



**PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION**

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF/2023/0552

BETWEEN

- (1) Patrick James McGee**
- (2) Mary Elizabeth McGee**

Applicants

and

Long Term Reversions (Harrogate) Limited

Respondent

**Property Address: Roofspace, Flat 12, 31 Chapter Way, London SW19 2RP
Title Number: SGL839073**

Judge Colin Green

**Hearing via CVP
On: 3 and 4 October 2024**

Applicants' Representation: Tom Morris of Counsel

Respondents' Representation: David Green of Counsel

DECISION

Introduction

1. The Respondent is the registered proprietor of the freehold estate in Nonsuch House, 31 Chapter Way, London SW19 2RP, and part of Baron House, 33 Chapter Way, London SW19 2RS. Its title is registered at HM Land Registry under title number SGL663395. The Respondent has been the registered proprietor since 3rd May 2005. These proceedings concern Nonsuch House (the “Building”).

2. The Applicants are the registered leasehold proprietors of Flat 12, Nonsuch House, 31 Chapter Way, London SW19 2RP (the “Flat”). The Applicants’ leasehold estate was created by a lease dated 24th September 2004 (the “Lease”). Their estate is registered at HM Land Registry under title number SGL658241. The Applicants have been the registered proprietors with leasehold title absolute since 19th October 2004.
3. The Flat is on the fifth and top floor of the Building. Above the Flat is an enclosed roof space (the “Loft”), which can be accessed only via an unlocked hatch within the Flat. It is common ground that the Loft is outside what was demised by the Lease.
4. Since 1st October 2004, the Applicants’ daughter – Charlene Louise McGee (“Miss McGee”) – has occupied the Flat as their licensee. From that time, it is the Applicants’ case that she has used the Loft as a storage area for her personal belongings and that, as a result of this and other acts of ownership, they have been in adverse possession of the Loft since October 2004.

Procedural history

5. On about 20th March 2022, the Applicants applied to HM Land Registry to be registered with a leasehold title to the Loft, using form ADV1 and stating that the application was made under paragraph 1 of Schedule 6 to the Land Registration Act 2002 Act, that is, on the basis they relied on the principles of adverse possession and specifically on paragraph 5(4) of Schedule 6 (reasonable mistake as to boundary).
6. The Land Registry then raised a requisition on 23rd January 2023, paragraph 1 of which was as follows:

“I note that in panel 11 of their statement of truth that your clients state that they claim a leasehold estate in this land on the same terms as that of their existing lease. It would appear from this that they accept the presumption set out in Smirk v. Lyndale Developments Limited (1975) 1 Ch 317 regarding the adverse possession of a tenant operating to the benefit of its landlord. If so, the appropriate application to make here would be in Form FR1 for registration of the additional leasehold title, and you should lodge that form and the appropriate fee.”

7. Form FR1 is the Land Registry’s form for applications for first registration of unregistered land. In the light of the requisition, and since the Applicant’s case was that the Loft should be registered as an accretion to the Lease, the Applicants withdrew their

ADV1 application and submitted a further application using form FR1 on 20th February 2023. The ST1 statement of truth in support however, was the same as that used previously, in the form required for a Schedule 6 application. Notice of objection was given by the Respondent on 25th May 2023. The Notice was in form NAP – the Land Registry’s form for giving notice to the Registrar in respect of an adverse possession application under Schedule 6 – and it required the Registrar to deal with the application under paragraph 5 of that Schedule. I accept that form NAP was used by the Respondent in response to the Applicants’ Schedule 6 statement of truth (at this point the Respondent was unaware of the Applicants’ withdrawn ADVI application, which had never been served) and the Land Registry accepted it as a sufficient objection to the FR1 application.

8. The disputed FR1 application was referred to the Tribunal. After an initial consideration of the matter by Judge Paton, on 4th December 2023 he gave notice to the parties under rule 9(4) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 of his proposal to strike out the proceedings and invited representations. Leaving aside the confusion caused by the Respondent’s use of form NAP in respect of an application for first registration, Judge Paton’s initial view was that in circumstances such as the present a claim that relied on adverse possession could only be brought under Schedule 6, not as an application for first registration. The Applicants filed representations dated 2nd January 2024 raising arguments some of which formed part of their case before me, and with which I will deal below. Judge Paton accepted that the Applicants’ submissions raised an arguable issue as to the applicability or otherwise of Schedule 6 to an application based on possession by a lessee of a landlord’s land relying on the doctrine of encroachment. The proceedings were not struck out and directions were given.
9. In an email to the parties of 11th January 2024, Judge Paton also made the following observations:

“As previously stated, the Applicants’ submissions raise an arguable issue as to the applicability or otherwise of Schedule 6 Land Registration Act 2002 to an application based on possession by a lessee of landlord’s land by way of an accretion to the lease.

The issue of whether Schedule 6 applies or not to such a case is clearly of some importance. If it does apply, then it would not be open to the

Tribunal to treat the current FRI application as if it were an ADV1 application. The Applicant would have to make a fresh ADV1 application to HM Land Registry. So it is not correct to say that any factual issue on Schedule 6 paragraph 5(4) could arise for determination in these present proceedings, since no application based on those provisions is currently before the Tribunal.

In the light of the issue raised, the parties are invited to consider whether they would wish the above issue to be the subject of a trial of a preliminary issue. Any application for such a trial of a preliminary issue should be filed with the Tribunal, copied to the other party, by 5pm on 1st February 2024, together with a proposed formulation of the preliminary issue for determination.

If any such application is made, the Tribunal will consider it and the current directions may be varied accordingly.

If no such application is made, the matter will proceed in accordance with the existing directions.”

10. Given how Judge Paton had approached matters, on 6th February 2024 the Applicants made a further application under Schedule 6 using form ADV1, supported by a statement of truth, no doubt with a view to that application being referred to the Tribunal so that there could be a determination at a single hearing of all possible options. The Land Registry responded on 29th February 2024 in the following terms:

“We note Judge Paton’s ruling, which may well have substantial consequences for our practice in this area if upheld by the Tribunal. However, it would not appear that this hearing has yet taken place and, as matters stand, we have received no order from the Tribunal for the cancellation of the existing application in Form FRI.

In the circumstances, it seems most appropriate to hold the latest application until we know whether it is necessary to proceed with it and, indeed, the Tribunal’s considered view of the law on this matter. Accordingly, we will await the Tribunal’s decision.”

11. That is where the second Schedule 6 application remains, which has not yet been served by the Land Registry on the Respondent. Therefore, the only application before the Tribunal is that for first registration of the Loft as an accretion to the Lease.

The issues

12. An agreed list of issues was prepared by counsel:

(1) Is the Applicants’ application one to which the provisions of the 2002 Act apply?

(2) If the 2002 Act does not apply:

- a. have the Applicants been adverse possession of the Loft for a period of at least ten years?
- b. if so, are they entitled to be registered with a leasehold estate in the Loft?
- c. is form FR1 the correct form to use for an application such as this?

(3) If the provisions of the 2002 Act apply:

- a. what are the consequences of the application having been made in form FR1?
- b. have the Applicants been in adverse possession for a period of at least ten years commencing with the date of their application to be registered?
- c. throughout that period, did the Applicants reasonably believe that they owned the Loft?
- d. are the Applicants entitled to be registered with a leasehold estate in the Loft?

13. Although it was understandable that the parties wished to have determined all potentially relevant issues, absent a referral of a Schedule 6 application to the Tribunal, like Judge Paton I was concerned that there was no jurisdiction on the FR1 application to determine the issues listed at (3). I referred counsel to the statements of the Upper Tribunal concerning jurisdiction in land registration cases in *Hallman v. Harkins* [2019] UKUT 245 (LC), after consideration of which it was accepted that it was only issues (1) and (2) that I had jurisdiction to decide. As far as (3) is concerned, if the provisions of the 2002 Act apply – specifically, Schedule 6 – I would have to direct that the current application be cancelled. The Land Registry would then proceed with service of the Applicants’ second Schedule 6 application, currently on hold.

14. There was no site view as it was considered that various photographs in the hearing bundle would suffice. I am grateful to counsel for their detailed skeleton arguments and comprehensive submissions, and their patience in dealing with my questions.

Does the 2002 Act apply?

