsheet, profit-and-loss or balance sheet approach.

28. In relation to the counterclaim for disrepair, it was common ground that Mr Kerr had an obligation to keep in repair under s.11 in the event that (as he alleged) Mr Maass had an assured shorthold tenancy, and that pursuant to s. 12 that obligation could not be contracted out of except with the permission of the Court, which was never sought.

29. It was agreed that it was necessary for a claim relating to disrepair to show that the landlord was aware of the problem.

30. It was agreed that it was not illegal to enter into a contract purporting to contract out of s. 11, or to act in accordance with provisions purporting to contract out.

31. I will deal with the legal principles applicable to quantifying damages for disrepair when I come to that issue, below.

The witnesses

32. I heard oral evidence from Mr Kerr, Mr Maass and Mr Rohwedder.

33. Each of them was honest and doing their best to give an accurate account. The passing of time and the lack of documents to help their memories inevitably meant that their recollections were a little patchy and I address one or two specific instances of this below. Possibly this was a bit worse in the case of Mr Kerr, but not materially.

34. Each of them was, unsurprisingly, somewhat affected in their evidence as to what happened by what they thought was fair and just; there was some wishful thinking.

35. I was told that Mr Kerr had recently had cataract treatment and was on medication, but neither of these things affected his evidence. The other witnesses both said that he was a man of very few words, and this was certainly true of the postcards he sent when the rent was late, but whether or not he was taciturn in his dealings with them, his manner of speech in the witness box was entirely normal and he gave clear and direct answers.

36. It was suggested by Mr Maass in his witness statement and to some extent in his oral evidence that Mr Kerr was motivated in seeking to terminate the tenancy of Arams Farmhouse and in the conduct of these proceedings by anger over some disagreement concerning tree felling on the Haie Estate. This was not really pursued with Mr Kerr and I reject it.

37. More substantively, Mr Kerr is a chartered accountant by profession and worked as such in London for many years. He was therefore not naïve when it came to commercial matters and he had some, although very incomplete and rather inaccurate, knowledge about the law of tenancies. It was said, and I accept, that he had a very hands-off approach to his tenants, left them alone and did not want to be bothered by them.

38. Mr Maass is dyslexic and struggles with documents, although he can manage them given ample time to read them slowly. As a result, his cross-examination, when it was necessary to go to documents, proceeded by Mr Ingham reading the relevant text out. This worked well and there were no problems. There are also very few documents in the case in any event.

39. Mr Maass has a psychology degree and has been a property owner and landlord (in a small way) over the years. In preparation for being a landlord he sensibly and

responsibly educated himself about landlord and tenant law at least at an outline level. So he was not naïve either.

40. As with Mr Kerr, Mr Maass gave clear, direct answers.

41. Mr Rohwedder gave clear, direct answers as well. He was a good witness.

The facts

42. I will deal with the facts chronologically in general. There are some issues which span the whole period and I will deal with those in discrete sections.

Mr Rohwedder and family take up occupation of Arams Farmhouse

43. It is not in dispute that Mr Rohwedder and his family, including Mr Maass, moved into Arams Farmhouse in spring 1993. They were put in touch with Mr Maass by the outgoing tenant. They had been living nearby prior to that.

44. It is also not in dispute that at a meeting around the time their occupation started, Mr Rohwedder and Mr Kerr agreed that the rent would be £155 per month and Mr Rohwedder would be responsible for maintaining the property.

45. There was, however, not agreement about whether Mr Rohwedder had moved in before asking Mr Kerr for permission. Mr Rohwedder said he asked Mr Kerr first, whereas Mr Kerr said that the reason he had been apprehensive about getting Mr Rohwedder to sign a tenancy was that he (Mr Kerr) understood that doing so after a tenant was already in occupation could lead to a situation where the tenant acquired rights to stay for a lengthy period.

46. I accept Mr Rohwedder's statement that he asked for permission before moving in. It makes sense and Mr Rohwedder is an open, honest and careful person for whom it would be out of character to take up residence without permission.

47. This does not however mean that Mr Kerr's perception was wrong, or that his recollection is false. It appears that Mr Rohwedder may well have been given access to look over the house, and possibly even a key for that purpose, before he communicated with Mr Kerr. So it is very plausible that Mr Kerr reasonably thought Mr Rohwedder was in occupation, even if he in fact was not.

