FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(AGRICULTURE LAND AND DRAINAGE)

Case Reference	:	**ALD/SE/S/2016/006**
Holding	:	**Home and Pishill Farm, Stonor, Henley on Thames, Oxfordshire**
Applicant	:	**William Graham Carr**
Represented by	:	**Michelmores LLP**
Respondents	:	**John Patrick Michael Hugh Evelyn** **Peter John Evelyn** **Henry William McCowen** **(as the Trustees of the JPMH Evelyn 1997 Settlement)**
Represented by	:	**Taylor Wessing LLP**
Type of Application	:	**Succession and Consent to Operation of a Notice to Quit**
Tribunal Members	:	**Regional Judge T Bowles** **Mr P Cherry – landowner member** **Mr N Stacey – farmer member**
Date of Decision	:	**8 April 2020**

REASONS

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As IN THE FIRST TIER TRIBUNAL **ALD/SE/S/2016/006**

PROPERTY CHAMBER

AGRICULTURAL LAND AND DRAINAGE

WILLIAM GRAHAM CARR

APPLICANT

AND

(1) JOHN PATRICK MICHAEL HUGH EVELYN

(2) PETER JOHN EVELYN

(3) HENRY WILLIAM MCCOWEN

(as the TRUSTEES of the JPMH Evelyn 1997 Settlement)

RESPONDENTS

REASONS OF THE TRIBUNAL

1. By its decision and written Reasons, dated 16th August 2019, the Tribunal directed, in respect of the application by William Graham Carr (Mr Carr) for succession to the agricultural holding at and known as Home and Pishill Farm (the Holding), previously held by his father, Graham Francis Carr, that, pursuant to section 39 of the Agricultural Holdings Act 1986 (the Act) that, subject to events that have not occurred, Mr Carr was entitled to a tenancy of the Holding from 29th September 2019. That direction has, accordingly, now taken effect.
2. By its same decision and written Reasons, the Tribunal further determined that the Respondents' application, dated 25th May 2017, for consent, pursuant to section 44 of the Act, to the operation of a notice to quit served by the Respondents, under Case G of Schedule 3 of the Act, should be dismissed.
3. The ground relied upon by the Respondents, in making their section 44 application had been that contained in section 27(3)(b) of the Act, applied to the section 44 application by section 44(2) of the Act, namely that the carrying out of the purpose for which the Respondents proposed to terminate the tenancy of the Holding was desirable in the interests of sound management of the estate (the Stonor estate) of which the holding formed a part. By section 44(4) of the Act, had the Tribunal given its consent to the operation of the Case G notice, the consequence would have been that Mr Carr's succession application, under section 39 of the Act, would have had to be dismissed, even

if Mr Carr had, as he did, satisfied all the criteria of eligibility and suitability for a direction in his favour under section 39.

4. The two applications were heard together by the Tribunal over five days, in May 2019. The Reasons of the Tribunal were expressed in a detailed decision, running to 194 paragraphs. Reference will be made to those Reasons, as necessary, in the course of these Reasons.

5. By application, dated, 28th August 2019, Mr Carr applied for his costs of the two applications, as from 25th May 2017, being the date of the section 44 application. The costs sought were expressed to exclude any part of the costs which had been incurred after that date in satisfying the eligibility and occupancy conditions, set out in section 36(3) of the Act, since such costs would have had to be incurred by Mr Carr, in any event, in demonstrating his entitlement to a direction, under section 39 of the Act. Other than those excluded costs, Mr Carr sought his costs on the indemnity basis.

6. On receipt of the application, the Tribunal, in accordance with the procedural guidance, given by the Upper Tribunal (Lands Chamber), in **Willow Court Management Co. (1985) Ltd v Alexander [2016] UKUT 290 (LC) (Willow Court)**, first determined whether Mr Carr had established that the Respondents had a case to answer. The Tribunal determined that such a case had been made out and, by email, dated 7th October 2019, the Respondents were directed to respond to the application, as they duly did, by 29th October 2019. Unusually and because the applications before the Tribunal were of weight and the costs involved were, manifestly, very substantial, the Tribunal further directed that the question of the entitlement to costs and the type of costs (standard or indemnity) to be ordered, were an order for costs to be made, should be determined at a hearing. That hearing took place on 28th January 2020. Mr Carr was represented, as at the hearing of the applications, by Stephen Jourdan QC and the Respondents, again, as at the hearing of the applications, by William Batstone. The Tribunal is grateful to both counsel for their detailed submissions.

7. The jurisdiction under which the First-tier tribunal may award costs is to be found in section 29 of the Tribunal Courts and Enforcement Act 2007. Sub-section (1) provides that the 'costs of and incidental to ... all proceedings in the First-tier Tribunal ... shall be in the discretion of the tribunal in which the proceedings take place'. By sub-section (2), the 'relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid'. By sub-section (3), sub- sections (1) and (2) are to have effect subject to Tribunal Procedure Rules.

8. The relevant Tribunal Procedure Rules are the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 (the 2013 Rules). For purposes of this case, Rule 13 (1)(b)(i) of those rules provides that the First-Tier Tribunal (this Tribunal) 'may make an order in respect of costs only ... if a person has acted unreasonably in bringing, defending or conducting proceedings in ... an agricultural land and drainage case'. Rule 13 (7) of the 2013 Rules provide that the amount of costs may be determined by summary assessment, by agreement, or by detailed assessment. In the event of a detailed assessment, the assessment is to be on the standard basis, or, if specified in the Tribunal's costs order, on the indemnity basis. In this case, it is common ground that the costs and circumstances of the case warrant a detailed assessment and, as discussed at the hearing, the Tribunal proposes that, if it makes a costs order, then that detailed assessment should be carried out by a Costs Judge, sitting as a Judge of this Tribunal.