15. Apparently, this gives rise to a question which has not been conclusively settled in any authority binding on me concerning the juridical basis of the doctrine that, where a tenant encroaches on land owned by their landlord which does not form part of the demise, there is a presumption that it is to be treated as part of their lease; what is known as the doctrine of encroachment. As Mr. Morris, counsel for the Applicants, put the question: is the presumption based on limitation, some form of adverse possession, or some form of estoppel? This has become a question of more than academic interest since the coming into force of the 2002 Act, concerning which it has very practical consequences. If the doctrine is based on adverse possession or limitation, how does it fit into the modern scheme of land registration where the landlord's title is registered? If it is based on estoppel, how does an encroaching tenant apply to the Land Registry so that his interest is reflected on the register?

16. It should be noted that the parties accepted that the doctrine of encroachment can apply in respect of a landlord's registered title of adjoining land – the dispute was whether it was subject to Schedule 6 – and that if the presumption arises in the present case, it has not been rebutted. It was not suggested that in respect of registered land the doctrine has not survived the provisions of the 2002 Act.

17. The doctrine of encroachment applies to two circumstances. First, if there is adverse possession by a tenant of land that belongs to a third party, there is a presumption that the encroachment enures for the benefit of the landlord. That is not the position under consideration here. Secondly, as set out in Megarry & Wade, *The Law of Real Property* (10th Edition) at [7-042]:

“...if the tenant occupies other land belonging to the landlord but not included in the demise, after the expiry of the limitation period that land is presumed to be an addition to the land demised to the tenant (“a mere extension of the locus of his tenancy”), so that it becomes subject to the terms of the tenancy. Although the tenant may acquire a title to it against the landlord for the remainder of the term, the tenant must give it up to the landlord when the tenancy ends. However, the presumption may be rebutted, e.g. by the tenant conveying the land to a third party and informing the landlord of this while the tenancy is still running. This doctrine is well-established, but it cannot rest upon limitation for two reasons:

- (i) *a squatter acquires a freehold estate even if he or she adversely possesses against a leasehold estate, whereas under this doctrine the tenant merely acquires an accretion to his lease; and*
- (ii) *adverse possession for the limitation period extinguishes the dispossessed owner's title.*

The doctrine has been explained as being akin to estoppel. In 2015 the justices of the Hong Kong Court of Final Appeal adopted, by a majority and a minority respectively, two differing analyses of the doctrine. For the majority, it is a form of adverse possession, despite the two anomalies noted above. For the minority the tenant's position is determined by a presumption that he or she does so under the lease and is estopped from denying that this is so. The limitation of actions is relevant only to bar the landlord's right to recover possession after 12 years; after that date the landlord's title is not barred but he or she is bound by the extension of the area of the lease. It is likely that the courts will have to decide which of these analyses is correct if an application for registration is brought by a tenant in respect of the landlord's registered land, since if the principle is a form of adverse possession then the provisions of the Land Registration Act 2002 will disapply the limitation period and the provisions of Sch.6 will take effect to curtail the tenant's rights to registration."

18. The Applicants' case is that Schedule 6 does not apply to their application. On that basis, they need only show that they have been encroaching on the relevant piece of land for ten years to be entitled to registration. The Respondent accepts that the doctrine of encroachment can in a suitable case be relied on where the landlord's title to adjoining land is registered, but that will be an application which relies on adverse possession so that the Applicant would have to establish a right to be registered by satisfying the conditions, and according to the procedure, under Schedule 6, as required by s. 97 of the 2002 Act. The application will not be one for first registration.
19. In addressing these issues, it is necessary to consider *Smirk v Lyndale Developments Ltd* [1975] Ch 317 and subsequent authorities to understand the rationale for the presumption and the circumstances in which it arises. *Smirk* is a decision of Pennycuick V.-C. in the High Court and although the Court of Appeal reversed his decision (on a ground not argued before him), Lawton L.J., giving the judgment of the Court, "accept[ed] Pennycuick V-C's statement of the law [on this topic] as being correct". This was also acknowledged by Neuberger L.J. in *Tower Hamlets LBC v Barrett* [2006] 1 P & CR 9 at paragraph 30. Mr. Morris submitted, in my view correctly, that the law as set out in *Smirk* is binding up to the Court of Appeal.

20. In *Smirk*, Pennycuick V-C carried out a review of previous cases, beginning with *Kingsmill v. Millard* (1855) 11 Exch. 313 and quoting from the judgment of Parke J.:

“It is laid down in all the cases-whether the inclosed land is part of the waste, or belongs to the landlord or a third person-that the presumption is, that the tenant has inclosed it for the benefit of his landlord, unless he has done some act disclaiming the landlord’s title. I am disposed to discard the definition, that the encroachment is made ‘for the benefit of the landlord,’ and to adopt that of Lord Campbell, viz. that the encroachment must be considered as annexed to the holding, unless it clearly appears that the tenant made it for his own benefit. It is not necessary that the land inclosed should be adjacent to the demised premises; the same rule prevails when the encroachment is at a distance. That is now the law; and I must add, that even though at the time of making the encroachment there is nothing to rebut the presumption that the tenant intended to hold it as a portion of his farm, yet circumstances may afterwards occur by which it may be severed from the farm: for instance, if the tenant conveys it to another person, and the conveyance is communicated to the landlord, then it can no longer be considered as part of the holding. But if the landlord is allowed to remain under the belief that the encroachment is part of the farm, the tenant is estopped from denying it, and must render it up at the end of the term as a portion of the holding.”

21. One of the earlier cases referred to by Parke J. was *Andrews v. Hailes* (1853) 2 El & BI 349, 118 ER 797, in which the tenant encroached upon a third party’s land, building a bakehouse and offices on it and occupying it for over 20 years. When his landlord served on him notice to quit, he gave up the land demised under his tenancy but sought to keep the encroached upon land for himself. The Court held that he had to surrender up that land to his landlord, its decision being based on the presumption and the estoppel. Lord Campbell CJ stated:

“I think it must be considered that the encroachment in this case was held by the defendant as part of the demised premises; and that being so, I think the defendant is not at liberty to deny that it was part of them. I proceed on what the civil law calls exceptio personalis, and the common law an estoppel, and say that the tenant cannot deny this.”

22. It is to be noted that as formulated in *Kingsmill* and *Andrews v. Hailes*, the doctrine of encroachment is expressed as an estoppel and there is no reference to limitation or adverse possession. When the term of the lease ends, if the tenant claims that he is entitled to the land encroached on the landlord can successfully argue that the tenant is

estopped from claiming that there has been anything more than an accretion to the tenancy.

23. Pennycuik V-C also considered *Whitmore v. Humphries* (1871) L.R. 7 C.P. 1, in which Willes J. stated:

“This rule undoubtedly applies when the encroachment is made over land belonging to the landlord, and no inquiry appears ever to have been made in such cases, whether it was made with the consent of the landlord or not. In such cases the reasonableness of the rule is very obvious; it only gives back to the landlord that which is rightly his, and prevents the tenant, who has taken advantage of his tenancy to encroach, from keeping that which it would be a breach of the duty arising from the relation of landlord and tenant not to give up. The rule, however, goes further than this. It is not confined to cases where the encroachment is upon land to which the landlord is entitled, it applies to cases where the land encroached upon does not belong to the landlord

...The result is to avoid questions which would otherwise frequently arise as to the property in land, and to exclude persons who have come in as tenants, and who are likely to encroach, from raising such questions. The reason of the rule appears on the one hand to be entirely independent of any notion of encroachment being a wrong done, and so also on the other hand it appears to be quite independent of the question, whether the encroachment was made with the assent of the landlord.

For these reasons I come to the conclusion that the meaning of the word ‘encroachment’ is quite apart from any question of assent or dissent on the part of the landlord, and signifies something taken in by the tenant by reason of his being tenant without anything to show that it was so taken otherwise than for the benefit of the landlord, to be held as part of the demised premises, and given up accordingly at the end of the term.”

24. Again, there is no reference to limitation or adverse possession. Limitation did arise however, in *Tabor v. Godfrey* (1895) 64 L.J.Q.B. 245, discussed in *Smirk* as follows:

“The headnote runs as follows:

“The tenant under a lease for years encroached upon and occupied a piece of land belonging to his landlord and adjoining the demised premises for a period of more than twelve years. The landlord during the term brought an action for an injunction and damages for trespass:- Held, that the action would not lie. The tenant must be deemed to have occupied the piece of ground as part of the holding, and he was entitled so to occupy it during the remainder of his lease.”