48. So I accept Mr Kerr's evidence as to his perception of matters, including his perception that there could be a risk associated with executing a written tenancy.

49. In any event, it is clear that no written tenancy was executed.

50. As well as what actually happened, the parties' states of mind at the time are important.

51. Mr Rohwedder said in his witness statement that he thought that what was being granted was an agricultural type of tenancy allowing him, and his children after him, to live in the house for as long as they wanted. He said in oral evidence that this belief arose in part from his understanding of agricultural tenancies in his native Germany, and he also said in oral evidence that he believed that Mr Kerr would be able to make Mr Rohwedder and his family leave, but only upon offering them equivalent alternative accommodation on the Haie Estate.

52. I accept Mr Rohwedder's evidence that his belief was of this general nature, although I think the level of detail exceeds what he can really recall.

53. However, I also find that he did not communicate any of it to Mr Kerr, and that it was not a reasonable belief for him to hold. It was not founded on any understanding of English law, and more generally it would have lacked any sense of proportion: Mr Rohwedder and his family were neither family nor friends of, and indeed were unknown to, Mr Kerr prior to moving into Arams Farmhouse. They were not agricultural workers, let alone workers on the Haie Estate or for Mr Kerr. Mr Rohwedder's job had nothing to do with the Estate. It would have made no sense, and there was no objective support for the idea, that in exchange for a modest monthly rent coupled with the responsibility for doing repairs, Mr Kerr gave up any chance of regaining possession of Arams Farmhouse, ever, if Mr Rohwedder did not want to leave (except if he rehoused them).

54. Mr Rohwedder's evidence that he thought the right of occupation would pass to his children only reinforces this lack of proportion.

55. Mr Kerr's evidence was that he thought the parties were agreeing to a tenancy which would continue on a monthly periodic basis until terminated by either party. I hold that that is what he believed, and that it was a reasonable belief in the circumstances. There was nothing to indicate otherwise to him.

56. Mr Kerr also said in his witness statement that because of his concern over the way in which he thought Mr Rohwedder had entered into occupation in the first place (which I have dealt with above), he was careful never to give any impression about the terms of Mr Rohwedder's occupation other than that set out in the preceding paragraph. I accept this evidence as well.

Works at Arams Farmhouse and discussions about them in the early years

57. It is not in dispute that when Mr Rohwedder and his family moved in, Arams Farmhouse had only rudimentary facilities, such as an outside lavatory. There was a dispute about whether these limited facilities were accompanied by a general state of

disrepair; of course it is possible for limited facilities to be spick and span. The evidence is very limited, but I find, so far as it is relevant, that the property was reasonably habitable. If there was any disrepair then it was minor.

58. Early in his occupation of Arams Farmhouse, Mr Rohwedder went to Mr Maass with a list of works that he wished to see done. If it was in writing, no copy survives.

59. In any event, it is common ground (with one exception that I will address shortly below) that none of those works were done by Mr Kerr. There is a disagreement about what was said: Mr Kerr's evidence was that he told Mr Rohwedder that he (Mr Kerr) would be prepared to do the works but only if the rent were increased to reflect the cost, while Mr Rohwedder says that Mr Kerr made no such offer and merely said that the level of the rent reflected Mr Rohwedder's responsibility for works at the property.

60. The exception I just mentioned is that Mr Kerr claimed that he did take responsibility for works to the cellar steps (I did not understand him to mean that he did the work with his own hands, but only that he arranged and paid for it), whereas Mr Rohwedder and Mr Maass said that they did it.

61. On this point I prefer the evidence of Mr Rohwedder and Mr Maass. Mr Kerr's recollection is probably wrong. I say that because they both recall it and because, given that they were living there, they were physically closer to it and experienced it more directly.

62. More generally, but fortified a little by the issue over the cellar steps work, I find that Mr Rohwedder is more likely to be correct that Mr Kerr did not offer to do the works on the list. It would not have been consistent with his clear approach of leaving his tenants alone for him to do so.