9. In the exercise of its powers under the 2013 Rules, or in the interpretation, of the 2013 Rules and, therefore, in the exercise of its powers in respect of costs and in the interpretation of the rule, or rules, giving rise to those powers, the Tribunal is required, by rule 3(3) of those rules to give effect to the overriding objective, namely the objective of dealing with cases fairly and justly.

10. Guidance, as to the construction and interpretation of rule 13(1) and as to the exercise of the powers and of the discretions arising under that rule, can be derived from a number of authorities, helpfully, cited to the Tribunal and, in particular from the Upper Tribunal decision, in **Willow Court**.

11. In that case, the Upper Tribunal (Lands Chamber|, listed three appeals from the First-tier tribunal, in relation to service charge disputes, in order to consider, for the first time, the jurisdiction under Rule 13 (1) (b) of the 2013 Rules.

12. The Tribunal will return to the Upper Tribunal's decision as to the ambit, or extent, of what can constitute 'unreasonable conduct', later in these Reasons. A number of matters can, however, be noted, at this stage.

13. No jurisdiction to award costs exists unless and until there has been a finding that the party against whom costs are sought has behaved unreasonably in bringing, defending, or conducting the proceedings in question. That finding is not a matter of discretion, but requires the Tribunal to apply an objective standard of conduct. If, but only if, the Tribunal, applying that standard, holds that the conduct of a party, in bringing, or in, defending, or in conducting the proceedings, has been unreasonable, does the Tribunal move to the twofold discretionary element involved in the exercise of the power created by the Rule.

14. The first part of that discretion involves the consideration as to whether, even granted a finding of unreasonable conduct, it is appropriate to make an order for costs. The second part of that discretion only arises where the tribunal, acting judicially, determines that an order for costs should be made and, in consequence, moves on to consider the precise order to be made.
15. In this regard, the position in the First-tier tribunal is wholly different from that existing in the courts, in that there is no equivalent of CPR 44.2 (2) (a), whereby a general rule exists that a successful party should have his, or her, costs. Accordingly, the fact of unreasonable conduct, if found, does not, in this tribunal, lead, necessarily, if at all, to an order that the party in question pays the entirety of the other party's costs.
16. Nor, in the exercise of its discretion as to what costs order to make, is the tribunal inhibited, or constrained by the requirement of establishing a strict causal nexus between the unreasonable conduct and the costs said to be recoverable on the ground of that conduct. The tribunal must apply a principle of relevance, when exercising discretion, and, hence, must have regard to the nature, gravity and effect of the unreasonable conduct. It does not, however, before making a specific order as to costs, have to require the claiming party to establish a causal link between the unreasonable conduct and the costs to be ordered and it is not to be regarded as punitive and impermissible to make an order for costs, consequential upon unreasonable conduct being established, which is not confined, strictly, to the costs proven to be attributable to the unreasonable conduct which has been established.
17. Reverting to the ambit, or extent, of what can and cannot constitute unreasonable behaviour, or give rise to a finding of such behaviour, in the context of rule 13 (1)(b) of the 2013 Rules, the first point of note and an important one is that the conduct complained of must be the conduct of a party in bringing, or conducting the proceedings in question. Accordingly, conduct, however unreasonable, prior and unrelated to the bringing of the proceedings in question cannot give rise to a finding of unreasonableness, sufficient to bring the tribunal's costs jurisdiction into play.
18. This limitation upon jurisdiction, however, must not be taken too far. In particular, as identified, at paragraph 95, in **Willow Court**, the motive of a party in bringing proceedings may be relevant in determining the reasonableness, or otherwise, of that party in commencing proceedings. As explained, by the President of the Upper Tribunal (Lands Chamber), in **The Kingsbridge Pension Fund Trust v Downs [2017] UKUT 0284 (LC) (Kingsbridge)**, at paragraph10, the behaviour of a party prior to the relevant proceedings

might well inform actions taken in the relevant proceedings and may support a finding that behaviour in bringing, or conducting, those proceedings was unreasonable.

19. In regard to unreasonableness itself, the Upper Tribunal, in **Willow Court**, based itself, very largely, upon the familiar judgment of Sir Thomas Bingham MR, as he then was, in **Ridehalgh v Horsefield [1994] Ch. 205 (Ridehalgh)**, at pages, 232C-233F; a judgment given in the context of and in respect of wasted costs.

20. In that judgment, which was a judgment of the whole court, the then Master of the Rolls made plain a number of matters; firstly and perhaps most importantly, that conduct cannot be stigmatised as unreasonable simply because it leads, in the event, to an unsuccessful outcome. That conclusion was endorsed, in respect of the jurisdiction, under rule 13(1)(b), in **Willow Court**, at paragraph 24 and, again, at paragraph 62 and, in **Kingsbridge**, at paragraph 9. In **Willow Court**, at paragraph 62, the Upper Tribunal, in restating that want of success cannot, on its own, be determinative of unreasonableness, drew attention to the fact, as it was put, that the First tier tribunal, in its residential property division, as in its agricultural land division, is a costs shifting jurisdiction by exception only and that parties must usually expect to bear their own costs.