It appears from the next paragraph that the point was tried by Charles J. without a jury, and Charles J., after holding that 12 years of occupation had elapsed, proceeds as follows, at p. 247:

“... and I should, apart from the legal question here, have to hold, certainly as to the strip, that the defendant had acquired a right to the freehold under the statute. But that is not the true inference, nor do I think the Statute of Limitations has anything to do with the case. But I do think that in the events which have happened, both the landlord and the tenant have treated this strip as part of the land demised. At the end of the lease the tenant could not have set up that the strip was his own, or said that it was not part of the land included in the lease. A tenant who enters under one title cannot turn round and say he entered under another. I remember a case of a lease under a tenant by the curtesy and the lessee saying that no such lease could be granted-and in vain. The principle is that a man who gets in by reason of being tenant must take land as under his original take. That is the reason why it is said that a tenant who has occupied an encroachment has occupied it for the benefit of his landlord. It is said that that principle cannot be applied during the currency of the tenancy, but I believe it has been so applied, and I think that it does apply to a tenant who so occupies during the currency of his tenancy.”

That judgment is entirely in accordance with the principle laid down in Kingsmill v. Millard, 11 Exch. 313. The effect is that the tenant in the case before Charles J. did not acquire a freehold title as against his landlord; what he did acquire was a leasehold interest in the land encroached on-that land being treated as an addition to the original subject matter of the tenancy.”

25. In other words, but for the doctrine of encroachment the court would have to find that the tenant had acquired the landlord's freehold title under the Limitation Acts. Due to the presumption however, he is prevented from relying on limitation which would produce an unjust result.
26. There is also the case of *J. F. Perrott & Co. Ltd. v. Cohen* [1951] 1 K.B. 705 in the Court of Appeal. The headnote runs as follows:

“A tenant of premises under a lease from 1936 to 1948 entered into occupation of land of the landlords, on which there were lavatories, which adjoined the demised premises. This was discovered by the landlords who, in 1943, by their solicitor protested. The tenant claimed that the land was included in the lease. The landlords' solicitor (who had repudiated the claim and proposed that the landlords and tenant should come to some arrangement about the future of lavatories on the land) asked the tenant to withdraw his claim and said that when he was in a

position to make any proposition with regard to the lavatories he would communicate with the tenant. The solicitor did not make any such proposition, the tenant did not withdraw his claim, and he continued in occupation of the land with the lavatories for five years until the end of the lease. At the termination of the tenancy the landlords claimed for repairs to the lavatories on the land as being subject to the tenant's covenants for repair contained in the lease: -

Held, following Tabor v. Godfrey (1895) 64 L.J.Q.B. 245, as explained by the Divisional Court in Lord Hastings v. Saddler (1898) 79 L.T. 355, that the tenant could not deny that the land was included in his lease and he was therefore liable under his covenant to repair the lavatories.”

27. In *Smirk, Pennycuik V-C* made the following observations:

“In the summary of the judgment of Denning L.J., Kingsmill v. Millard, 11 Exch. 313, was apparently not cited, and Somervell L.J. based himself on the principle laid down by Charles J. in Tabor v. Godfrey, 64 L.J.Q.B. I do not think it would be useful to read the judgment of Somervell L.J. on the facts in Perrott’s case [1951] 1 K.B. 705, but he said, at p. 708:

“That being so, it is right to treat the lavatories as part of the demised premises; and the tenant-who of course at one time wanted the lavatories so treated-cannot now adopt the other position and say: ‘Although I have occupied them, although I have treated them as part of the demised premises as against my landlords when their solicitor suggested they were not part of the demised premises, I shall now change my position and claim that they were not included in the demise.’”

Then Denning L.J. said, at p. 709:

“I fully agree with the judgment of Somervell L.J. and I too only wish to say a few words on the question of the lavatories. It raises a question which has not hitherto been before this court, and it is this: if a tenant encroaches upon property of the lessor which adjoins the demised premises,” -and it is to be observed that Denning L.J. uses the word “encroachment” as most people would do today without any specific connotation of waste-“does the tenant become liable to repair the property on which he has encroached, just as if it were included under the covenants to repair contained in the lease? The principle underlying the cases on encroachment is not perhaps strictly an estoppel, but it is akin to it. If a tenant takes possession of adjoining property and by his conduct represents that he is holding it under the demise, then, if the landlord acts on that representation by allowing the tenant to remain in possession, the tenant cannot afterwards assert that he is holding it on any other footing. The tenant cannot, for instance, claim that he is holding it adversely to the landlord so as to acquire a title under the Limitation Act of 1939; nor can he claim

that he is only a licensee, who has all the benefits of occupation but none of the burdens of the lease. The reason is not because of any doctrine of 'blowing hot and cold'; for that, as Lord Atkin once said, is merely a descriptive phrase which does not express any precise legal concept: see Lissenden v. C.A. V. Bosch Ltd. [1940] A.C. 412, 429. The reason is because the tenant has by his conduct made a representation that was intended to be binding, was intended to be acted on, and was in fact acted on; and he cannot be allowed to go back on it."

Then he elaborates that. So both Somervell and Denning L.JJ. base their judgments on estoppel; both refer to Tabor v. Godfrey, 64 L.J.Q.B. 245. Those judgments appear to me in conformity with the principles laid down in Kingsmill v. Millard, 11 Exch. 313 and in particular the requirement laid down in that case of communication between the landlord and the tenant. Here, the result of the communication was an estoppel; it might have been another case of express or implied agreement."

28. The *Perrott* case can be regarded as an instance of an estoppel arising from an express representation by the tenant, but in Mr. Morris' submission the presumption of encroachment, and the estoppel against the tenant, operates even if there has been no express representation or knowledge on the part of the landlord, which is supported by the conclusion of Pennycuik V-C:

"Having been through the authorities I propose, as I have said earlier, to adopt and apply the principle laid down in Kingsmill v. Millard, 11 Exch. 313."

29. *Long v Tower Hamlets London Borough Council* [1998] Ch 197 provides further support for this view. The facts are not material for current purposes, but the judgment of James Munby Q.C. sitting as a deputy High Court judge contains the following passage:

"[Miss Hargreaves] relies upon the principle that, if a tenant occupies land belonging to the landlord but not included in the demise, that land is presumed to be an addition to the land demised to the tenant, so that it becomes subject to the terms of the tenancy and must therefore be given up to the landlord when the tenancy ends: Smirk v. Lyndale Developments Ltd. [1975] Ch. 317. Mr. Philip Walter of counsel, on behalf of Mr. Long, seeks to confine the principle, which otherwise he accepts, in two ways: first, he says it is limited to cases where the encroachment is on land which is waste; secondly, he says that it is limited to cases where the tenant is estopped by words or conduct from denying that the additional land is within the demise. Neither condition, he says, is satisfied in the present case."

I cannot accept either of Mr. Walter's submissions. In Smirk v. Lyndale Developments Ltd. [1975] Ch. 317 Sir John Pennycuick V.-C. considered all the relevant authorities, which as he said, at p. 323G, had "got into something of a tangle," and concluded, at pp. 324, 329C, 332G, that the law had been correctly stated by Alderson and Parke B. in Kingsmill v. Millard (1855) 11 Exch. 313. His decision on the point was not challenged on appeal and was accepted as correct by the Court of Appeal [1975] Ch. 317, 3370, 340E, 341H. The law as laid down in those two cases I take to be clear and binding on me. They show that the principle applies whether or not the land encroached upon is waste. They show, moreover, that the principle is based on a presumption, albeit a rebuttable presumption, which, although it may be considered to operate in a manner akin to an estoppel, is not dependent upon proof, as Mr. Walter I think would have it, of any active representation to the landlord by the tenant. On the contrary, the presumption is treated as applying unless the tenant, during the term, communicates with the landlord in such a way as to show that he is asserting his own title as against the landlord or, as Alderson B. put it, that he is setting the landlord at defiance."

30. *Secretary for Justice v. Chau Ka Chik Tso* [2011] HKCFA 86 is a decision of the Hong Kong Court of Final Appeal. As summarised in the first supplement to the Second Edition of *Adverse Possession*, at [25-1D to E]:

"In Ka Chik Tso it was assumed that the doctrine of encroachment was applicable to the facts. The question for the court was whether this amounted to adverse possession and whether it mattered that the tenant relying on encroachment had occupied under two sequential leases, one replacing the other and whether his encroachment rights benefited him under his second lease. On the first question, the nature of encroachment, the five judge court was split 2:3 as to reasons, but unanimous in outcome.

In essence, the differences in view can be expressed as follows: the minority was of the view that the landlord and tenant relationship gave rise to a presumption that the tenant, if encroaching, was doing so under his lease and would be estopped from denying that this was so. Limitation played no direct role in that interpretation, save that the landlord (or third party) might find his right of recovery barred for the duration of the lease during which period the estoppel operated. For the majority, the doctrine worked as a true form of adverse possession, albeit vesting in the squatter a leasehold and not a freehold, interest and not barring the title of the person against whom adverse possession was occurring."