63. I do not however attach much weight to either of these points (the cellar steps work or whether Mr Kerr offered to do the work if the rent were increased accordingly). What is clear and was clearly discussed and agreed at the time was that the level of rent reflected Mr Rohwedder taking responsibility for repairs and maintenance.

64. Mr Rohwedder said in his oral evidence that he does not think he ever spoke to Mr Kerr after this early discussion about possible works, Mr Kerr having said that he "did not want to be bothered" with problems. Mr Kerr did not accept the peremptory tone of "not being bothered" but there clearly was a dearth of communication for many years and Mr Rohwedder or another member of his family just delivered the rent in cash every month to Mr Kerr's house. If the rent was late, Mr Kerr sent a postcard with a few words along the lines of "Rent, April".

65. One consequence of this was that Mr Kerr had little or no knowledge of works undertaken by or for Mr Rohwedder and, later, by Mr Maass.

66. Early in their occupation of Arams Farmhouse, Mr Rohwedder and his family undertook some initial works. Some were repairs, some were improvements, and some were necessary to allow Arams Farmhouse to be used for business as a residential home.

Was the rent "low"?

67. At this point, I will briefly digress to cover the question of whether the rent of £155 per month was in fact "low". This will be relevant when I come to consider detriment but it also forms part of the general background and equity of the situation.

68. Mr King submits that there is no formal evidence of what a market rent would have been. This is correct but not the end of the matter.

69. First, Mr Rohwedder himself said in his witness statement that Mr Kerr called the rent "low" during the initial discussions referred to above. Mr Rohwedder did not say that he took issue with Mr Kerr at the time, or that the rent was not in fact low. I find the parties proceeded on the understanding that it was low (and hence Mr Rohwedder's responsibility for works).

70. Second, Mr Kerr explained in his oral evidence that the rent of £155 per month had come about in an unusual way: some time prior to Mr Rohwedder's occupation Arams Farmhouse had been occupied at a rent of about £300 per month by one Mrs Tamplin, an elderly lady who found the property unsuitable to her needs, and too big. At the same time, other tenants on the estate called von Frieden were in a one-up-one-down property which was too small for them. They and Mrs Tamplin agreed to swap properties but each to continue to pay the same rent, with the result that the rent for Arams Farmhouse fell from £300 per month to £155 per month.

71. This account sounds very odd at first but it fits with the very informal way in which Mr Kerr did things, and the give-and-take, somewhat freewheeling way that the tenants in this unique part of the world lived their lives (as also evidenced by the way Mr Rohwedder and his family found their way to Arams Farmhouse). I accept it, and it supports a position that the rent for Arams Farmhouse was set initially at a lower than market rate.

72. Third, the rent was never increased, over a period of nearly 25 years. I believe I can take judicial notice of inflation, and it is clear that the rent in real terms fell enormously as time went by.

73. None of this allows me to quantify with any precision how much below market rates the rent was, but I find that the shortfall was very substantial.

1995 to 2010

74. Mr Maass started work in about 1994 or 1995. He had a variety of jobs including working on the Haie Estate. He took an NVQ in agriculture and at some point started making a contribution to the rent.

75. In 2000 he went to University; while there he rented and later bought a property with his wife (which they subsequently rented out, as I have mentioned above). He returned to Arams Farmhouse in vacations. In this sense it was his "family home", but at the same time not his only or even main home.

76. Mr Kerr submitted evidence based on various title and company documents challenging whether Mr Maass' home during this period really was Arams Farmhouse. As with other apparently disputed points in this case, they are both right, as I have just explained: Mr Maass had other addresses and there were times when he spent much less time at Arams Farmhouse than in other places, but he maintained a connection. I accept his account of his activities and movements.

77. As mentioned above, in 2002 Mr Rohwedder and Mr Maass' mother separated and Mr Rohwedder moved out, although he visited from time to time and kept possessions there. This means that there was a period of some years when the person whom Mr Kerr believed to be the tenant (or at least the main tenant and person who made the initial arrangement) was not living at Arams Farmhouse. But this passed unnoticed by Mr Kerr, it seems, because he had no contact with the occupants and, as I have said, did no more than send a post card if the rent was late.