21. The acid test, in the view of the then Master of the Rolls, was whether the conduct complained of, whether the bringing of proceedings, or their conduct, permitted of a reasonable explanation. That view, or an alternative but similar formulation; would a reasonable person in the position of the relevant party have conducted himself, or herself, in the manner complained of; found favour, as the approach to be adopted to the determination of unreasonableness, under rule 13(1)(b), both in **Willow Court**, at paragraph 25 and in **Kingsbridge**, at paragraph 9.

22. In the course of giving the judgment of the court, in **Ridehalgh**, Sir Thomas Bingham explained that expression 'unreasonable' was apt to describe conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case. In **Willow Court**, it was submitted that unreasonableness, in the context of rule 13(1)(b), extended further than, simply, behaviour which could be described as vexatious, abusive and frivolous, should extend to the conduct of a person who fails to prepare properly, or to adduce proper evidence, or to fail to state his, or her, case clearly, or who seeks an wholly unachievable or unrealistic outcome, that the jurisdiction to award costs should be regarded as a primary method of controlling such conduct and that the exercise of the jurisdiction should not be regarded as exceptional.

23. That submission was rejected and in argument before this Tribunal, Mr Batstone submitted that, in rejecting the extension of the concept of unreasonableness to embrace conduct of the kind just described, the Upper Tribunal had, thereby, limited conduct which could be regarded as unreasonable to conduct which fell within the rubric of vexatious, abusive, or frivolous.

24. This Tribunal is not persuaded. Both in **Willow Court** and in **Kingsbridge**, the Upper Tribunal determined that unreasonable conduct included conduct that was vexatious, or designed to harass the opposing side. In neither case did the Upper Tribunal conclude that unreasonable conduct was limited to such conduct. Nor, properly understood, did the then Master of the Rolls, in **Ridehalgh**, limit the meaning of 'unreasonable, or of 'unreasonable conduct' in that way. The Master of the Rolls described unreasonableness as an expression which aptly described vexatious and harassing conduct. He did not, thereby, limit the extent of the meaning of the word to such conduct, or behaviour. That that is the case is clear from his ultimate conclusion, or acid test; namely that conduct, whether the product of improper motive, or excessive zeal, is unreasonable if it does not permit of a reasonable explanation. While such conduct would plainly include vexatious, or harassing behaviour, the Master of the Rolls was, as it seems to this Tribunal and as it did to the Upper Tribunal, in **Willow Court** and in **Kingsbridge**, deliberately not confining, or straight jacketing, unreasonable conduct to conduct of that nature.

25. In the result, this Tribunal is satisfied that the question for the Tribunal in respect of the matters complained of on behalf of Mr Carr is whether those matters are susceptible of reasonable explanation, or, as put, alternatively, by the Upper Tribunal, in **Willow Court**, whether a reasonable person in the position of the party against whom costs are sought would have conducted himself, or herself, in the manner complained of.

26. In asking and answering that question, the Tribunal, while mindful of the fact sensitive nature of applications such as the present, has derived further assistance from **Willow Court**.

27. The objective standard of conduct required of tribunal users should not be set at an unrealistically high level and, correspondingly and consequentially, costs orders, under rule 13(1)(b), should be reserved for the clearest cases. A tribunal should not be over zealous in detecting unreasonable conduct after the event. In particular, in the view of this Tribunal, a tribunal should be careful to guard against hindsight and against the determination of a costs application with the benefit of hindsight and with the ex post facto clarity that accompanies hindsight. Experience shows that that which is apparently

obvious following analysis and determination is, often, very much less obvious prior to that determination.

28. The tribunal, however, is entitled, in the determination, case by case, of the relevant objective standard of reasonableness, to have regard to the circumstances in which the relevant party stands. If that party is without legal advice and representation, then the objective standard of reasonable conduct to be applied to that party will be the standard to be expected of a party in that position.
29. Correspondingly, in a case, such as the present, where both parties have, throughout, had the benefit of specialist legal advice and representation, then the objective standard of reasonableness to be applied should, as it seems to this Tribunal, have regard to that fact.
30. In support of his application for costs, Mr Carr relied on six matters; the fact that the reason underlying both the Respondents' opposition to the succession application and its pursuit of the consent application was the animus, or antipathy, of the Respondents, or their agent, Mr Trower, towards the Carr family and their, consequent, desire to remove Mr Carr and his family from the estate; the fact that , in support of the consent application the Respondents had made use of the services of Mr Butcher, of Strutt and Parker as a purported independent expert, when, in truth, he was 'a 'hired gun', put forward by the Respondents to make their case and with evidence tailored to that purpose', 'who never had been independent of the Respondents, but rather had been from the outset a key participant in the preparation of the Respondents' case' (see, for quotations, Tribunal's Reasons at paragraphs 129 and 134); the fact that the Respondents sought, in respect of the consent application, to use their own failure, in breach of their repairing covenants, to keep the structure of certain of the farm buildings in proper repair, as part of their argument that consent should be given to the operation of the Case G notice, on the ground that the release of the buildings, given their poor structural state, from the tenanted estate would constitute sound management of the estate; the fact that, without, it is said, reasonable foundation, the Respondents had made allegations, ultimately not pursued, as to the quality of Mr Carr's husbandry of the holding; the fact that, in regard to Mr Carr's suitability to succeed to the tenancy of the holding, the Respondents had, until faced with Mr Carr's answers under cross examination, chosen to allege that Mr Carr had 'manipulated' his and his wife's finances, in order to satisfy the livelihood requirement for eligibility to a succession, contained in section 36(3)(a) of the Act; the fact that, although, ultimately, not pursued in final submissions, the Respondents chose to bring into play a number of historic allegations said to go to the integrity, or, as Mr Carr's

costs application puts it, the want of good faith of Mr Carr and/or his father, as going to the suitability of Mr Carr, as tenant of the Holding.