31. *Ka Chik Tso* is not binding on me and Mr. Morris' case was that I should prefer the reasons provided by the minority as more consistent with Pennycuick V-C's statement

of the law in *Smirk* and in subsequent cases. The minority reasons were given by Mr Justice Ribiero PJ, with whom Mr Justice Chan PJ agreed.

32. Ribiero PJ stated at [30]:

“I turn now to consider how the encroachment doctrine functions in cases involving a tenant’s encroachment on his landlord’s land in the light of the authorities. The conclusion which I shall come to is that the doctrine does not operate by relying on some form of partial application of the provisions of the Limitation Ordinance. It operates to prevent that Ordinance from being relied on by the tenant at all. I will also conclude that the consequence of the tenant acquiring a leasehold interest in the land encroached upon coterminous with his tenancy flows from the presumption and estoppel forming part of the doctrine and not from limitation barring the landlord’s right of action.”

33. Reference is also made at [38] and [39] to *Whitmore v Humphries* (1871-72) LR 7 CP 1, a case not referred to in *Smirk* but which appears to be the earliest case (at least as mentioned in the authorities to which I was referred) where limitation is addressed.

“38. Whitmore v Humphries, was a case involving an encroachment on the landlord’s land. The tenant was held by Willes J to have encroached on manorial waste belonging to his landlord by enclosing an adjoining piece of common pursuant to an agreement that such encroachment should be held “on the same terms as are usually applicable to encroachments by virtue of the law”. Willes J stated the general rule as to the presumption as follows:

“By the rule of law applicable to this subject the landlord is entitled at the determination of the tenancy to recover from the tenant, not only the land originally demised, but also any land which the tenant may have added to it by encroachment from the waste, such encroachment being deemed to be made by him as tenant as an addition to his holding, and consequently for the benefit of his landlord, unless it is made under circumstances which shew an intention to hold it for his own benefit alone, and not as part of his holding under the landlord.”

39. *Willes J went to hold that an estoppel arose which excluded application of the Statute of Limitations:*

“If the general provisions of the statute [of Limitations) apply when the encroachment is on the land of the landlord, what becomes of the general rule of law applicable to all encroachments, namely, that the tenant is estopped from denying that the encroachment forms part of the holding - which, with reference to such a case, is really only another way of saying that

he holds in such a way as that the Statute of Limitations does not apply? The case of an encroachment is a peculiar case in the law, which treats it as being part of the holding. It follows obviously that the general provisions of the Statute of Limitations do not apply to it.”

34. At [40] and [41] a possible way out of the “conundrum” is suggested.

“40. In my view, Willes J's decision suggests a way out of the doctrinal difficulties mentioned above. But for intervention of the doctrine, an encroaching tenant who has occupied the land encroached upon for longer than the limitation period might well be able factually to set up adverse possession as the basis for both barring his landlord's right of action to recover the land and extinguishing his landlord's title to it. However, the doctrine gives the landlord some protection by presuming that the tenant's occupation of the encroachment area is as an annex to his demised holding and estopping the tenant from contending that his possession is adverse to his landlord.

41. The limitation period is still important since the doctrine is only needed and only comes into play to defeat a potential plea of adverse possession barring the landlord's right of action after the period has run out. However, the doctrine does not incorporate as an ingredient the operation of any provisions of the Limitation Ordinance to bar the landlord's right of action. It is not the law of limitation, but the combined effect of the presumption and the estoppel arising under the doctrine, that converts the tenant's occupation in such circumstances into a leasehold interest in the encroachment area. After the prescribed statutory period, the presumption equally applies to the landlord who benefits from the doctrine so that he is deemed to have granted the tenant a leasehold interest over the land encroached upon on the same terms as the existing tenancy. It is for that reason, and not because his right of action has been extinguished as against a trespasser, that the landlord cannot recover possession of the area of encroachment until the lease comes to an end.”

35. There is then a review of subsequent authorities, and at [64] the following conclusion:

“In my view, the authorities discussed above show that in cases involving encroachment on the landlord's land, the doctrine operates by giving effect to the presumption and the estoppel discussed above. If the limitation period has not yet expired, the tenant may of course be ejected and cannot plead the Limitation Ordinance to meet the landlord's claim. However, upon expiry of the limitation period, the doctrine comes into play and the Limitation Ordinance would still not provide a defence to the landlord's claim. This is because the doctrine operates so that the tenant is presumed to have occupied the encroachment on the same terms as apply to his demised holding and he is estopped from asserting that he was, on the contrary, in adverse possession. In such cases, the

presumption applies equally to the landlord. The doctrine protects his interest from being destroyed by operation of the Limitation Ordinance but the price extracted by the law for such protection is that the landlord must accept that the tenant has acquired a leasehold interest over the encroachment, with possession to be recovered by the landlord only after determination of the lease.”

36. In other words, on expiry of the limitation period two interrelated estoppels arise, which have a proprietary effect:
- 36.1. The tenant is estopped from departing from the presumption that the encroachment is an accretion to his tenancy.
- 36.2. The landlord is estopped from asserting that the tenancy does not extend to the land encroached on.
37. Mr. Morris submitted that the doctrine of encroachment exists *because* of limitation but does not have its basis in limitation. The presumption operates by way of estoppel and gives rise to a property right, an accretion to the land demised by the lease, which binds both landlord and tenant.
38. I prefer the reasoning of Ribiero PJ, which is consistent with *Smirk*, to that of Lord Scott of Foscote NPJ (with whom Mr Justice Bokhary PJ and Mr Justice Litton NPJ agreed) and, with respect, having taken that view I do not consider it necessary to set out Lord Scott’s reasoning.
39. I now turn to consider how encroachment can be dealt with under the 2002 Act where the accretion has been in respect of the registered title of the landlord. Sections 96 and 97 of the 2002 Act are:

“96 *Disapplication of periods of limitation*

(1) No period of limitation under section 15 of the Limitation Act 1980 (c. 58) (time limits in relation to recovery of land) shall run against any person, other than a chargee, in relation to an estate in land or rentcharge the title to which is registered.

(2) No period of limitation under section 16 of that Act (time limits in relation to redemption of land) shall run against any person in relation to such an estate in land or rentcharge.

(3) Accordingly, section 17 of that Act (extinction of title on expiry of time limit) does not operate to extinguish the title of any person where, by virtue of this section, a period of limitation does not run against him.

97 Registration of adverse possessor

Schedule 6 (which makes provision about the registration of an adverse possessor of an estate in land or rentcharge) has effect.”

40. For current purposes, the relevant paragraphs of Schedule 6 are as follows:

“SCHEDULE 6

Registration of adverse possessor

Right to apply for registration

- 1(1) A person may apply to the registrar to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for the period of ten years ending on the date of the application.
- (2) A person may also apply to the registrar to be registered as the proprietor of a registered estate in land if—
- (a) he has in the period of six months ending on the date of the application ceased to be in adverse possession of the estate because of eviction by the registered proprietor, or a person claiming under the registered proprietor,
 - (b) on the day before his eviction he was entitled to make an application under sub-paragraph (1), and
 - (c) the eviction was not pursuant to a judgment for possession.
- (3) However, a person may not make an application under this paragraph if—
- (a) he is a defendant in proceedings which involve asserting a right to possession of the land, or
 - (b) judgment for possession of the land has been given against him in the last two years.
- (4) For the purposes of sub-paragraph (1), the estate need not have been registered throughout the period of adverse possession.

