Neutral Citation Number: [2022] EWHC 2036 (CH)

Case No: CH-2022-BHM-000009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
CHANCERY APPEALS (ChD)
ON APPEAL FROM THE COUNTY COURT AT BIRMINGHAM
ORDER OF HHJ RAWLINGS dated 28 April 2022
County Court Case Number: J30BM026

Date: 29/07/2022

Before :

MR JUSTICE ZACAROLI

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Between :

FRANK PILE	**Appellant**
- and –	
SIMON PILE	**Respondent**

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Kerry Bretherton QC and Katie Gray (instructed by **Loxley Solicitors Limited**) for the **Appellant**
George Woodhead (instructed by **Nelsons Solicitors Limited**) for the **Respondent**

Hearing Date: 26 July 2022

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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.

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Mr Justice Zacaroli :

1. This appeal raises the question whether one of two brothers, being joint tenants of a periodic tenancy, can be restrained from serving a notice to quit, in order to acquire a new lease for himself, on the basis that to do so would constitute a breach of trust (as between the two joint tenants).

Background

2. The appellant, Frank Pile ("Frank") and the respondent, his brother Simon Pile ("Simon"), are joint tenants under the following tenancies of which a Mr John Stranks ("Mr Stranks") is the landlord;

   (1) An agricultural tenancy of farm land at Fir Tree Farm (the "Agricultural Land"), dated 11 February 1989, the term under which commenced on 25 March 1988 and has continued thereafter from year to year as a periodic tenancy, protected under the Agricultural Holdings Act 1986 (the "Agricultural Tenancy"); and

   (2) A commercial tenancy of land at Fir Tree Farm (the "Commercial Land"), dated 9 December 2005, initially for a term of 12 years, but continued thereafter as a periodic tenancy, protected under the Landlord and Tenant Act 1954 (the "Commercial Tenancy").

3. Simon and Frank are also both co-owners of agricultural land known as Part Camp Barn Farm and Part Hoggins Farm (the "Sale Land"). This is the subject of an order for sale by HHJ Kelly dated 1 November 2021.

4. On 23 March 2021 Frank, Mr Stranks and a company of which Frank and his wife were the sole directors and shareholders, F N Pile and Sons Limited (the "Company"), entered into an agreement (the "New Tenancy Agreement") under which:

   (1) Frank would serve a notice to quit under the Agricultural Tenancy;

   (2) Mr Stranks would serve a notice to terminate the Commercial Tenancy, and Frank agreed not to serve a counter-notice; and

   (3) Mr Stranks would grant the Company tenancies of the Agricultural Land and the Commercial Land on expiry of the notices under the respective tenancies.

5. As it happened, while Frank served a notice to quit the Agricultural Tenancy, Mr Stranks did not serve a notice to terminate the Commercial Tenancy. Simon commenced proceedings against Frank in October 2021 to set aside the New Tenancy Agreement. Those proceedings were concluded when HHJ Johns QC, in the County Court at Central London, gave judgment by consent, setting aside the New Tenancy Agreement and the notice to quit served by Frank pursuant to it.

6. The present proceedings were brought by Simon following a telephone conversation with Mr Stranks in which Mr Stranks said that he had resumed negotiations with Frank for a new tenancy of both the Agricultural Land and the Commercial Land.

The claim

7. Simon's claim against Frank is based on the contention that Frank's actual or threatened conduct constitutes a breach of trust. In the particulars of claim Simon contends that he and Frank hold the Agricultural Tenancy and the Commercial Tenancy as trustees for themselves as beneficial tenants in common in equal shares. The particulars of claim do not identify any basis for the trust relationship other than the fact of co-ownership of the tenancies.

8. The entry by Frank into the New Tenancy Agreement is said to have constituted a breach of trust, in that he sought to profit at his brother's expense by obtaining a new lease in his own name of the Agricultural and Commercial Land.

9. Simon also contends that Frank, by entering into further negotiations with Mr Stranks, is committing a further breach of trust. Specifically, it is contended that Frank has placed himself in a position of conflict of interest between himself and his duties as trustee; that he has sought to profit from his trusteeship; and that he has breached the well known rule in *Keech v Sandford*.