31. In the view of the Tribunal, the latter four of Mr Carr's contentions, each taken in isolation, would not warrant, even if constituting, or amounting to, unreasonable conduct, the making of any separate orders for costs against the Respondents. Referencing **Willow Court**, the Tribunal, in the exercise of the first phase of its judicial discretion, does not consider it appropriate to make separate costs orders in respect of any of those matters.

32. Taking each matter shortly and successively, while the Tribunal expressed a very clear view that a landlord cannot take advantage of his own breach of repairing covenant to procure, on grounds of sound management of the estate, the release from the tenanted estate of buildings that he has allowed to fall into disrepair and while, as it seemed to the Tribunal, this was what the Respondents had, in effect, sought to do, it would be putting it too high to say that this was a central plank in the Respondents' case, in bringing the consent application, or in the Tribunal's decision to reject that case. In those circumstances, whatever the demerits of the Respondents' position, on this point, the Tribunal's view was that it would not be just, or fair, to treat this aspect of the Respondents' application as justifying any separate order for costs.

33. The Tribunal takes a similar approach in respect of the allegations of bad husbandry. Those allegations were never seriously pursued and, in the event, evidence that Mr Carr pursued the highest standards of husbandry was left wholly unchallenged. The allegations of bad husbandry were, however, only ever at the periphery of the Respondents' consent application. For that reason and while, as with the point last discussed, relevant to the overall consideration of the Respondents' conduct, in bringing the consent application, the Tribunal does not consider that the fact of the making of those allegations is sufficient to warrant the making of a separate costs order.

34. The last two of the six matters raised, on behalf of Mr Carr, go to the Respondents' defence of the succession application and, purportedly, to Mr Carr's suitability to take on the tenancy of the Holding. In both instances, the allegations, of manipulation and of bad faith, or want of integrity, were not carried through into final submissions. In the case of Mr and Mrs Carr's alleged manipulation of their finances, the allegation was dropped as soon as Mr Carr made plain, in his oral evidence, that such manipulation had not taken place. In regard to so-called bad faith, the material put forward in support of that contention was elderly, largely related not to Mr Carr but to his father and never,

remotely, established the alleged, or any, bad faith as against Mr Carr. In the view of the Tribunal, these matters should never have been raised.

35. That said, neither allegation (manipulation, or bad faith) was ever at the heart of the case, or of the Respondents' defence to the succession application. As such, in the view of the Tribunal, they, too, fall to be considered as part of the factual matrix surrounding the two applications with which the Tribunal has been concerned and weighed in the balance as part of the determination by the Tribunal of the reasonableness, or otherwise, of the Respondents' conduct, in bringing or defending those applications, rather than as giving rise to separate and free-standing orders for costs.

36. Mr Carr's costs application does not discriminate between the two applications, succession and consent. His case is that the Respondents' position, in respect of both applications, was motivated by the animus, or antipathy, of the Respondents, or their agent, Mr Trower, towards the Carr family and by their consequent desire to evict the Carr family from the Stonor estate and that that antipathy, or animus, and that motive, did not afford good reason, or provide a reasonable explanation, for their conduct, both in opposing the succession application and in pursuing the consent application.

37. It is clear from the Tribunal's findings, as set out, in extenso, in its written Reasons that that animus, or antipathy did exist and that the Respondents' motivation, both in their defence of the succession application and their prosecution of the consent application was, indeed, to procure the eviction of Mr Carr and his family from the estate. However, those facts, while, undoubtedly, relevant to the reasonableness, or otherwise, of the Respondents' conduct and as informing the conduct of the Respondents , in respect of the proceedings, as contemplated in **Willow Court** and **Kingsbridge**, are not, in themselves, in the view of the Tribunal, sufficient to give rise to a finding of unreasonableness and an order for costs.

38. As explained by the Tribunal, at paragraphs 106 and 108 of its written Reasons, the fact that a landlord is motivated in his actions by the wish to secure a removal of his tenant, while requiring the tribunal to consider the matters put forward by the landlord with particular scrutiny, does not debar the landlord from appropriate relief, if, following scrutiny, the landlord has made out a proper case. Correspondingly, where a landlord, whatever his motivation, embarks on a course of conduct for which, looked at objectively, there is a realistic and reasonable explanation and where his conduct is one which a reasonable landlord would, or could, have taken, that conduct, even if, in the event, unsuccessful in securing the relief sought, should not be stigmatised as unreasonable,

simply by reason of the underlying motivation. It is not the place of a tribunal, exercising this jurisdiction, to penalise an unsuccessful landlord, by reason of his motivation, if objectively considered, his conduct can, or might, be regarded as reasonable.

39. The relevance of the foregoing, in this case, attaches, in the view of the Tribunal, to the approach that the Tribunal should take, notwithstanding its clear view as to the Respondents' motivation, to the costs of the succession application, as distinct, from the consent application.