Notification of application

2(1) *The registrar must give notice of an application under paragraph 1 to—*

- (a) *the proprietor of the estate to which the application relates,*
- (b) *the proprietor of any registered charge on the estate,*
- (c) *where the estate is leasehold, the proprietor of any superior registered estate,*
- (d) *any person who is registered in accordance with rules as a person to be notified under this paragraph, and*
- (e) *such other persons as rules may provide.*

(2) *Notice under this paragraph shall include notice of the effect of paragraph 4.*

Treatment of application

3(1) *A person given notice under paragraph 2 may require that the application to which the notice relates be dealt with under paragraph 5.*

(2) *The right under this paragraph is exercisable by notice to the registrar given before the end of such period as rules may provide.*

4 *If an application under paragraph 1 is not required to be dealt with under paragraph 5, the applicant is entitled to be entered in the register as the new proprietor of the estate.*

5(1) *If an application under paragraph 1 is required to be dealt with under this paragraph, the applicant is only entitled to be registered as the new proprietor of the estate if any of the following conditions is met.*

(2) *The first condition is that—*

- (a) *it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant, and*
- (b) *the circumstances are such that the applicant ought to be registered as the proprietor.*

(3) *The second condition is that the applicant is for some other reason entitled to be registered as the proprietor of the estate.*

(4) *The third condition is that—*

- (a) *the land to which the application relates is adjacent to land belonging to the applicant,*
 - (b) *the exact line of the boundary between the two has not been determined under rules under section 60,*
 - (c) *for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him, and*
 - (d) *the estate to which the application relates was registered more than one year prior to the date of the application.*
- (5) *In relation to an application under paragraph 1(2), this paragraph has effect as if the reference in sub-paragraph (4)(c) to the date of the application were to the day before the date of the applicant's eviction.*

Right to make further application for registration

- 6(1) *Where a person's application under paragraph 1 is rejected, he may make a further application to be registered as the proprietor of the estate if he is in adverse possession of the estate from the date of the application until the last day of the period of two years beginning with the date of its rejection.*
- (2) *However, a person may not make an application under this paragraph if—*
- (a) *he is a defendant in proceedings which involve asserting a right to possession of the land,*
 - (b) *judgment for possession of the land has been given against him in the last two years, or*
 - (c) *he has been evicted from the land pursuant to a judgment for possession.*
- 7 *If a person makes an application under paragraph 6, he is entitled to be entered in the register as the new proprietor of the estate.*

...

Effect of registration

- 9(1) *Where a person is registered as the proprietor of an estate in land in pursuance of an application under this Schedule, the title by virtue of adverse possession which he had at the time of the application is extinguished.*

- (2) *Subject to sub-paragraph (3), the registration of a person under this Schedule as the proprietor of an estate in land does not affect the priority of any interest affecting the estate.*
- (3) *Subject to sub-paragraph (4), where a person is registered under this Schedule as the proprietor of an estate, the estate is vested in him free of any registered charge affecting the estate immediately before his registration.*
- (4) *Sub-paragraph (3) does not apply where registration as proprietor is in pursuance of an application determined by reference to whether any of the conditions in paragraph 5 applies.*

Apportionment and discharge of charges

10(1) Where—

- (a) *a registered estate continues to be subject to a charge notwithstanding the registration of a person under this Schedule as the proprietor, and*
- (b) *the charge affects property other than the estate,*

the proprietor of the estate may require the chargee to apportion the amount secured by the charge at that time between the estate and the other property on the basis of their respective values.

- (2) *The person requiring the apportionment is entitled to a discharge of his estate from the charge on payment of—*
 - (a) *the amount apportioned to the estate, and*
 - (b) *the costs incurred by the chargee as a result of the apportionment.*
- (3) *On a discharge under this paragraph, the liability of the chargor to the chargee is reduced by the amount apportioned to the estate.*
- (4) *Rules may make provision about apportionment under this paragraph, in particular, provision about—*
 - (a) *procedure,*
 - (b) *valuation,*
 - (c) *calculation of costs payable under sub-paragraph (2)(b), and*
 - (d) *payment of the costs of the chargor.*

Meaning of “adverse possession”

11(1) *A person is in adverse possession of an estate in land for the purposes of this Schedule if, but for section 96, a period of limitation under section 15 of the Limitation Act 1980 (c. 58) would run in his favour in relation to the estate.*

(2) *A person is also to be regarded for those purposes as having been in adverse possession of an estate in land—*

(a) *where he is the successor in title to an estate in the land, during any period of adverse possession by a predecessor in title to that estate, or*

(b) *during any period of adverse possession by another person which comes between, and is continuous with, periods of adverse possession of his own.*

(3) *In determining whether for the purposes of this paragraph a period of limitation would run under section 15 of the Limitation Act 1980, there are to be disregarded—*

(a) *the commencement of any legal proceedings, and*

(b) *paragraph 6 of Schedule 1 to that Act.*

...

15 *Rules may make provision about the procedure to be followed pursuant to an application under this Schedule.”*

41. In short, under the 2002 Act in respect of adverse possession the relevant terms of the 1980 Act are disapplied and are replaced by the provisions of Schedule 6.

42. *Ruoff & Roper: Registered Conveyancing* at paragraph 33.029.08 deals with applications for registration based on the presumption of accretion, and states:

“It is open to the tenant squatter to accept that the presumption does in fact apply, which he may be inclined to do particularly where the encroachment is onto other land which belongs to his landlord but is not included in the squatter’s existing lease, as opposed to being onto land belonging to a third party. In such a case, he may make an application for first registration on the basis that the land is to be treated as an accretion to his existing lease, provided there is more than seven years of the term of the existing lease unexpired (Land Registration Act 2002 s.3(3)). Evidence of the squatter’s title to that lease, if unregistered, should accompany the application. Any notice served by the Registrar will confirm the application is being made on this basis. If the application is completed, the Registrar will enter a note in the property

register of the squatter's title to the effect that, although not originally within the extent demised by the existing lease, the land encroached on is now held for the term of, and as an accretion to, that lease."

43. Unsurprisingly, this is the approach taken in paragraph 11.2 of Land Registry Practice Guide 4: "Adverse possession of registered land", updated on 2nd April 2024, in which it is stated that where the presumption applies in respect of encroachment onto other land belonging to the landlord but not included in the demise, application can be made on form FR1 for first registration of the tenant's leasehold title to the land concerned. Clearly, the Land Registry does not think that Schedule 6 applies, as reflected in the correspondence set out above, which advised the Applicants that the appropriate application was not under Schedule 6 using form ADV1 but by using form FR1 for first registration of the Loft as an accretion to the Lease of the Flat.
44. Mr. Green, counsel for the Respondent, submitted that in such circumstances, application can only be made by the tenant under Schedule 6 even though the title claimed is an accretion to the lease and not the landlord's registered title. That is to say, provided adverse possession can be established for the requisite period, the Applicants in the present case can apply under Schedule 6 to be registered with a leasehold title to the Loft as an accretion to the Lease even though the only registered title to the Loft is as part of the Respondent's freehold title.
45. For the following reasons, I do not consider that Schedule 6 can be construed in this way. Under paragraph 1(1) of Schedule 6, the application is "to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for the period of ten years ending on the date of the application". The estate in question is an existing registered estate, in this case the Respondent's registered freehold title to the Loft. Where an accretion to a lease is alleged however, the landlord's existing registered title and the leasehold title sought by the tenant are not the same. Indeed, the landlord will not be registered as proprietor of any such registered estate but a different registered estate. The leasehold title sought will not exist as a registered estate.
46. In addition, there are various routes by which an application can proceed through the provisions and procedures set out in Schedule 6, but in all cases the outcome for a successful applicant will be the same – the applicant, "is entitled to be entered in the

register as the new proprietor of the estate” (paragraphs 4 and 7) or “registered as the new proprietor of the estate (paragraph 5(1), subject to the provisions concerning registered charges in paragraph 9). This is what has been described as a statutory vesting of the registered estate from a registered proprietor to the applicant who will be the new registered proprietor of that estate. There is no provision for a successful applicant to be registered in respect of some different estate. I do not see how the doctrine of encroachment, and the right to a new leasehold title, can fit into the machinery of Schedule 6.

47. I was referred to two previous decisions of the predecessor forum to this Tribunal which although not binding on me may be of persuasive authority in respect of the issues under consideration. First, *Dickenson v. Longhurst Homes Limited* (REF/2007/1276), a decision of Mr. Michael Mark sitting as a Deputy Adjudicator. In that case, the applicants had purchased the freehold of their property from the local authority and subsequently transferred it to their daughter who granted them a tenancy back for the lifetime of them and the survivor of them or until they gave notice that they no longer wished to live there. The freehold to a disputed strip of land together with other adjoining land had been sold to the respondent and the applicants claimed they had been in adverse possession of the disputed land for a period since before the transfer to their daughter and her grant of a tenancy to them. Title to the respondent’s land, including the disputed strip, was registered and the applicants applied under Schedule 6. Mr. Mark considered that there was a presumption that their possession of the disputed strip was on behalf of their daughter, their landlord, rather than themselves under the first of the presumptions concerning accretion mentioned in paragraph 47 above, concerning land owned by a third party, not the landlord. That presumption was not rebutted and therefore it was only their daughter, not the applicants, who could seek to be registered in place of the respondent in respect of the freehold to the disputed strip under Schedule 6.