10. Simon sought an interlocutory injunction to restrain Frank, in essence, from entering into negotiations with Mr Stranks, or anyone else, for the surrender or sale of the Agricultural Tenancy or the Commercial Tenancy or for the grant of a new tenancy to Frank, without Simon's consent.

The Judge's judgment

11. The Judge applied the *American Cyanamid* test, concluding that there was a serious issue to be tried as to whether Frank would be acting in breach of trust if he unilaterally entered into an agreement, for some personal benefit to himself, the consideration for which is Frank cooperating in the termination of the Agricultural or Commercial Tenancies. This is the only part of the Judge's judgment in issue on the appeal.

12. The Judge went on to conclude that there was a real risk of Frank bringing about the termination of the Tenancies, that damages would not be an adequate remedy and that the balance of convenience favoured the grant of an injunction. There is no appeal against these conclusions.

13. Before the Judge, Ms Bretherton QC, who appeared below and on appeal on behalf of Frank, relied principally on the decision of the House of Lords in *Hammersmith LBC v Monk* [1992] 1 AC 478 ("*Monk*"). That case concerned the validity, as between joint tenants of a council flat and the local authority landlord, of a notice to quit given by one joint tenant without the concurrence of the other. At p.493C-F, Lord Browne-Wilkinson addressed the possibility that the service of the notice might constitute a breach of trust, but noted that seemed "very dubious" and that, even if it did, it could not affect the validity of the notice as against the landlord.

14. Mr Woodhead, who appeared below and on appeal for Simon, relied before the Judge on *Harris v Black* [1983] 83 PNCR 466. That case involved two solicitors who had practised in partnership together from leased premises of which they were joint tenants. After dissolution of the partnership, each of the partners carried on their separate business from the same premises. The landlord served a notice to quit. One of the former partners wished to remain in the premises, the other did not. The

question was whether the reluctant partner could be required to join the other in serving a counter-notice and applying to the court for a new tenancy. The Judge at first instance refused to grant an injunction. That decision was upheld on appeal, but Mr Woodhead relies on the fact that the Court of Appeal recognised that there was jurisdiction, in an appropriate case, to make such an order: see the judgment of Slade LJ (with whom Robert Goff LJ agreed) at p.373.

15. The Judge concluded, at §41 of his judgment, that although Frank was free to serve a notice to quit in respect of the Agricultural Tenancy, and free to agree not to serve a counter-notice in respect of the Commercial Tenancy, there was at least a serious issue to be tried that he would be acting in breach of trust if he did so in order to obtain a personal benefit for himself. I set out his conclusions in this regard in full:

> "(a) Frank is using the extinguishment of a trust asset, that is the periodic tenancies, in respect of which he owes duties as trustee to Simon, as the consideration for obtaining a personal benefit to the detriment of the trust. This is not a case of Frank simply choosing to no longer incur the liabilities or obligations that go with the continued existence of the relevant tenancy;
>
> (b) my conclusion is, I consider, consistent with the rule in *Keech v Sandford*. It is wrong to talk, as the Particulars of Claim do, in terms of Frank "breaching the equitable rule in *Keech v Sandford*" (because *Keech v Sandford* provides for automatic consequences regardless of whether there is a breach of trust or not, it is not therefore a rule that can be breached) but one of the reasons for the rule in *Keech v Sandford* is to avoid conflicts of interest for a trustee in deciding whether to terminate a lease where the trustee may be considering taking a new lease on the same premises in their own name. The rule provides that, regardless of whether the trust could itself have continued the lease, or obtained a new lease itself, any new lease obtained in the name of the trustee after termination of the lease held by the trust is automatically held upon trust on the terms of the original trust. The rule is a strict one, and clearly, in my judgment, aimed at ensuring that beneficiaries do not lose out as a result of any such conflict of interest on the part of the trustee. It would be strange to my mind if, given the rule in *Keech v Sandford*, Frank were to be taken not to be acting in breach of trust if he deliberately obtains a personal benefit for himself (other than a new lease over the same land, which Simon cannot share in) by destroying the trust asset; and
>
> (c) whilst I note the comment of Lord Browne-Wilkinson in *Monk* that he was "dubious" about whether the cohabitee in that case would have been taken to have acted in breach of trust by serving the notice to quit, first the comments were both obiter and he gave no reasons for being "dubious" and second, those comments can only have applied to the particular facts of *Monk*. Here, Simon appears to be specifically seeking to