40. As already indicated, the Tribunal does not consider that the Respondent's conduct in raising the issues of bad faith and manipulation, discussed above, warrants the making of any separate costs order in respect of those matters. Rather, although directly related to the Respondents' defence of the succession application, they are best viewed as part of the matrix in determining the overall reasonableness of the Respondents' conduct, in respect of both applications

41. The real issue, on the succession application, other than a discrete issue, arising from an ill-considered letter written by Mr Carr's solicitor, Mr Williams, was, essentially, an issue of law; namely as to whether, as set out in paragraph 65 of the Tribunal's written Reasons, a person, such as Mr Carr, undoubtedly is, who, independently of his economic relationship with the holding, in question, has sufficient income and resources for his economic survival, is capable of being a suitable person to succeed to the tenancy of a holding, or whether the succession provisions are intended to be available, only to those , who, without benefit of those provisions would suffer hardship, with the consequence that those, like Mr Carr, who would not suffer hardship are to be treated, in law, as unsuitable to succeed.

42. The Tribunal firmly rejected that proposition, as is set out at paragraphs 66 to 75 of its written Reasons. The question, now, though, is as to whether the Respondents' argument, that economic dependence upon the holding was a necessary criterion of suitability, was so unrealistic and unarguable that no reasonable landlord, in the position of the Respondents, would have advanced the argument, or, put another way, that, given its lack of merit, there is no reasonable explanation as to why the Respondents elected to advance the argument.

43. This Tribunal is not prepared to say that no reasonable landlord would have been prepared to take the point advanced, here, by the Respondents, or, correspondingly, that no reasonable explanation exists for the landlord's conduct in advancing the argument. There is, in principle, nothing at all unreasonable, from the perspective of an estate

owner, in seeking to secure possession of an agricultural holding. The only question is whether the argument advanced, to that end, was so thin that no reasonable and, in this case, well advised landlord would have considered the argument realistic and, therefore, one reasonably to be advanced. If the answer to that question is 'yes' then that affords a perfectly reasonable explanation for the conduct taken.

44. Mr Jourdan QC, for Mr Carr, in forceful submissions, contended that the Respondents' argument as to the supposed criterion of economic dependency upon the holding, as a necessary ingredient of suitability was, in his terms, 'hopeless'. The argument certainly did not find favour with the Tribunal. The Tribunal cannot say, though, without benefit of the detailed consideration and analysis of the argument which took place at the hearing, that the argument was, palpably, hopeless and, for that reason, unreasonably advanced, from the outset. The argument derived an, albeit limited, measure of support from the explanation for the extension of the relevant rights of succession, set out, at **17.3**, in **Muir Watt & Moss on Agricultural Holdings (15th Ed. 2018)**, referred to in paragraph 65 of the written Reasons and to describe it as unreasonable from the outset would, in the view of this Tribunal, be to adopt an over zealous approach and one which, as foreshadowed in paragraph 27 of these Reasons, was at risk of attaching too much weight to hindsight and the clarity arising from hindsight.

45. In the result, therefore, the Tribunal is not disposed to make any order for costs in favour of Mr Carr, in respect of the succession application. The argument as to the need for economic dependence was, as already stated, the central and fundamental argument in respect of the defence of the application. The manipulation and bad faith points, already discussed, were no more than make weights and not sufficient, in themselves, to warrant a separate costs orders.

46. The position, however, as to the consent application is altogether different. In the view of the Tribunal that application was both unreasonably brought and unreasonably conducted.

47. The consent application was, as set out at paragraphs 112 to 121 of the written Reasons, designed, specifically, to prevent Mr Carr from procuring a direction from the Tribunal that he succeed to his father's tenancy of the Holding. As set out, in particular, in paragraph 121, the sound estate management proposals, placed before and rejected by the Tribunal, arose out of legal advice obtained by the trustees that, adopting and applying the sound estate management grounds which had been discussed by the First-tier Tribunal, in **Collins v Spofforth and Others 27th November 2008 ALT Refs SW1/1057/58**

(Spofforth), application could be made under section 44 of the Act, having the effect of precluding Mr Carr from succeeding to his father's tenancy of the Holding. Such proposals had never been in the mind of the Respondents prior to the receipt of that advice and it is completely clear, from the evidence before the Tribunal, that the proposals, as ultimately advanced by the Respondents were explicitly designed around the decision in **Spofforth**, in order to seek to take advantage of that decision. The unsuccessful consent application was a deliberate construct, to that purpose, brought with the clear motive of removing, or evicting, the Carr family from the Stonor estate and so brought, by reason, as already outlined, of the Respondents' animus, or antipathy, in particular that of their long-standing agent, Mr Trower, towards the Carr family.

48. That, however, as already discussed, at paragraph 38 of these Reasons, would not, of itself justify the Tribunal making a costs order, in the exercise of its jurisdiction, under rule 13(1) of the 2013 Rules, if the grounds advanced, whatever, the underlying purpose, or motivation, were, in themselves, realistic and ones which could, or might, have been advanced by a reasonable landlord in the position of the Respondents and, hence, were susceptible of reasonable explanation. That, however, is not this case, whether in respect of the bringing of the application, or its conduct.

49. The most obvious area in which the Respondents' conduct has been unreasonable and, manifestly, not susceptible of reasonable explanation is in the role which the Respondents have allowed one of their so-called independent experts, Mr Simon Butcher, to play in these proceedings. That role is set out, at length, in the written Reasons, at paragraphs 118 to 120 and 129 to 138.

50. Although put forward as an independent expert, Mr Butcher had, in fact, been instructed as a 'hired gun' to make the Respondents' case. His instructions, although, ostensibly, said to have been to prepare a report to assist in determining whether the consent application should be made, were, in reality, instructions to prepare a report in support of the application with evidence tailored to that purpose. Far from being independent, he was, palpably, a member of the Respondents' litigation team and it was in that capacity, as explained in paragraph 137 of the written Reasons and quite extraordinarily, given his supposed independent status, that he was deployed to prepare a financial report on behalf of the tenants (the Straceys), who, under the Respondents' proposals would have acquired the bulk of the Carr Holding, in order to assist those tenants in securing the financial backing which would have been required to render those proposals viable. The

Tribunal was unable to give any weight to his evidence, or even to treat his report as admissible in respect of the matters it contained.