78. In 2006 Mr Maass' mother moved out. Arams Farmhouse was then occupied by Mr Maass' sisters and a family friend called Heidi Zeller.

79. By late 2009 or early 2010 Mr Maass had a young family and wanted to move into Arams Farmhouse full time. He asked Heidi Zeller to leave and she did.

80. In February 2010 Mr Maass and Mr Kerr met to discuss the situation at Arams Farmhouse.

81. It is not clear precisely what triggered this meeting. Mr Maass thought it arose from his removal of an asbestos roof from a building near Arams Farmhouse having irritated Mr Kerr. Mr Kerr said that it arose when he became aware that both Mr Rohwedder and his wife had left Arams Farmhouse and Mr Maass had taken over. I do not think it matters, but for what it is worth I marginally prefer Mr Kerr's view, because it makes sense in the way that the discussion coincided with Mr Maass moving in with his family as the main occupants.

82. It is agreed that Mr Kerr called for the meeting, although I do not think that matters either.

83. Much more importantly, it is common ground first, that Mr Kerr said he wanted to put the tenancy on a more formal basis, but, second, that nothing was ever put in writing. Mr Kerr said that he just never got around to having documentation prepared, which I accept.

84. Further, it is common ground that it was agreed that the rent would stay the same and Mr Maass would be responsible for maintenance and repairs. In other words, the arrangement made between Mr Rohwedder and Mr Kerr stayed in place in those respects.

85. However, Mr Kerr also said that he informed Mr Maass that the tenancy would from then on be on a monthly periodic basis. Mr Maass denied this and said that he would not have agreed to such a potentially short period of time.

86. I do not think the evidence is strong enough to establish that Mr Kerr was so plain about the tenancy being on a monthly periodic basis, although I am sure Mr Kerr was truthful that that was his recollection. But just the fact that he referred (as is common ground) to a formal tenancy cuts against Mr Maass' case that at this stage he (Mr Maass) already had the right to stay indefinitely. It is not said by Mr Maass that he told Mr Kerr of any belief on his part that he or his family (or Mr Rohwedder before him) already had the right to stay in Arams Farmhouse for as long as they wanted even if Mr Kerr asked them to go.

87. Both sides were clearly under the continuing misapprehension that it was possible to put the obligation on a tenant to carry out maintenance and were not aware of s. 11 or its effect.

2010 to the present

88. Mr Maass continued to do works to the property and I will mention these in more detail below. I think it is likely that they were undertaken at a lesser rate than when Mr Rohwedder had been in occupation, because it is Mr Maass' evidence that the property at the time of trial was in a state of disrepair (though not as bad, he says, as when occupation by Mr Rohwedder began).

89. It is common ground that Mr Maass and Mr Kerr communicated very little in relation to these repairs, and less as time went on.

90. In about 2014 Mr Maass told Mr Kerr that he was concerned about some cracks in the property. Mr Kerr visited with an architect.

91. I find that there was an unpleasant smell at the time, arising from some issue with the drains. Mr Maass and Mr Kerr disagreed about the precise cause and severity. I do not feel able to resolve that, and it does not matter. I find that Mr Kerr went inside

and looked around the property. I find that he was able to gain a general impression of its condition, but he did not conduct any sort of detailed inspection and his attention was not drawn by Mr Maass to anything in particular (other than the cracks).

92. It was not alleged in connection with this visit that Mr Kerr complained of disrepair as such, other than in relation to the cracks.

93. In 2017 Mr Kerr retained Strutt & Parker to act as agents and to advise on the management of the Estate. As a result Mr Kerr and Ms Whyatt-Watts of Strutt & Parker visited Arams Farmhouse in April 2017. Mr Kerr says that at that stage he observed that Arams Farmhouse was in a poor state of repair, and that there was a problem with Japanese knotweed. The s. 21 notice was sent on 19 May 2017.