48. In my view, *Dickenson* is concerned with a different matter to that which arises in the present case. There was no issue whether Schedule 6 was engaged in respect of the claim to the registered freehold estate of a third party; what was addressed was who was entitled to the benefit of the encroachment and the identity of the correct applicant. Here, it is contended that there has been an accretion to a lease, and very different

considerations arise concerning the relationship of the doctrine with Schedule 6. The Applicants are not seeking to be registered in respect of their landlord's freehold title to the Loft.

49. The second case is *Skipwith v. Singh* (REF/2009/0850) a decision of Mr. Owen Rhys, sitting as a Deputy Adjudicator. In that case, the applicant was the registered proprietor of a lease of a flat in a building of which the respondent was the freehold proprietor with registered title. The applicant claimed to have been in adverse possession of a loft room as an accretion to the lease: the same circumstances as the present case. The applicant's Form ADV1 was modified by the addition of the following words on the top left hand corner of the first page: "NB THIS IS AN APPLICATION FOR REGISTRATION OF AN ACCRETION TO THE APPLICANT'S LEASEHOLD LAND BY WAY OF AN ENCROACHMENT ONTO THE LANDLORD'S NEIGHBOURING FREEHOLD LAND – THE ADV1 HAS BEEN ADAPTED ACCORDINGLY." The Land Registry had already rejected a previous purported application, where the ADV1 had been modified by the deletion of the words "Application for registration of a person in adverse possession under Schedule 6 to the Land Registration Act 2002".
50. Having made certain findings on the evidence as to adverse possession, Mr. Rhys set out the legal issues in the following terms:

"In the light of these findings, can the Applicant establish that the Loft Room has been added to the Lease by "accretion"? At this point I need to say something about the way in which he has formulated his case. The application was of course made in Form ADV1, namely under Schedule 6 of the 2002 Act. Schedule 6 of the 2002 Act contains the new regime for barring registered titles, in force in relation to the period after 13th October 2003. However, the form was modified by the Applicant, as I have stated. The purpose was to notify the Land Registry (and the freeholder) that a freehold title was not claimed, merely a leasehold title, enduring for the same period as the Lease itself. The original application in ADV1 was rejected by the Land Registry, because the words "claim for adverse possession under Sch 6" had been deleted. Not surprisingly the Land Registry refused to accept this as a valid application, and a modified ADV1 was lodged as stated above. The effect, however, is that the application is brought under the new regime. However, the Statutory Declaration in support, made by the Applicant on 31st October 2008, refers to more than 12 years' adverse possession commencing in May 1991. In the circumstances, Mr Gallagher argues that the Applicant may also rely on the pre-2002 Act law of adverse

possession, on the basis that title under Section 15 of the Limitation Act (and section 75 of the Land Registration Act 1925) was acquired on some date prior to 13th October 2002. The Respondent did not seek to argue that the Applicant was precluded from relying on the pre-2002 law, and in my judgment that position is correct. If the evidence establishes that the registered title had become barred prior to 13th October 2003, the fact that the application was made under Schedule 6 (in Form ADV1) cannot in some way revive the freeholder's title. If the title was barred prior to 2003, the freeholder has at all material times held it on trust for the Applicant under section 75 of the 1925 Act. Accordingly, there are two issues before me: (1) had the Respondent's title to the Loft Room been acquired by the Applicant (as an accretion to the Lease) by way of adverse possession prior to 13th October 2003? (2) if not, is the Applicant entitled to be registered with (leasehold) title to the Loft Room under Schedule 6 of the 2002 Act?"

51. It was found that for the period May 1991 to the date of the application, the applicant has been in adverse possession of the Loft Room so that whether or not the application had been made by the applicant under the pre-2002 regime, or under Schedule 6 to the 2002 Act, the applicant would be able to establish either twelve, or ten, years' adverse possession, as the case may be. If the application had been treated as made entirely under the 2002 Act, the outcome would be the same. Mr. Rhys then went on to consider issues arising under the counter-notice procedure of Schedule 6 and found in favour of the applicant. The Chief Land Registrar was directed to give effect to the application as if no objection had been made.
52. The decision was made on the basis that the applicant could validly modify form ADV1 by the insertion of the words mentioned, to claim a leasehold title to the Loft Room by accretion under Schedule 6 rather than the Respondent's registered freehold title. Whether that was permissible was not put in issue or addressed and for the reasons set out above, I do not consider that Schedule 6 can be construed to allow for this.
53. I agree with Mr. Morris that the difficulty presented in reconciling encroachment by a tenant over his landlord's registered title to adjoining land with the provisions of Schedule 6 can be avoided by viewing the doctrine, and the rights to which it gives rise, as founded in estoppel as explained by Ribiero PJ in *Ka Chik Tso*. The argument is as follows.

54. Prior to the 2002 Act the doctrine operated to prevent a tenant relying on limitation and gave the landlord a defence to a claim to the freehold estate under the 1980 Act. The only right was limited to an accretion to the tenant's leasehold estate. Although s. 96 of the 2002 Act disapplies limitation in respect of registered land, this does not mean there is no room for the doctrine of encroachment to operate. Where the landlord's adjoining land is unregistered, the doctrine will arise at the point when the 1980 Act will otherwise give the tenant a right to the landlord's freehold estate. Where the landlord's title is registered, from the time when there is at least ten years of adverse possession the tenant will have the right to apply under Schedule 6. At that point however, as with the 1980 Act, the doctrine will arise, and the tenant is estopped from making such a claim. Assuming adverse possession continues up to the date of an application to the Land Registry, he will be limited to making a claim to a leasehold estate as an accretion to his tenancy which is a new, unregistered estate that does not fall within the provisions of Schedule 6. That is to say, if a tenant would otherwise be entitled to apply under Schedule 6, by reason of a mutual estoppel both landlord and tenant are prevented from claiming or recognising anything other than such an accretion to the tenant's leasehold estate, which has a proprietary effect. Under both the 1980 and 2002 Acts, adverse possession for the relevant period is the triggering requirement for the presumption to arise but the consequence of that presumption (assuming it is not rebutted) is to prevent reliance on the provisions concerning adverse possession in either Act, such as extinguishing the landlord's freehold under s. 17 of the 1980 Act or a right to claim the freehold under Schedule 6 of the 2002 Act. The tenant is estopped from relying on adverse possession to claim his landlord's title to the land on which he has encroached; his claim is limited to an extension of the land subject to his tenancy. Schedule 6 is only engaged where the presumption is rebutted and there is no estoppel.
55. Therefore, although the right to seek registration of a leasehold estate in respect of the additional land arises as the result of at least ten years adverse possession, there is no right to the registration of an adverse possessor which would be contrary to section 97 of the 2002 Act and no claim subject to the provisions of Schedule 6. The registration sought is by a tenant relying on the presumption of encroachment seeking registration of an accrual to his leasehold estate. Section 97 does not bar a claim which is for something other than the landlord's existing registered estate: a claim to a leasehold rather than a freehold estate, which is a claim for which Schedule 6 makes no provision.

56. In my view, this the correct analysis of matters. As mentioned in paragraph 16 above, there was no dispute that the doctrine under consideration has survived the 2002 Act in respect of registered land, and I consider that it can only operate outside the provisions of Schedule 6.
57. There is a contrary decision of the Tribunal, however: *Patterson v. Thomas* (REF/2018/1036), a decision of Judge Owen Rhys. In that case the applicants were the registered proprietors of a leasehold estate and contended that they had acquired title to an adjoining, disputed parcel of land also owned by their landlord, the respondents. They had first applied in form ADV1 under Schedule 6 seeking registration in respect of the disputed land but subsequently applied using form FR1 for first registration of a leasehold title to the disputed land, which is the application that had been referred to the Tribunal.
58. Judge Rhys concluded that the Land Registry had taken the view that the applicants' claim was based on encroachment by a tenant onto land belonging to his landlord, rather than adverse possession as such, which could be the only explanation to refer the earlier ADV1 application. The reason for this was that if the applicants were successful, their landlords' freehold title to the disputed land would not be barred, because the disputed land was being treated as being added to the lease for the term of the lease only. He continued:

“7 ...There has been a great deal of discussion in academic circles as to whether the doctrine of encroachment is really a branch of the law of limitation, or rather whether it operates as a form of estoppel.