51. No conceivable reasonable explanation exists such as to justify the Respondents' conduct in respect of Mr Butcher. The 'hired gun' approach to expert evidence has long been outlawed. Nor can it possibly be appropriate and susceptible of reasonable explanation to put forward, as an independent expert, a person who is demonstrably partisan and who was, from the very outset, a key participant in the preparation of the very case that, as a purported independent expert, he was called by the Respondents to endorse and support.

52. That conclusion is enough, of itself, to entitle the Tribunal, if so minded, to make an award of costs in favour of Mr Carr.

53. As to whether, as a matter of discretion, such an order should be made, the Tribunal's clear view is that, even viewed in isolation to the rest of the Respondents' conduct, an order, in respect of some part of Mr Carr's costs would be appropriate.

54. The conduct of Mr Butcher was not at the periphery of the Respondents' case. It was at the heart of it. It was his task to prepare the report which was to underwrite the Respondents' case and, thereafter, as a supposed independent expert, to support that case. Consequent upon his report and upon the application founded, in large part, upon his report, Mr Carr has had to expend very large sums in costs in meeting the application, including, but not limited to, the costs incurred in respect of his own expert witnesses.

55. Mr Batstone submitted that it had been open, given the stance, successfully taken, by Mr Carr and his advisers, to Mr Butcher's report and evidence, to stand on that stance and not to incur, in particular, expert costs. He also adverted to the fact that the Respondents had relied upon experts other than Mr Butcher and submitted that some part, at least, of Mr Carr's expert costs should be regarded as relating to those experts, who had not been criticised by the Tribunal in the way that Mr Butcher had been.

56. With respect to Mr Batstone, the suggestion that a properly advised applicant, such as Mr Carr, should have foregone his own expert evidence, in the hope, or expectation, that the Tribunal would elect to disregard Mr Butcher's report and evidence, is quite unrealistic. No properly advised applicant, such as Mr Carr, could behave in that way. As to the other experts, two matters are material. Firstly, in the view of the Tribunal, it was Mr Butcher's report which was the 'driver' in respect of the production of the other expert evidence. His report shaped the application and the other experts dealt with those areas where Mr Butcher acknowledged a lack of detailed expertise. Secondly, as explained, at paragraph 16 of these Reasons, this jurisdiction does not require a strict causal link between the

unreasonable conduct, of wich complaint is made, and the costs ordered to be paid, provided that any costs so ordered are an appropriate reflection of the nature, gravity and effect of the conduct of which complaint is made.

57. In this case, the Tribunal has no doubt, for the reasons already set out, that the Respondents' conduct, in respect of Mr Butcher, was both unreasonable and reprehensible and further, given the role that Mr Butcher was asked to and did play, both in the inception of the application and in the conduct of the application, that that conduct has, inevitably, had a significant effect upon the costs that Mr Carr has had to incur in meeting the Respondents' application.

58. Mr Carr's case, however, is that the Respondents' conduct, in respect of Mr Butcher, is no more than one aspect of the Respondents' unreasonable conduct in the bringing and conduct of the consent application. The Tribunal agrees.

59. In the view of the Tribunal, the fact that the Respondents chose to behave in the way that they did, in respect of Mr Butcher, reflects and is indicative of an approach to the consent application which is not susceptible of reasonable explanation.

60. What that behaviour demonstrates is that the Respondents were, for the reasons and motives already discussed, so set upon precluding Mr Carr from succeeding to the tenancy of the Holding that, when once they had been told that a **Spofforth** based application might be available, they pursued such an application without any serious consideration of its realistic merits.

61. Instead of genuinely seeking a report from Mr Butcher, or elsewhere, as to the realistic merits of the proposal to be advanced, or seeking, even, advice as to any effective proposal that might be made, Mr Butcher was, as set out in paragraph 120 of the written Reasons, given specific instructions as to how, having regard to **Spofforth,** Mr Butcher might present the Respondents proposals in his report. The realistic merits of the proposals were never considered and Mr Butcher's role was, simply, to put, in so far as he could, an effective framework around the Respondents' preconceived proposals.

62. That same single minded desire to remove the Carr family from the Stonor estate, irrespective of the core quality of the points to be advanced, to that purpose, is, also, to be found in some of the other points raised and, subsequently, abandoned, by the Respondents, as previously discussed. Such matters as Mr Carr's alleged bad husbandry and, in particular, the historic complaints raised in supposed demonstration of his want of good faith, or integrity, tend to evidence, as it seems to this Tribunal, a willingness, in

the Respondents, to take, as against Mr Carr, any point, good, bad, or indifferent, that might, conceivably, work to that end.