Works done over time

94. The works done by Mr Rohwedder and/or Mr Maass over time were set out at paragraph 13 of Mr Maass' witness statement. It was not disputed that the works were in fact done. They vary in a number of ways, although it is not necessary or possible to say how or to what extent these considerations apply to each one specifically:

a. Many were done only by Mr Rohwedder, before Mr Maass was an adult.

b. Some have continued over the years, for example item (a), the maintenance of the driveway, and item (d), central heating, which was undertaken soon after Mr Rohwedder moved in but extended by Mr Maass in 2010.

c. Some were repairs, like the driveway and item (j) (fascia and guttering replacement), but others were not and were improvements (such as item (c) – knocking together two rooms, and item (g) – a loft conversion).

d. Some were for the specific purpose of being able to run a care home, for example items (e) and (f).

95. Although it is not possible to be precise as to each, I find that few if any of these works were notified to Mr Kerr, although he may perhaps have observed the drive.

96. Mr Maass assigned a value of £100,000 to the works overall. This was a very broad, qualitative assessment which was not entirely the cost to him or the benefit to the property value but a blend of both. And so far as it reflected the cost to him, it included out of pocket costs (though these were relatively minor) and, more importantly, investment of his time and labour. At the very general level at which assessment of this imprecise exercise can be undertaken, I find that Mr Maass' judgment is on the high side, but of the right order of magnitude.

Mr Maass' state of mind

97. I make the following findings as to Mr Maass' state of mind:

a. He always regarded Arams Farmhouse as his family home in the sense identified above.

b. He always expected to stay there for a long time.

c. He was always aware that in fact Mr Kerr had never asked a tenant who paid their rent to leave a property on the Estate.

d. He had a general but not detailed understanding of landlord and tenant law from his time as a landlord himself.

e. He understood that his occupation of Arams Farmhouse was, in a very broad sense, as a tenant and not as an owner.

f. He was uncertain what his position would be on the death of Mr Kerr but expected to stay at Arams Farmhouse until then, at least.

g. He did not know that it was not possible for a landlord to contract out of the obligation to keep a property in repair.

98. There is something of a tension between points c. and f. above, and between them and Mr Maass' case that he in fact has a right to stay at Arams Farmhouse in law as a matter of proprietary estoppel: why should that end in the event of Mr Kerr's death? I think the explanation is that Mr Maass' belief was not primarily as to his *legal* rights in relation to Mr Kerr, but really a *factual* hope or expectation that in fact Mr Kerr would never ask him to leave. There is really no evidence that Mr Maass reasonably and realistically thought, especially when his occupancy was under review in 2010, that he had a legal right to insist on staying forever if Mr Kerr made an otherwise lawful request for him to leave.

99. In any event, it bears repeating that as with Mr Rohwedder, any belief that Mr Maass had had of a legal right to stay indefinitely was not communicated to Mr Kerr.

Mr Kerr's state of mind as to the repairing obligation

100. I have dealt above with Mr Kerr's state of mind at the time of his discussions with Mr Rohwedder and Mr Maass.

101. It was also pleaded by the amendment I have referred to above that Mr Kerr knew that the property was in fact subject to a repairing obligation on him. This was put to him and he steadfastly rejected it. I accept his evidence. Leaving aside his own statement as to what his belief was, I can see no extrinsic reason to suppose that he might have known that. He was not a lawyer and his knowledge of landlord and tenant law, while not nil, was rudimentary. Moreover, Mr Rohwedder and Mr Maass both had the belief that it was possible for the repairing obligation to fall on them by agreement, and Mr Maass had himself been a landlord for a period yet did not know about the effect of s. 11.

102. I do not see any basis for the plea that he wilfully shut his eyes to the true incidence of liability for repairs and I reject that too.

103. I therefore reject the factual basis of Mr Maass' case so far as it relates to what Mr Kerr's state of mind was, or should have been, and the proprietary estoppel by acquiescence allegation fails for this reason. My other factual findings and assessments both above and below are not therefore necessary but I make them in case of any appeal, so the parties can see my reasoning, and because some of them have a bearing on the disrepair counterclaim.