> negotiate away trust assets in order to obtain a personal benefit for himself. That appears to me to be a clear breach of trust."

Grounds of Appeal

16. Frank seeks to appeal that decision on two grounds. First, that *Monk* provides binding authority to the effect that one of two or more joint tenants of a periodic tenancy that served a notice to quit would not be acting in breach of trust if they did so in return for a personal benefit received by them. Second, that there was no authority on that issue, and the position was uncertain so that it was appropriate to grant permission to appeal.

17. The Judge gave permission to appeal on the second ground but refused permission on the first ground. In an order dated 17 June 2022, I directed that the application for permission to appeal on the first ground, with the hearing of the appeal if permission was granted, be heard together with the appeal on the second ground.

18. I have had the benefit of a much fuller citation of authority than was provided to the Judge. In addition, since the Judge gave judgment in this case, the issues which lie at the heart of this appeal have been considered at length in *Procter v Procter* [2022] EWHC 1202 (Ch) ("*Procter*") a decision of HHJ Davis-White QC sitting as a judge of the High Court. Both parties commended that judgment to me, as containing a thorough review of the relevant authorities and an accurate summary of the law. They differed only on the application of the principles to be derived from it to the facts of this case.

19. In light of the further authorities to which the parties have referred, although framed as two separate grounds of appeal, the question has boiled down to the following: whether there is a seriously triable issue that one of two or more joint tenants of a periodic tenancy may, without committing a breach of trust, serve a notice to quit (or refuse to serve a counter-notice in the face of a notice from the landlord to terminate the lease), where he or she seeks to do so in order to obtain a personal benefit, such as the acquisition of a new lease in their own name.

Discussion

20. *Procter* concerned (among other things) partnership property held by three siblings as joint tenants. One of them – referred to as Suzie – had ceased to be a partner. The relevant property was a periodic tenancy of a farm. The judge found that the property continued to be held on trust for the partnership. Suzie, as one of the joint tenants, served a notice to quit upon the landlord. Her brothers, and co-joint tenants, claimed that the service of the notice was invalid because it constituted a breach of trust by Suzie. I draw the following propositions, of particular relevance to this appeal, from *Procter* and the authorities referred to in it.

21. First, whereas in general all co-owners (at law) of a tenancy must act unanimously in order to carry out an effective positive act in relation to the tenancy, in the case of a periodic tenancy the estate only continues so long as it is the will of both parties that it should continue. Accordingly, it is the *continuation* of the tenancy that is considered to be the positive act in relation to the tenancy, so that a notice given by one of the co-

owners is effective to terminate the tenancy: see *Procter* at §275-276, citing *Monk* at 490G to 491A per Lord Bridge.

22. Second, the fact that the joint tenants of a periodic tenancy are, by reason of their co-ownership of the tenancy at law, trustees for sale under the Law of Property Act 1925 ("LPA 1925") does not alter the position. The service of a notice to quit is not the exercise of a statutory or other power vested in trustees for sale: see *Crawley Borough Council v Ure* [1996] QB 13 ("*Ure*"), particularly per Hobhouse LJ at p.27D. Accordingly, it was not a breach of trust for a co-owner of a periodic tenancy to fail to consult the beneficiaries (under s.26(3) of the LPA 1925) before serving a notice to quit. While it was possible for a co-owner to owe trust duties which would be breached by service of a notice to quit, such duties were not owed where the only basis for the trust relationship was the trust for sale imposed on co-owners of property: see Hobhouse LJ at 27E-G:

> "It must be observed that both Lord Browne-Wilkinson [1992] 1 A.C. 478, 493 and Slade L.J., 89 L.G.R. 357, 373 in the Court of Appeal recognise the possibility that there might be a trust which would affect a joint tenant in this position. It would have to be a trust of a more specific character and both Lord Browne-Wilkinson and Slade L.J. clearly felt great difficulty about the possible existence of such a trust having regard to the expiring subject matter of the trust, and the role of the trustee for sale. However, any such trust as there visualised would probably have to be one which arose under the principles discussed in *Jones v. Challenger* [1961] 1 Q.B. 176, and as illustrated by *Bull v. Bull* [1955] 1 Q.B. 234 and *In re Evers' Trust* [1980] 1 W.L.R. 1327. In the present case no argument has been advanced based upon the existence of any such trust or trust obligation. The difficulties, factually, in the present case are obvious. They include the fact that the wife had left the property and ceased to live there or wish to live there some nine months before she served the notice. However, no such trust is relied upon. The only trust obligation that is put forward is that found in section 26(3) and that obligation, as I have held, does not apply to the service of the notice. Therefore, it follows that the husband fails on the first step in his argument and none of the further steps (which themselves are not without difficulty) need to be considered."

23. In *Monk*, the point was explained by Lord Bridge (at p.490F) in terms of the scope of the trust under LPA 1925:

> "At any given moment the extent of the interest to which the trust relates extends no further than the end of the period of the tenancy which will next expire on a date for which it is still possible to give notice to quit. If before 1925 the implied consent of both joint tenants, signified by the omission to give notice to quit, was necessary to extend the tenancy from one period to the next, precisely the same applies since 1925 to the

> extension by the joint trustee beneficiaries of the periodic tenancy which is the subject of the trust."

24. Third, the same is true where the only basis for the trust relationship is the trust that arises in cases of co-ownership under the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA"): see *Notting Hill Housing Trust v Brackley* [2001] EWCA Civ 601. The question in that case was whether the service of a notice to quit by one joint tenant of a periodic tenancy was the exercise of a function of a trustee, within s.11(1) of TOLATA. Peter Gibson LJ, at §23, held that it was not, on the basis of the reasoning in *Monk* and *Ure*. Jonathan Parker LJ, in a concurring judgment, said this:

> "Thus, as Hobhouse LJ put it in *Ure*, the notice is merely an indication that the act of will which is required on the part of all parties to achieve a continuation of the tenancy beyond the end of the current period is not going to occur. If the matter is viewed in that light, it becomes clear, in my judgment, that in serving such a notice a joint tenant is not acting as a trustee and that, in consequence, no duty to consult the other joint tenant pursuant to section 11 of the 1996 Act can arise."

25. Fourth, while there are circumstances in which a joint tenant of a periodic tenancy might owe trust duties which would preclude them from serving a notice to quit, that depends on the existence of factors (such as an agreement between the tenants that the property would be used for a particular purpose, or that the property is held on trust for a partnership) that give rise to trust duties that go beyond those of a bare trust under LPA 1925 or TOLATA. At §192 of *Procter* HHJ Davis-White QC, referring to the passage from the judgment of Hobhouse LJ in *Ure* quoted above, said:

> "As I understand what Hobhouse LJ was saying it was that there might be a trust where the essential trust for sale was nevertheless subject to an underlying purpose which would affect not just the exercise of the court's discretion in deciding whether to order a sale on an application but also might give rise to duties in the case of a periodic tenancy preventing one co-owner from unilaterally serving a notice to quit."