8. *The doctrine, and its application in the case of registered land, was the subject of detailed analysis in a decision of the Hong Court of Final Appeal in Secretary of Justice v. Chau Ka Chik Tso [2011] HKCFA 86. In that case, the majority (of a very strong court) held that the doctrine of encroachment was indeed a branch of the law of adverse possession. Critically, although technically the freehold title is not wholly extinguished by the tenant's encroachment, it is in effect extinguished for the period the lease, since it becomes subject to an additional burden, namely the addition of the encroachment of the leasehold interest. Where, as here, the lease is for a term of 125 years, to all intents and purposes the land is permanently lost to the landlord. That is why, in my judgment, there is every reason in principle to equate the law of encroachment with the law of adverse possession. Where both the leasehold and freehold estates are registered, it would in my*

judgment be anomalous and unjust for the tenant to be able to encroach on the land belonging to the landlord without submitting to the new regime applicable to registered land under LRA 2002.”

59. Judge Rhys therefore decided to treat the FR1 application as if it had been made under Schedule 6, as such an application had been made, albeit not referred to the Tribunal, and the applicant’s Statement of Case essentially pleaded adverse possession, not encroachment as a separate doctrine. The Land Registry had not given the respondents the opportunity of serving an NAP counter-notice, but since he had heard evidence relating to the paragraph 5 conditions, he considered it right to deal with the application as if an NAP had been served, and proceeded to do so.
60. In addition, Mr. Green submitted that there is no good reason why a tenant’s encroachment on the registered land of his landlord for at least ten years should circumvent the procedures under Schedule 6 and put him in a better position than a non-tenant who has been in adverse possession for the same period, and who might be required to satisfy one or more of the paragraph 5 conditions. On the Applicants’ case, the encroaching tenant will be able to rely on adverse possession but would avoid those conditions entirely. On the other hand, they would also be deprived of the benefit of acquiring the landlord’s freehold estate under Schedule 6, an estate that would not be subject to any restrictions and obligations in their lease. That is not the case under the presumption of encroachment where there is an accretion to the lease of the land encroached on.
61. I recognise that after the coming into force of the 2002 Act, it might be considered an anomaly to treat an application in reliance on the presumption of encroachment – where adverse possession for at least ten years is a precondition for the presumption arising – as not subject to the constraints (nor having the benefits) of an application under Schedule 6 for the freehold. Nevertheless, in my view there are sufficient grounds for regarding encroachment as falling outside Schedule 6, particularly as the schedule does not accommodate such a claim. And with respect to Judge Rhys, I feel I must differ whether to adopt the majority or minority view in *Ka Chik Tso*.
62. Mr. Morris pointed out that on the above analysis, the defence provided by s. 98(1) of the 2002 Act would not be available:

“(1) A person has a defence to an action for possession of land if—

(a) on the day immediately preceding that on which the action was brought he was entitled to make an application under paragraph 1 of Schedule 6 to be registered as the proprietor of an estate in the land, and

(b) had he made such an application on that day, the condition in paragraph 5(4) of that Schedule would have been satisfied.”

63. If the tenant is estopped from making an application under Schedule 6, he has no entitlement and cannot rely on this defence. Nevertheless, s. 98(6) states:

“The defences under this section are additional to any other defences a person may have.”

Therefore, the tenant could rely on the doctrine of encroachment as a defence, contending that the landlord is estopped from denying that the tenancy extends to the additional land and therefore has no right to possession.

Adverse possession

64. I must determine whether there has been at least ten years adverse possession of the Loft prior to the Applicants’ FR1 application of 20 February 2023 which will give rise the presumption of encroachment with the consequences set out above.
65. There was no dispute as to the relevant law. The Applicants must establish, for throughout the period in question, that (1) their daughter, Miss McGee, was in possession of the Loft, that is: that she had a sufficient degree of single and exclusive physical custody and control of the Loft, and (2) that she had an intention to exercise such custody and control on her own behalf and for her own benefit, see: *Pye v. Graham*¹.
66. What acts constitute a sufficient degree of exclusive physical control will depend on the circumstances of the case, the nature of the land and the manner in which land of that kind is commonly used or enjoyed.

“...what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an

¹ [2002] UKHL 30

occupying owner might have been expected to deal with it and that no one else has done so."²

67. The intention that must be shown is:

*"the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."*³

As to the evidence required to establish the intention, as Lord Hope put it in *Pye* at [71]:

"The important point for present purposes is that it is not necessary to show that there was a deliberate intention to exclude the paper owner or the registered proprietor...The only intention which has to be demonstrated is an intention to occupy and use the land as one's own... So I would hold that, if the evidence shows that the person was using the land in the way one would expect him to use it if he were the true owner, that is enough."

68. Therefore, I need to consider matters as a two-stage process: what is the nature of the Loft and in what manner is land of that nature commonly used or enjoyed? Second, do the acts relied on amount to use of the Loft as an occupying owner might have been expected to deal with it?

69. As to the first question, since the grant of the Lease, the Loft has only been accessible from a ceiling hatch in the hallway of the Flat; there is no access from any other part of the Building. The floorspace has the same footprint as the Flat and since the Loft lies immediately below a gable roof it contains the structural joists and timbers that support the roof, which rises to an apex within the Loft. At either end are two walls constructed from breeze blocks that separate the Loft from adjoining loft space, for fire-safety reasons, making the Loft entirely self-contained. There are conduits that run through those walls. Some pipes and cables serve the Flat alone, others relate to equipment that is shared amongst several flats. There are no windows or other source of natural light.

70. A description of the Loft was agreed by counsel in the following terms, to be used if I were to direct that effect be given to the application:

² per Slade J in *Powell v. McFarlane* (1977) 38 P & C R 452, at p. 471, cited with approval in *Pye* at [42]

³ *Powell* at pp. 471-472, approved in *Pye* at [43]

“The Loft is shown edged red on the Plan and includes the space up to but excluding the inner surface of the roof but excludes:

- (a) any part or parts of the building within the Block of which the Loft forms part lying above the inner surface of the roof;*
- (b) any of the main timbers, joists and roof of the said building within the Block or any of the external structural walls therein except any plastered surfaces thereof and the hatch frame and hatch door giving access to the Loft; and*
- (c) any Conduits in the Block which do not serve exclusively the Loft or the Flat immediately below it.”*

71. On 28th April 2020, the Respondent granted a lease of the roof and airspace above the Building (the “Airspace Lease”). The Airspace Lease does not include the Loft. It demised, “that part of the roof surface and airspace above it forming part of the Building”. Although this does not include the space beneath the roof, it does include the right to demolish and remove such parts of the Building extending above the roof level, including the roof covering, and the right to cut into, fix upon, join or annex to or build upon the roof or other joists and any roof structure for the purpose of permitted works under the Airspace Lease. The above description of the Loft makes it clear that the structural timbers and joists in the Loft are excluded, as they are in the Lease of the Flat. Therefore, an issue raised by Mr. Green in respect of the Airspace Lease does not arise and I do not need to address it.
72. The use to which lofts may be put is obvious: they are used primarily for storage though depending on size, this might be combined with use as a home office, den or the like.
73. As to the second issue, whether Miss McGee has used the Loft as an occupying owner might have been expected to deal with it, there were witness statements from Miss McGee and her parents who each provided testimony at the hearing and were subject to cross-examination. I also heard evidence from Daniel Harrison who is the managing director of Pier Management Limited, the asset managing agents for the Respondent, but who was also the property manager for the Building during the years 2007- 2010.
74. Based on such evidence, I make the following findings.

75. Miss McGee moved into the flat on 1 October 2004, shortly after the grant of the Lease to her parents. Owing to the location of the hatch into the Loft from the Flat, she assumed the Loft formed part of what had been purchased and after the fitting out work described below began using the Loft for storage of her belongings as space is limited in the one-bedroom Flat.
76. Various works have been carried out to make access to and use of the Loft more convenient. About a week after Miss McGee moved in work was carried out by her father, a carpenter, and an electrician to install a folding ladder to the Loft, fixed to the inside of the hatch, and boarding which covers almost the entirety of the floor area other than over and surrounding the hatch. Subsequently, some of the boarding was removed by electricians surrounding new electrical cabling which was installed. In total, the boarding covers about ninety per cent of the floor area of the Loft.
77. At the same time as the ladder and boarding, strip lighting or some other form of lighting was installed in the Loft with a light switch in the hallway close to the hatch. The lighting was said to be attached to the joists although this was not apparent from the photographs (although the switch was). Mr. Green suggested that no lighting had been installed. In my view however, it is entirely credible that permanent lighting would be installed in the Loft from the outset of its use as there is no natural light and manoeuvring without a light source would be dangerous. I attach no significance to the fact that Mr. McGee could not remember precisely where the light switch was positioned; he is an elderly man, and the lighting was installed twenty years ago. Nor do I place any weight on Miss McGee being unsure of precisely what kind of lighting it is.
78. A replacement Loft hatch was installed about ten years ago. In about 2015/16 electrical cabling was installed in respect of new ceiling lighting for the Flat. Broadband wiring was in place for the Flat when Miss McGee moved in, which was upgraded to fibre-optic cable in 2022/23.
79. There are various photographs taken by Miss McGee at some time after 2022. In order that the Loft could be seen more clearly, she positioned a mobile light, powered by a cable dropped through the hatch space and into a socket in the hallway. There are various items stored in the Loft, including a Christmas tree, bags, cardboard boxes with

Christmas decorations and old books, clothing in boxes marked “winter jumpers” and “winter boots”, boxes with bank statements, other documents, and files, a dog cone, and a hanging rack for clothes.