63. The fact that the proposals advanced, specifically, the fundamental proposal as to the amalgamation of the bulk of the Holding with that farmed by the Straceys were never thought through and were advanced purely as a means to an end (paragraph 113 of the written Reasons) is further demonstrated by the measures that the Respondents, late in the life of the application, were obliged to take, in order to be able to present their proposals as viable. It was the realisation that the Straceys' existing farm business was not well capitalised and that the projected extension of their holding, to include the bulk of the Carr Holding, that required Mr Butcher's intervention to present a report to the Straceys' bankers, in order to procure necessary increased funding. Had this been a properly considered application, the Straceys' likely ability, or otherwise, to sustain their proposed extended farm business would have been considered prior to the outset of proceedings and not, only, in the month, or so, preceding the hearing.
64. By the same token, had this been a properly considered application, it seems to this Tribunal that a careful evaluation would have had to be made, at an early stage, as to whether it could really and sensibly be said that it was more desirable to amalgamate the bulk of the Carr Holding with the other two holdings on the Stonor estate, with some buildings released for improvement, or, potentially, development, than it would be to retain the existing structure of the estate, with three main holdings and with Mr Carr succeeding to his father's tenancy of the Holding.
65. On that evaluation, a reasonable landlord, in the circumstances of the Respondents would necessarily have considered a number of salient matters.
66. Firstly, that Mr Carr was an experienced, capable and successful farmer, who, as ultimately conceded by the Respondents, farmed to the highest standards of husbandry and who was, on that footing, eminently suitable to succeed to the Holding.
67. Secondly, that the three principal holdings on the Estate were viable, as they stood, and, therefore, that amalgamation was not necessary to remedy a lack of existing viability, or to meet any immediate need to preserve the existing farming and husbandry of the estate.
68. Thirdly, that the release of buildings from the Holding, on the grounds that they were not in a fit state of repair for use in a modern farming operation, in circumstances where their state of disrepair flowed from the Respondents own failure to carry out its covenanted obligation to repair, was, unlikely to find favour as being desirable on grounds of sound estate management.

69. Fourthly, that, in the circumstances where a viable status quo existed, where the existing husbandry of the Holding was to a high standard and where the principal grounds for the proposed amalgamation was said to be (a) that the amalgamation would best protect the now amalgamated holdings against the future uncertainties which may face agriculture; and (b) that amalgamation would enable a mixed farming, rather than an arable regime, to be carried on the Carr holding, to the supposed benefit of the health and fertility of the estate land, it would be incumbent upon the Respondents to provide convincing evidence, rather than assertion, or generic propositions (see paragraphs 164 and 166 of the written Reasons) and, most particularly, to be in a position to explain, with conviction, how the purposes of the amalgamation would be best achieved by a set of proposals that, instead of reinforcing the stronger units on the estate, had the effect of removing one of the stronger businesses, in order, apparently, to shore up a weaker one (see paragraph 168 of the written reasons).

70. Fifthly, that, in circumstances where the core proposal was said to be intended to strengthen the ability of the remaining farms on the estate to sustain themselves in difficult times, it was fundamental that the proposals would strengthen and not weaken, or destabilise, either of those businesses and that the businesses, or any of them, supposedly strengthened by the Respondents' proposals were not, in fact, put at risk. It is the Respondents' failure to have any regard, at the outset, to this consideration which is highlighted, in paragraph 63 of these Reasons. The fact is that, even after Mr Butcher's late intervention, the risks to the Straceys' business, arising from the Respondents' proposals radically outweighed the supposed, or putative, advantages said to arise from the amalgamation.

71. The Tribunal is satisfied, both by reference to the matters set out at paragraphs 61, 62 and 63 of these Reasons and its own findings and conclusions, as set out in its written Reasons, in respect of the consent application, that no such evaluation was ever attempted. The Respondents have, throughout these proceedings, had high quality legal representation and, had such an evaluation been carried out by those legal advisers, the Tribunal is satisfied that the consent application would never have been brought. This was, from the outset and for all the reasons set out in the Tribunal's written Reasons, in respect of the consent application, a flawed application. It is not one that can be explained by over zealousness, nor is its flawed nature only exposed with benefit of hindsight.

72. Mr Batstone sought to fortify the merits of the application by reference to the fact that Mr Carr's legal advisers took it seriously. They had no option but to do so. He also pointed

to the detailed findings of this Tribunal, as demonstrating that this application was realistic and had serious prospects. The fact that the Tribunal dealt with the application point by point and without highly coloured language, as it was required that it should do, does not, however, detract from the fundamental fact that, in the Tribunal's view, this application was always flawed.

73. In the result, the Tribunal is satisfied that no reasonable explanation exists, or existed, for the bringing of this application and, regrettably, that the only safe conclusion is that the application was brought in the manner and for the reasons set out in paragraph 60 of these Reasons.
74. The consequence of that conclusion is to reinforce the conclusion, already reached, by reference to the Respondents' conduct in respect of Mr Butcher, namely that this is a case where, in its discretion, costs should be awarded.
75. In regard to the extent of those costs, the Tribunal's view is that, in a case, such as this, where the application should not reasonably have been brought, the right order is that the Respondents (the applicants in respect of the consent application) should pay such part of Mr Carr's entire costs of the two applications (succession and consent) as properly reflects the costs of the consent application.
76. The parties agreed that, to achieve that end, should such costs be awarded, the Tribunal should evaluate the proportion of Mr Carr's overall costs that related to, or reflected the consent application. The unattractive alternative would be to make an issue based costs order, leaving it to the tribunal charged with the assessment of the costs to identify those costs that went to the succession application and those that went to the consent application.
77. The Tribunal agrees to such an evaluation.
78. In the view of the Tribunal, there is no real doubt but that the bulk of the costs that have been expended by Mr Carr, both at the hearing and in preparation, have related to the consent application. Time and cost was expended, both in preparation and at the hearing, in respect of Mr and Mrs Carr's finances and the bad faith, or integrity, issue (going to the succession application). That time and those costs reflected, however, only a relatively small part of the overall costs which Mr Carr will have had to incur in meeting the consent application. No precise analysis is possible, but doing the best it can, the Tribunal's estimate is that 80% of the costs incurred will have been incurred in meeting that application. The Tribunal directs, therefore, that the Respondents should pay 80% of Mr

Carr's overall costs; those costs to be assessed. As already indicated, by a Costs Judge sitting as a judge of the First-tier tribunal.