26. Examples of such cases included *Jones v Challenger* [1961] 1 QB 176, where the property was required for the purpose of providing a matrimonial home. *Procter* itself was such a case. At §292, HHJ Davis-White QC said:

> "In this particular case Suzie was not a co-owner in equity, She was in the position of a trustee holding the property on trust for the Partnership and subject to quite different duties and obligations than a simple co-owner in equity. The co-ownership cases where there is said to be (in effect) a right to refuse to take a new tenancy at the end of the period of the current periodic tenancy does not apply where the person in question is not a co-owner in equity but only a trustee. The question is whether a trustee in the position of Suzie is, in effect, required to take a new tenancy and not simply indicate that she is unwilling to renew and bring about a further period

> of tenancy. In my judgment the answer is clearly in the affirmative. I see no reason why Suzie, in the position of a trustee as regards the periodic tenancy, should not owe fiduciary duties to act in the best interests of the Partnership, not to act for a collateral purpose (her own self interest), to preserve the trust property which is in effect a periodic tenancy with an ability to prolong the same by not carrying out the step of serving a notice to quit, and to avoid a conflict between self interest and duty."

27. Mr Woodhead submitted that even if Frank did not owe a duty not to terminate the tenancies, per se, he did owe a duty not to do so for the purpose of acquiring a new lease himself. For that proposition he relied on the well-known case of *Keech v Sandford* (1726) Sel. Cas. 61. In that case, the trustee held a lease for the benefit of an infant. The lessor refused the trustee's request for a renewal for the benefit of the infant. The trustee then took a renewal of the lease for himself. It was held that the trustee held the new lease on trust for the infant, on the principle that wherever a lease is renewed by a trustee or executor it shall be for the benefit of the cestui que trust. Although there was no fraud in the case, "…yet he [the trustee] should rather have let it run out, than to have had the lease for himself."

28. The principle in *Keech v Sandford* depends, however, on the existence of trust obligation under which the trustee is obliged to obtain any renewal of the lease for the benefit of the cestui que trust. The underlying principle, as explained by Buckley J in *Re Biss* [1903] 2 Ch 40, at p.43, is that "the trustee owes it to his cestui que trust to obtain a renewal, if he can do so, on beneficial terms, and that the court will not allow him to obtain a renewal upon beneficial terms for himself when his duty is to get it for his cestui que trust." Although Buckley J was overturned on appeal, as HHJ Davis-White QC noted in *Procter* at §297, the Court of Appeal agreed with his general statements of the law.

29. In the case of a periodic tenancy – for the reasons set out in the cases to which I have referred above – an obligation to take a renewal for the benefit of the other co-owners of the property would fall outside the scope of the trust imposed by LPA 1925 or TOLATA. As Lord Browne-Wilkinson made clear in *Monk*, while the law could have taken the approach that where a home is jointly owned it cannot be right that one co-owner can unilaterally join with the landlord to put an end to the other's rights in the home, that is not in fact the path the law has taken. Instead, the law has for centuries adopted a contractual approach: where parties have jointly contracted to rent a property and one of them wishes to quit the home, then he or she cannot be held to a tenancy contract which is dependent for its continuation on the will of the tenant: *Monk* at p.491F-492A.

30. In *Re Biss* in the Court of Appeal, Collins MR (at p.57) compared the position of partners (who could not obtain a lease of premises where the joint trade was carried on behind the back of his co-partners) with a mere tenant in common or co-mortgagors: "Tenants in common do not stand in a fiduciary relation to each other; *Kennedy v de Trafford* [1897] AC 180; and one of two mortgagors, tenants in common, is not debarred from buying for himself the undivided equity of redemption in the whole."

31. In reliance on these authorities, in *Procter* at §300, HHJ Davis-White QC said this:

> "It can thus be seen that the comments in more recent cases about co-owners not owing duties regarding renewals and services of notices to quit are entirely in line with authority but they do not impinge on the situation of a trustee who is not as co-owner in equity or is a co-owner in equity such as a partner (or, possibly, where the co-ownership trust is not a bare trust for sale/trust of land but one where the purpose of the trust impacts upon the basic sale provision of the trust (e.g. the purpose includes the provision of a home for members of the family))."

32. On the basis of these authorities, in my judgment, in agreement with the submissions of Ms Bretherton QC, in a case where a party is a trustee only by reason of their co-ownership with another joint tenant under a periodic tenancy (i.e., in the language of HHJ Davies-White QC in *Procter*, there is merely as "bare" trust for sale or trust of land), then the trustee is neither precluded from serving a notice to quit on the landlord nor precluded from doing so for the purpose of acquiring a new lease of the property for themselves.