104. I did not understand from the amended pleading that it was Mr Maass' case that Mr Kerr knew of the belief of Mr Rohwedder or Mr Maass that they had a more substantial right over the property than an assured shorthold tenancy, but if it had been then I would have rejected that too, as I have said above. There was no evidence that they communicated any such belief to him, and although the pleading refers to their belief compendiously and in general terms, they did not in fact have the same mental state, according to their written evidence. For example, Mr Rohwedder said he

thought it was an agricultural tenancy but that Mr Kerr could insist on him leaving if he rehoused the family; but he made no mention of the rights acquired being only for Mr Kerr's life, while Mr Maass did not mention any agricultural tenancy and did say that the right was until Mr Kerr's death. Nor did they do anything that outwardly might have suggested to Mr Kerr that they thought they had any such greater right: he knew little of what they were doing, they appreciated his limited knowledge, and insofar as he was aware of what they did by way of works, it was consistent with the basic deal they had made for a low rent to reflect that the obligation to repair fell on them.

Detriment and reliance

105. This is far from those cases of alleged proprietary estoppel where someone has organised their whole lives around the expectation that they will in the future own some piece of property, giving up other opportunities.

106. Mr Maass, as I have said above, went to university, bought, rented and rented out property, lived in various places of his choosing and made a family. This life experience was certainly enhanced by his long connection with Arams Farmhouse, but it was not dependent on it. So far as he made plans around being in Arams Farmhouse for a long time, he relied primarily on Mr Kerr's history of letting tenants stay in place for a long time, not an expectation as to his legal rights, and he always expected that he might well have to leave on Mr Kerr's death.

107. The concrete detriment alleged is really all down to the works undertaken in pursuance of the agreements by Mr Rohwedder and Mr Maass with Mr Kerr that the former two would undertake repairs.

108. Although these works undoubtedly took place, I do not consider that that makes them a detriment to Mr Maass (or Mr Rohwedder), at least not in a relevant sense or at a broad level of assessing matters equitably.

109. First, many of them, and I find the greater part of the effort and expense, were not repairs as it had been agreed Mr Maass and Mr Rohwedder would be responsible for. They were improvements that Mr Maass and Mr Rohwedder made of their own free choice and without involving Mr Kerr.

110. Second, Mr Maass and Mr Rohwedder had the full benefit of these improvements. For example, it was decided to knock two rooms together, and that improvement in enjoyment of the property has been experienced for 25 years.

111. Third, the works done for the purpose of running a care home represented a business decision which must have been expected to pay for itself and probably did.

112. I also bear in mind that any improvements which were made will not necessarily be what Mr Kerr would have wanted, or such as to benefit him in future.

113. Finally, and very importantly, it is necessary in my view to factor in, in a general but not mathematically precise way, that Mr Rohwedder and Mr Maass have had the benefit of a low rent for 25 years, falling more and more behind with the effect of inflation. In itself I find that this at least counterbalanced the cost or value of the works done to Arams Farmhouse, which is unsurprising, since that it what the parties thought was a fair balance to strike, in 1993 and 2010.

114. For all these reasons I would have found in any event, aside from the fact that Mr Maass' case fails in relation to Mr Kerr's state of mind, that there was no adequate or relevant reliance or detriment to support the allegation of proprietary estoppel by acquiescence.

Unconscionability

115. In the light of the findings above I also find that Mr Kerr has very clearly not acted unconscionably.

116. What has happened is that the parties mutually misunderstood whether it was possible to place the obligation for repairs on the tenant. Focusing on Mr Kerr, he made an innocent and understandable mistake in this regard.

117. It was understandable because although the law does not allow parties to enforce such an arrangement (at least not without the permission of the court), lay persons acting fairly and equitably might not realise or expect that. For example, they might well think, if they thought about it at all, that such arrangements could be valid if reasonable, or that they could be valid if the rent reflected the arrangement (which it did in the present case), or that they could be valid if the tenant gave informed consent and was capable of doing the repairs (which was also true in the present case – indeed I consider that Mr Rohwedder and Mr Maass both took pride and satisfaction in their ability to look after and improve Arams Farmhouse).

118. In any event, and this ties back in with my analysis of the law, anything that might be said of Mr Kerr in relation to the incidence of the obligation to repair has really nothing to do with Mr Maass' claim to a permanent entitlement to live in Arams Farmhouse. There would be a complete lack of proportion in depriving Mr Kerr of his property.