79. The only outstanding question is as to the nature of that assessment and whether it should be an assessment upon the standard or upon the indemnity basis, as sought on behalf of Mr Carr.

80. There is no doubt, as already set out, but that the Tribunal does have explicit jurisdiction to order indemnity costs. There is, however, little, if any, guidance as to the exercise of that discretion, in the tribunal context. In **Kingsbridge**, the Upper Tribunal was invited to make such an order, but declined, with the observation, only, that the tribunal rules, in that case pertaining to the Upper Tribunal, did not suggest that indemnity costs were appropriate in every case where an order for costs was made.

81. The 2013 Rules, with which this Tribunal is concerned, likewise, do not suggest that indemnity costs are always appropriate, given that they give a tribunal awarding costs a choice between standard and indemnity costs. In argument, Mr Jourdan QC submitted that, given that unreasonable conduct was the starting point for any costs order, the yardstick for indemnity costs must reflect unreasonableness to a high degree. Mr Batstone did not, materially, differ from this, pointing out that in what is, as a matter of norm, a non-costs jurisdiction, the bar for an award of indemnity costs must be set very high.

82. Before the Tribunal, Mr Jourdan QC placed some reliance upon the decision of the High Court, in **Burgess v Lejonvarn [2019] EWHC 369 (TCC)** and the statement of principles to be found in paragraphs 8 to 11 of that judgment. One of the principles identified in that case and derived from the judgment of Tomlinson J, in **Three Rivers District Council v the Governor and Company of the Bank of England [2006] EWHC 816 (Comm.)** at paragraph 25, is that where a claim is speculative, weak, opportunistic, or thin a claimant who chooses to pursue it is taking a high risk and can be expected to pay indemnity costs if the claim fails. The context underlying that principle is that conduct of that nature takes the case outside the norm. Conduct outside the norm is well understood to be the gateway to be passed before indemnity costs are awarded.

83. Since the hearing before the Tribunal, an appeal, in **Burgess v Lejonvarn**, has been heard and determined (**[2020] EWCA Civ 114**). The Tribunal has been provided with that decision and both parties have had the opportunity to comment upon its relevance.

84. As it seems to this Tribunal, the effect of the appeal decision is to place somewhat more focus on the principle set out above, in defining circumstances which take the conduct of a case outside the norm and which open the door to indemnity costs. The question, or

one of the questions, to be asked, in determining whether a party's conduct is outside the norm, is whether a reasonable claimant in the position of the actual claimant would have concluded that the claim was so weak or speculative that it should not, or should no longer be, pursued (see **paragraph 54**).

85. Applying that approach, in this case, the Tribunal has no doubt but that the conduct of the Respondents has been outside the norm. This is a case where the Respondents, acting reasonably, should have concluded at the outset that the consent application should not have been brought.
86. The next and final question, however, is whether, the door being open to indemnity costs, such costs should, in this case, be awarded.
87. In the view of this Tribunal, they should. The starting point where a party's conduct has been outside the norm should, in the usual case, be to order indemnity costs, While a broad discretion exists as to whether to make such an order, the type of conduct which is to be regarded as outside the norm is precisely the kind of conduct that will usually warrant the extra stringency of such an order.
88. In this case, there is no good reason to exercise discretion against ordering indemnity costs. The Respondents' case on the consent application was not just weak, or speculative, it was one which should not reasonably have been brought at all and where, therefore, Mr Carr should never have been exposed to the costs of meeting the application.
89. To that fact, in considering the question of discretion, should be added the Respondents conduct in respect of the role played by Mr Butcher. It is very well understood that a party's conduct, in putting forward, as an independent witness, someone, who, to the knowledge of that party is not properly independent is, in itself, outside the norm, such as to expose that party to an order for indemnity costs. This case represents a blatant example of such conduct, in respect of a so-called expert witness central to the Respondents' case. It is a paradigm example of the kind of case where an order for indemnity costs should be made.
90. In a number of cases, where the conduct, or lack of proper independence, of an expert has called for an indemnity costs order, the courts have concluded that that order should not extend to the whole costs of the litigation, or proceedings, but be limited to the costs generated by the expert and by his conduct.
91. In this case, however, as explained earlier in these Reasons, at paragraph 54, Mr Butcher's conduct has been at the heart of this case. It was his task to write the report which underwrote the Respondents' case and, thereafter, as a purported independent expert,

to support that case. In this instance, therefore, the case for limiting the extent of any indemnity costs order, arising from his conduct and role, is very much reduced.

92. Taking all the last foregoing together, the Tribunal is satisfied that the costs ordered against the Respondents should be assessed on the indemnity basis and that, regrettably, the high degree of unreasonableness, contemplated by both counsel as an appropriate yardstick for such an assessment, has, in this case, been reached.

93. The direction of the Tribunal, therefore, is that the Respondents should pay 80% of Mr Carr's costs of the consent application to be assessed by a Costs Judge sitting as a judge of the First-tier tribunal upon the indemnity basis.

94. The parties are asked to lodge a draft to give effect to this direction.

Master T Bowles
8 April 2020