80. Items have been stored throughout the Loft save for around the hatch and down a central area that runs for the length of the Loft which provides access to place or retrieve items. On average Miss McGee accesses the Loft about four times during the summer months and three to four times in the winter. She estimates that since she first started using the Loft in late 2004 the items accumulated have grown by more than half.
81. Mr. Green submitted that it was of significance that the items stored did not exceed a certain height and did not fill the entirety of the available space. I do not consider that possession of the Loft would require this. The practicalities of accessing items dictates that boxes and other items can only be stacked to a manageable height.
82. Regarding the evidence of Mr. Harrison, since he has not been in the Loft he was unable to provide anything of real evidential value. There were photographs taken by someone from Pier Management or on their behalf on 23rd November 2023, but these were of other loft spaces in the building, not the Loft. Photographs were taken of the Loft on 24th February 2024, again not by Mr. Harrison, but these do not add anything of significance to those provided by Miss McGee.
83. Mr. Green relied on certain provisions in the Lease which he submitted prevented Miss McGee’s use as amounting to exclusive possession. Part II of the First Schedule to the Lease sets out the rights granted to the Lessee, paragraph 3 of which provides:

“The right with agents and workmen at reasonable hours during the daytime after reasonable notice (except in case of emergency when no notice shall be required) to enter into and upon other parts of the Block for the purpose of inspecting repairing maintaining decorating or renewing any part of the Property including any Conduits which serve exclusively the Property the Lessee making good all damage thereby occasioned”

“Conduits” is defined as including wires and cables for the transmission of electricity, telephone and other communications media.

84. Installing and maintaining wiring in the Loft is permitted under this right, and therefore such use cannot amount to adverse possession. Is that enough to exclude adverse possession in respect of the storage of items in the loft?

85. The issue of possession in excess of permission has been addressed in a number of cases, discussed in *Adverse Possession* (Second Edition) at [621ff]. Based on Neuberger J's observations in *Pye v. Graham* [2000] Ch 676 at 697F-H, and Collins LJ in *Allen v. Matthews* [2007] 2 P & CR 441 at [86] and [87], there is the following conclusion at [6-28]:

"The question posed by Neuberger J in Pye and by the trial judge and the Court of Appeal in Allen was... whether user falling outside the scope of the licence was capable of constituting possession, notwithstanding the continuing existence of the licence. It is considered that this is the right question. It is well established that, where a license is given for a specific purpose, and the licensee used the land for a purpose not permitted by the licence, that amounts to a trespass. Accordingly, if unlicensed acts, which constitute a trespass, are sufficiently extensive to satisfy the requirements of exclusive possession, and are accompanied by the manifested intention to possess, then the existence of a licence authorising a limited use of the land falling short of possession should not prevent the licensee from being in adverse possession."

86. That is the position here. The right to maintain and renew wiring and cables is a very limited right, and the storage of items in the Loft clearly goes substantially beyond this.

87. Paragraph 2 of the Second Schedule (Rights Excepted and Reserved) provides for:

"The right for the Lessor and its servants agents and workmen at all reasonable times to enter the Property for the purpose of inspecting repairing maintaining decorating or renewing any part of the Block (whether hereby demised or not) including all Conduits in or upon the Block or any part thereof"

And paragraph 17 of the Third Schedule (Lessee's Covenants) is a covenant to permit entry:

"...upon the Property for the purpose of executing repairs improvements or alterations to or upon any part of the Property or of the said neighbouring property or for the purpose of constructing laying down altering cleansing emptying removing renewing or maintaining any"

existing or new Conduits in or upon the Estate or any part thereof including the Property... ”

88. I accept that the right reserved would allow entry by the Lessor to the Loft through the hatch in the Flat to carry out an inspection and certain other activities and that the Lessee would be obliged to allow such access. Nevertheless, the existence of such a right on the part of the Lessor does not in my view displace a finding of possession in respect of the Loft. There is no suggestion that the right has been exercised at all, save for the occasion when someone from Pier Management or Parkfords took photographs of the Loft on 24th February 2024, a year after the Applicant’s application of 20th February 2023, and nothing has happened during the period under consideration to disturb the use and control of the Loft by Miss McGee or which could amount to occupation and control by the Respondent.
89. Having regard to the above matters I find that there has been adverse possession of the Loft by Miss McGee from late 2004 through to the date of the FR1 application.
90. Mr. Green submitted that if I were to find in favour of the Applicants, since the use of the Loft has been for storage I should find that its use is limited to use as a loft. No authority in support was provided, and the argument appears to be akin to considerations that apply in respect of the nature and extent of an easement acquired by prescription. In my view, they do not apply to adverse possession.

Are the Applicants entitled to be registered with a leasehold estate in the Loft?

91. Given my findings in respect of adverse possession and what I consider to be the law in respect of the doctrine of encroachment in the present case, I find that they are so entitled.

Is form FR1 the correct form to use?

92. This is an issue concerning under which provisions of the 2002 Act the Applicants should be applying if Schedule 6 is not engaged. According to *Registered Conveyancing and Land Registry Practice Guide 4*, the application will be for first registration under s. 3, using form FR1.

93. Mr. Green contended that the requirement to register arises under ss. 27(1) and 27(2)(b)(i):

- “(1) If a disposition of a registered estate or registered charge is required to be completed by registration, it does not operate at law until the relevant registration requirements are met.*
- (2) In the case of a registered estate, the following are the dispositions which are required to be completed by registration—*
 - (a) a transfer,*
 - (b) where the registered estate is an estate in land, the grant of a term of years absolute—*
 - (i) for a term of more than seven years from the date of the grant,”*

94. I do not think this case falls within those provisions as there has been no “disposition” and no “grant”. The right to be registered in respect of a leasehold estate of the Loft has not arisen by demise but by operation of law.

95. There is a further alternative, suggested in the first supplement to the Second Edition of *Adverse Possession* at [25-1K], which is that the tenant could rely on paragraph 5(b) of Schedule 4 for the purpose of “bringing the register up to date”. This would be an application for alteration of the register, made using form AP1, and would be on the basis that as the result of the presumption a right has arisen for additional land to be incorporated into the registered lease and noted on the landlord’s freehold title. The application would not amount to rectification as the alteration does not involve the correction of a mistake (paragraph 1(a) of Schedule 4). I agree, although in my view (and in the view of the editors of the supplement) it does not preclude as an alternative an application for first registration in respect of the additional land, the position taken by the Land Registry in this case.

96. Accordingly, I consider that the application for first registration is appropriate.

Conclusion

97. In the light of the above, I will direct the Chief Land Registrar to give effect to the Applicants' application as if the Respondent's objection had not been made, subject to two conditions I am empowered to make under rule 40(3)(a) of the 2013 Rules.

97.1. I have made it a condition that the agreed description of the Loft, set out at paragraph 70 above, is noted on the register.

97.2. When completing the Applicants' form FR1, their solicitor marked the box "possessory title" in respect of the class of title applied for. The leasehold title to the Flat is registered with title absolute. Given that under the doctrine of encroachment, a successful applicant will be entitled to the same class of title as the existing lease, the box "absolute leasehold" should have been selected. Mr. Morris said that he was satisfied with a possessory title, which could be upgraded at a later date, but since both counsel accepted that the appropriate title to the Loft would be title absolute, in my view it is preferable for the title to be registered with the same class as the Flat and therefore, I have made it a condition that the Applicants are registered with leasehold title absolute.

Costs

98. I provided a draft of this decision to counsel for any corrections. As a result of subsequent negotiations, it was agreed that there be no order as to the costs of the reference.

Dated this 18th day of February 2025

Colin Green

By Order of the Tribunal