

[2025] UKFTT 00726 (PC)



PROPERTY CHAMBER
FIRST – TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY
LAND REGISTRATION ACT 2002

REF/2023/0687

BETWEEN

(1) NEIL HOOD

APPLICANT

and

(1) SOUTHERN LAND SECURITIES LIMITED

(2) UPSPACE 8 LIMITED

RESPONDENTS

Property Address: Loft Space at 109 Leabank Square, Berkshire Road, London E9 5LR

Title Numbers: EGL234371 EGL392208 AGL463976

**Before: Mr Simon Brilliant sitting as Judge of the Property Chamber of the First-tier
Tribunal**

Sitting at: 10 Alfred Place, London WC1E 7LR

On 05 March 2025

Site View 04 March 2025

Applicant's Representation:

In person

Respondent's Representation:

Mr L Johnson of counsel

DECISION

Encroachment – the applicant holds a long lessee of a top floor flat – the applicant takes possession of the loft space above the flat which is outside his demise – the applicant applies to Land Registry for alteration of the register to include the loft within his title - the respondent landlord serves Form NAP – Land Registry rejects it on the basis that the application is based on encroachment not adverse possession — factual possession – intention to possess.

Powell v McFarlane (1977) 38 P&CR 452, JA Pye (Oxford) Ltd v Graham [2003] 1 AC 419, Tower Hamlets LBC v Barrett [2005] EWCA (Civ) 923, Dickenson v Longhurst Homes Ltd (REF/2007/1276), Skipwith v Singh (REF/2009/0850), Secretary of Justice v Chau Ka Chik Tso [2011] HKCFA 86, McGee v Long Term Reversions (Harrogate) Ltd [2025] UKFTT 00233 (PC).

Introduction

1. At the beginning of the hearing, Mr Johnson, on behalf of the respondents, fairly and in my judgment correctly, conceded that Mr Hood's application to be registered with a long leasehold title to the loft in his flat must succeed.

2. Rule 36 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 provides:

(1) The Tribunal may give a decision orally at a hearing.

(2) ... the Tribunal must provide to each party as soon as reasonably practicable after making a decision ... which finally disposes of all issues in the proceedings ... -

(a) a decision notice stating the Tribunal's decision;

(b) written reasons for the decision

3. Having given my decision orally at the hearing, following this concession, these are now my written reasons.

4. If they are fuller than they might otherwise have been, this is because these proceedings raise issues of some general importance relating to the law of accretion or encroachment, and its relationship with the law of adverse possession.

5. At the hearing, counsel agreed with me that there was no reported decision on this issue since the decision of the Hong Kong Final Court of Appeal in Secretary of Justice v Chau Ka Chik Tso [2011] HKFCA 86 (“Ka Chik Tso”).

6. This decision, which is not binding on me (albeit highly persuasive), was split 3-2. The majority (including Lord Scott of Foscote) held that the law of adverse possession impacted on the law of encroachment. The minority disagreed.

7. Since the hearing, my attention has been drawn to a very recent decision of Judge Green in McGee v Long Term Reversions (Harrogate) Ltd [2025] UKFTT 00233 (PC) (“McGee”). This concerned the same issues as in this case. Whilst not binding on me, I refer to it below where it supports the approach I had already decided to take. McGee itself also referred to two earlier decisions of the Adjudicator to Land Registry bearing on these same issues: Dickenson v Longhurst Homes Ltd (REF/2007/1276) and Skipwith v Singh (REF/2009/0850). These are not necessary for me to discuss, but I identify them for the sake of completeness.

The flat

8. Mr Hood, the applicant, is the long lessee of flat 109, Leabank Square, London E9 5LR (“the flat”) under a lease dated 25 November 1988 (“the lease”) for a term of 125 years from 25 December 1987. The lease of the flat is registered at Land Registry under title number EGL234371.

9. Mr Hood acquired the residue of the term of the lease in December 1994, over 30 years

ago.

10. The flat is situated on the top second floor of a small block (“the block”).

11. The current freehold owner of the block is the first respondent, Southern Land Securities Limited (“the landlord”). The freehold is registered at Land Registry under title number EGL392208.

The loft

12. There is a loft space situated immediately above the flat (“the loft”). It is reached through a hatch measuring 480mm x 480mm (“the hatch”) situated in a corridor within the flat between one of the two bedrooms and the sitting room. It is walled off both from (a) the other flats’ lofts and (b) the airspace, as defined below. The loft has the same footprint as the flat itself.

13. The demise of the flat is set out in the first schedule to the lease. It includes the plastered coverings and plasterwork of the ceilings. But it expressly does not include any part of the block lying above the surface of the ceilings. Accordingly, the loft does not fall within the demise of the flat, but lies within the freehold of the block (and, presumably, within the loft and airspace lease, as defined below).