119. This would also have been relevant to any remedy I might have awarded if the elements of proprietary estoppel by acquiescence had been made out. Since they have not, I do not need to deal with remedy. I will just record Mr Ingham's submission that, in principle, Mr Maass might have been able to bring a claim for unjust enrichment against Mr Kerr to recover money spent on Arams Farmhouse pursuant to the mistaken understanding as to the obligation to repair. I make no finding as to this and it forms no part of my reasoning. Mr Ingham was also clear that any such claim

would be resisted on the facts; it was really just a forensic point to emphasise that it was not a necessary consequence of his submissions that a party in Mr Maass' position would necessarily be deprived of all remedy.

The disrepair counterclaim

120. This was sparsely pleaded, to say the least. The pleading did not make clear what the disrepair was, or when it happened, and merely said that an environmental health expert's report would make clear the defects in due course. Such a report was done, but not until May 2018. It identified a large number of defects, many of which are minor. The more major, on which argument focused, concerned damp, which was severe in a number of places and less bad in others.

121. The report put the total cost of repairing all the defects at £40,980. Obviously, one cannot simply translate this to the damages claimed, since a problem which is very expensive to repair may cause only minimal disruption, for example rotting window frames may continue to keep a property mostly weatherproof, warm and dry but cost many thousands of pounds to repair.

122. The heads of damage pleaded are general: inconvenience and distress to Mr Maass and his family, and diminution in their enjoyment of the property. Mr Maass did not give evidence about impact of the disrepair on his (or his family's) quality of life. He said at paragraph 13 of his witness statement "the fact that the property is not currently in a perfect state is not denied, however it is still far better than the almost derelict state it was in when we occupied the house".

123. I suspect that Mr Maass' relative reticence on the question of the extent of disrepair arises from the fact that it might suggest that he had not kept up his end of the bargain struck with Mr Kerr and affect the proprietary estoppel by acquiescence part of the

case. That is understandable, but my assessment of the counterclaim must proceed on the assumption that the obligation to repair was on Mr Kerr.

124. The argument at trial focused on two issues: was Mr Kerr aware of any disrepair, and what should the damages be, if and to the extent that he was?

125. Mr Kerr's own witness statement says that he observed a general poor state of repair at his visit in 2017, and clearly he has been aware of the problems in the report of May 2018, although only for a few months. So this degree of knowledge is not disputed.

126. What was in dispute, however, was what might have been observed at the visit in 2014. Mr Maass accepted that he did not specifically draw Mr Kerr's attention to individual areas of damp, and Mr Kerr spent only a short time in the property.

127. Doing the best I can, I find that the general disrepair in the property is quite severe. Some of the problems will have had no impact at all on the use of the property (for example chimney flashing) and others are quite trivial such as the odd damaged light fitting. The main problem is unquestionably damp, and the numerous photographs of that give the impression that it is in many rooms, including rooms likely to be in regular use and where damp will be unpleasant and detrimental to the occupants' comfortable enjoyment, such as bathrooms, bedrooms and rooms where books are kept. Mr Kerr could easily have disputed these matters if they were wrong, but did not. As I note above, his evidence is that the disrepair is significant.

128. I take account of the fact that some damp is often inevitable in an old property, as the report acknowledges, but Arams Farmhouse goes well beyond that.

129. This disrepair clearly did not happen in a short timescale. I find on the balance of probabilities that it was generally evident in 2014 (although it may not have been as

bad) and that given that it is spread widely around the property. I find that Mr Kerr's visit, albeit brief and for another purpose, enabled him to appreciate the overall picture, and he did, even if not pointed to particular problems.

130. There was a faint attempt in Mr King's closing written submissions to argue that Mr Kerr was aware of the disrepair in 2010 when Mr Maass and Mr Kerr discussed the terms of Mr Maass' occupancy, but it erroneously said that they met at Arams Farmhouse, and they in fact met at Mr Kerr's house.

131. Although Mr Maass' evidence is lacking in directly addressing loss of enjoyment, I believe I can rely on all the evidence in the case for this purpose, and I know that Mr Maass lives there with his family and the general level of disrepair. It is obvious that it must affect their quality of life, not so as to make it unliveable (indeed Mr Maass clearly enjoys living there very much) but to make it appreciably less enjoyable than if the property was in a reasonable condition.