33. Mr Woodhead referred me to a number of cases where *Keech v Sandford* applied to impose a trust over a new lease, or the purchase of a reversion, by one of two joint tenants. The circumstances of all those cases were different from this case, however, because there was in each case something – such as a partnership or other arrangement which gave rise to additional trust duties, and I need refer only to one of them, *Cork v Cork* [1997] 1 EGLR 5, a decision of Knox J. That case involved a joint tenancy of an agricultural tenancy, where the landlord had served a notice to quit. The question was whether one of the joint tenants could be compelled to join in service of a counter-notice. The matter came before Knox J on an application for an interlocutory mandatory injunction.

34. In granting the injunction, Knox J concluded that the decision in *Monk* was not inconsistent with the possibility of the court granting an injunction to compel one or more joint tenants at law to serve a counternotice, if the equitable considerations under the trust for sale so dictated. He noted that *Monk* was concerned with the results of what one of two trustees *had* done vis a vis the landlord, whereas he was concerned with how the trustees for sale should be directed to behave vis a vis the landlord. The question, he said, was whether there were any equitable interests which operated to vary the *prima facie* position that either of the two, or more, joint tenants could serve a notice to quit.

35. In that case, he concluded that there were such equitable interests:

> "On that issue, are there any such equitable interests which arise, it seems to me that it is arguable that a result was achieved, consequent upon the family discussions in 1991 and thereafter, leading up to the deed of retirement, which positively had the effect of an agreement that Mr Roger Cork should remain as the occupying farming tenant of this farm. It is true that the evidence on this score is thin but this is an

> interlocutory application, and the evidence is there and is not actually in terms disputed, that ere was an agreement that Mr Roger Cork would continue to farm this farm in his own right."

36. Accordingly, *Cork v Cork* is to be viewed as an example of a case where the trust on which the joint tenants held the property was one which – by reason of the agreement that one of the joint tenants would continue to remain in occupation of the property – contained fiduciary obligations beyond those of a bare trust for sale or trust of land.

37. Ultimately, I understood Mr Woodhead to accept the proposition that in the case of a mere bare trust for sale/trust of land no duty was owed which would prevent one of the joint tenants from terminating the tenancy even where he or she did so in order to acquire an advantage such as a new tenancy for themselves. He submitted, however, that the facts of this case were indeed such as to impose additional duties on Frank as trustee, such that he was precluded from serving a notice to quit, where his purpose in so doing was to acquire a new lease for himself, or for the Company.

38. The starting point in considering whether such duties are owed is the pleading. As I have already pointed out, the only pleaded basis for a trust is the fact of co-ownership of the periodic tenancies. No other legal basis for the existence of any other fiduciary duties is pleaded. Nor is there any pleading of facts which might give rise to fiduciary duties over and above those inherent in a bare trust for sale.

39. Mr Woodhead pointed to paragraph 30 of the particulars of claim, in which it is pleaded that Frank's conduct in entering into further negotiations with Mr Stranks for the grant of a new tenancy has placed him into a position of conflict of interest between himself and his "duties as a trustee"; that in so doing he has sought to profit unlawfully from his trusteeship; and that he is in breach of the rule in *Keech v Sandford*. This, however, is merely a conclusory pleading as to breach of duty. While it is true that a pleading that someone is in breach of a duty implies that such a duty is owed, it would not in any event be sufficient merely to plead that Frank owed the duties alleged. There has to be some factual foundation for pleading the imposition of such duties. The only factual foundation for the imposition of any duties as trustee is the fact of co-ownership of the periodic tenancies. For the reasons I have already expressed, that fact is insufficient to give rise to the duties on which Simon seeks to rely.

40. I was shown a draft amended pleading which had been available before the Judge, although an application to amend was not pursued in front of him. The draft amendments relate, however, to the circumstances of breach and do not provide any additional basis for trust duties being owed, beyond the mere fact of co-ownership.