132. I therefore have to assign a quantum to a general, significant but not overwhelming lowering of enjoyment over a period of 4 years.

133. Mr King presented a variety of ways to assess quantum, although his main thrust was that since the damages were capped at £10,000, which would be reached by any method, it did not matter what approach I adopted. I think I should take a more principled approach.

134. Mr King relied on *Wallace v. Manchester* (1998) 30 HLR 111 for the proposition that damages could be on the basis either of diminution in value, or a "global award" or both. He also argued that there was an "unofficial tariff" of £1,000 to £2,750 per annum, but that that had not been adjusted for inflation. However, I note that the £3,500 for three years of disrepair awarded in Wallace was for a situation where an external wall had partially collapsed, the windows were rotten and there was a constant infestation of rats: an order of magnitude worse than Arams Farmhouse.

135. Finally, he directed attention to the total cost of repairs in the May 2018 report, and said that that plus the value of work done by Mr Kerr should be the proper measure, albeit that of course it would then be capped at £10,000.

136. I reject the cost of repairs of £40,980 as a relevant or principled approach for the reasons given above: it is not correlated to the impact of the problems on Mr Maass and his family. I also reject the sums spent by Mr Maass as being of any real relevance.

137. As I have said above, I do not think that *Wallace* is a good comparable, for two reasons which pull in opposite directions: its age suggests it is would be too low, but on the other hand and in the other direction, the disrepair was much worse.

138. A more recent case in the materials shown to me was *Earle v. Charalambous* [2006] EWCA Civ 1090 where a long leaseholder suffered damp and water penetration (clearly still worse than Arams Farmhouse but not nearly so bad as in *Wallace*) and the award was £13,500 for the first two year period and £10,000 for the second two year period when things were so bad that the tenant moved out. The second period award was just under half the rental value.

139. I was only addressed on these matters relatively briefly and only really by Mr King, since Mr Ingham's main line of defence was the factual proposition that no notice had been given to Mr Kerr, which I have rejected. I believe the appropriate overall principles are:

a. This is a contract claim and the overall principle applies of putting the claimant in the position, so far as money can, as if the obligation had been performed, i.e. the property had been kept in repair.

b. The relevant loss is the discomfort and inconvenience suffered.

c. The level of rent is relevant and may be used as a factor.

d. Loss to the tenant's asset in the property may be relevant but that can only apply to a long lease, not relevant to my task.

140. The present case is a complex one in relation to trying to use the level of rent in the assessment, because of course it was unrealistically low, precisely because the parties had agreed that the obligation to repair should be on Mr Maass.

141. Mr King submitted that I should have regard to what the rent would have been had the parties not made such an agreement, but of course I do not know what that would have been; only that it would have been significantly more.

142. So I think rent paid (or notionally payable) can only be the very broadest indicator in this case, given the uncertainties. The overall rent actually paid in the 4 year period will have been £7,440.

143. Doing the best I can, I find that the discomfort caused was well above the trivial, but still at the lower end of the spectrum compared with cases like *Wallace* and even *Earle*. Things were nothing like bad enough for Mr Maass and his family to consider moving out, they enjoyed their life at Arams Farmhouse, and had things been truly awful I think Mr Maass would have taken action himself, as had been done earlier in relation to damp (see item 13(f) in Mr Maass' statement in relation to 2002).

144. I therefore award £5,000, being £1,250 per year. This is in fact well over 50% of the rent paid but at the same time at the lower end of other awards, for the reasons arising from the artificiality of the rent noted above.

Conclusion

145. The Claimant is entitled to possession of Arams Farmhouse. The Defence and Counterclaim based on proprietary estoppel by acquiescence fails.

146. The Counterclaim for disrepair succeeds and I assess quantum at £5,000.

147. I will deal with the appropriate form of order, and costs, by way of written submissions. I direct the parties first to try to agree, and failing that to provide written submissions by 22 January 2019, not to exceed 4 pages of normal type, with any supporting evidence. If these directions are not practical then the parties are invited to suggest appropriate variations.

148. I record that Mr Ingham accepted in his closing submissions, in answer to a question from me, that in the event of the claim to possession succeeding Mr Kerr would allow 3 months for Mr Maass to arrange to leave.