41. Mr Woodhead then referred to paragraph 26 of the Judge's judgment in this case, where the Judge placed reliance on certain matters notwithstanding that they were not pleaded in the particulars of claim. Those matters, however, were that if Frank agreed (as suggested in witness evidence) to serve a notice to quit in respect of the Agricultural Land and not to join with Simon in serving a counter-notice in respect of the Commercial Land, in consideration of Mr Stranks granting rights of way over the Agricultural Land for the benefit of the Sale Land, then that would amount to a breach of trust. Nothing in those non-pleaded matters takes the contention that Frank owed

fiduciary duties that went beyond those owed by a trustee under a bare trust of land/trust for sale any further.

42. While I accept that it may be permissible for an interlocutory injunction to be granted based on non-pleaded matters contained in evidence, with an undertaking to file and serve a claim form and particulars of claim, the most that Mr Woodhead could point to by way of evidence was that it had never been disputed that the Agricultural Land was in fact being used by Simon to carry on a farming business, that he and his mother lived in a property on the Commercial Land, and that the Commercial Land was in fact being used for Frank's business. This falls far short of evidencing any facts (such as an agreement or arrangement to be derived from usage as to the purpose for which the land was to be held, as in *Cork* or *Procter*) which might give rise to the superimposition of equitable duties inconsistent with a single joint tenant's right to terminate the tenancy.

43. Moreover, I did not understand Mr Woodhead to contradict Ms Bretherton's submission that the only basis for the existence of trust duties on Frank that had to date been asserted in pleadings, evidence, skeletons or orally before the Judge was the trust arising as a result of co-ownership of the tenancies.

44. Mr Woodhead suggested that there is in fact a different basis for the imposition of trust duties in this case, and that he anticipated that he would receive instructions to seek to amend the pleading in order to make good that point. Such a case might be based – for example – on the circumstances in which the parties divided up their use of the respective pieces of land on the termination of the partnership that formerly existed between them and their parents, or on the basis of a long history of usage. The problem is that not only are such matters not pleaded but I was not taken to any evidence on which such a pleading might be based. It is not open to a party on an appeal to rely for the first time – in support of a case that particular trust duties are owed by the other side – on matters other than those that were relied on before the Judge in the absence, at least, of an application to amend supported by a properly formulated pleading and evidence.

45. Accordingly, I conclude that on the basis of the pleading and evidence currently before the Court, there is no serious issue to be tried that Frank owed trust duties to Simon which precluded him from serving a notice to quit, whether or not that was done for the purpose of acquiring a new lease of the Commercial Land and/or the Agricultural Land. It follows that I conclude that the Judge erred – understandably, given that he was not taken to a number of the authorities on which the parties have relied before me – in concluding that there was such a triable issue.

46. The manner in which the legal argument has developed, with the benefit of the further authorities to which I have been taken, is no longer accurately reflected in the grounds of appeal. So far as ground 1 is concerned, I do not accept that *Monk* is itself a binding authority for the proposition that one of two or more joint tenants would not be acting in breach of trust in serving a notice to quit even if done to obtain a personal benefit. *Monk* was concerned only with the validity of a notice as between the joint tenants and the landlord and to the extent that the reasoning in it provides the foundation for the proposition which I have accepted, it is not binding authority for that proposition. I therefore refuse permission to appeal on ground 1.

47. So far as ground 2 is concerned, while it was true to say that the authorities cited to the Judge did not provide a clear and binding answer, so that the there was no authority directly in point, there *is* in fact authority which compels the conclusion that in the case of a bare trust for sale/trust of land one of two or more joint tenants would not be acting in breach of trust in serving a notice to quit, even if done to obtain a personal benefit. That authority includes *Procter* (decided since judgment in this case) and other authorities referred to above that were not cited to the Judge. In substance, therefore, albeit on a different basis, I allow the appeal on ground 2.

48. Since, as I have set out above, there is no pleaded or evidential basis currently before the court to suggest any reason other than the mere fact of co-ownership as the foundation for trust duties being owed by Frank, that means that the order of the Judge should be set aside, and replaced with an order dismissing the application for an injunction.