14. As explained below, Mr Hood’s case is that he himself, his tenants and licencees, have constantly used the loft since he became the lessee of the flat. No one else has had the use of it, he says, although on a few occasions employees of the freeholder have entered the loft, at his request, to carry out repairs.

The airspace

15. On reaching the second floor of the block by a staircase, there is a long straight corridor reaching to a window/balcony at the far end of the building (“the common parts corridor”). On the left hand side, going down this corridor, are numbers 106, 107 and 108. On the right hand side, going down this corridor, are numbers 111, 110 and then the flat (nearest to the

window/balcony at the far end of the common parts corridor).

16. There is situated above the common parts corridor, along its whole length and breadth, a large high open space beneath the roof (“the airspace”). I must emphasise that the airspace is an entirely different structure to the loft, and has its own entrance in the ceiling of the common parts corridor. Access from the airspace into the loft cannot be obtained, except by breaking through the plasterboard wall which separates them (which, we shall see, did once occur).

The airspace and lofts lease

17. The second respondent is Upspace 8 Ltd (“Upspace”). By an underlease dated 18 December 2018, the landlord’s predecessor in title demised to Upspace’s predecessor in title a long lease of the airspace and (I presume) the lofts of the top floor flats (“the airspace and lofts lease”). The airspace and lofts lease is registered at Land Registry under title number AGL463976.

18. The airspace and lofts lease was, apparently, granted with a view to the building of two new stories on top of the block. This concerns Mr Hood. He is also concerned that the granting of the airspace and lofts lease was done in breach of the rights of first refusal contained in Part I of the Landlord and Tenant Act 1987 (“the 1987 Act”). Whilst much of Mr Hood’s written material bears on such matters, they are not relevant to these proceedings.

The doctrine of encroachment

19. In summary, where a tenant encroaches onto his landlord’s adjoining land, it is presumed, unless proved by him to the contrary, that the land becomes an addition to the land demised, so that it becomes subject to the terms of the lease and must be given up at the end of the lease: see Jourdan and Radley-Gardner Adverse Possession Bloomsbury Professional 2011 (“Jourdan”) para 25.1, and Tower Hamlets LBC v Barrett [2005] EWCA (Civ) 923, [104], [108].

20. The question arises as to whether adverse possession plays any part in encroachment

cases. As already stated, in Ka Chik Tso, the Court of Final Appeal in Hong Kong was split 3-2 on this issue.

21. In essence, the difference of 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 might find his right of recovery barred for the duration of the lease during which the estoppel operated.

22. 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 barring the title of the person against whom adverse possession was occurring: see *Jourdan First Supplement 2017* para 25.1E.

23. It has been suggested that it is far from clear whether the English courts will follow the minority or the majority judgments. There are strong arguments in favour of both. The minority approach is more in keeping with the historical development of the encroachment principle, while the majority approach appears to restore principle to an area of law that has developed in an unprincipled manner: see *Jourdan First Supplement 2017* para 25.1L.

24. In McGee, Judge Green preferred the minority approach at [38]. This approach is also favoured by Professor Emma Lees in her article “Encroachments and Schedule 6 LRA 2002: unknotting the tangle (2015) 79 *Conveyancer and Property Lawyer* 110.”¹

The original application

25. On 26 August 2021, Mr Hood made a statement of truth in Land Registry prescribed form ST1. This form is appropriate for supporting an application for adverse possession. In the ST1 Mr Hood set out the facts about his use of the loft (which will be considered below) in the belief he was making an application for adverse possession of the loft.

¹ She says, “As a matter of authority in English Law it is fairly clear that the approach in Ka Chik Tso is wrong ... It is unlikely that an English court would therefore follow the decision of the Hong Kong Court, notwithstanding the presence of Lord Scott ... [The Court’s] approach on limitation does not make sense as a matter of policy or logic.”

26. The form ST1 is not an application to Land Registry, but merely evidence in support. The appropriate way of commencing an application for adverse possession of registered land is by way of prescribed form ADV1. No such form has been used in this case.

27. Instead, by prescribed form AP1, dated 07 October 2022, Mr Hood applied to change the registers of the flat, the block and the airspace (“the original application”). This application was to reflect the fact that he had acquired title to the loft by encroachment, not by adverse possession.

The process leading to the objection

28. On 23 April 2023, as required, Land Registry served notice of the original application on both the landlord and Upspace. Separate notices were served on each respondent. Each notice referred to encroachment. It included the following:

It appears likely where a tenant applies against other land held by their own Landlord and accepts the presumption, it is not strictly a case of adverse possession, and the tenant can apply to alter to show accretion to their lease.

29. This confirms that Land Registry had not regarded the original application as being based on adverse possession. It regarded it as an application to alter the register under paragraph 5(b) schedule 4 to the Land Registration Act 2002 (“the 2002 Act”). In other words, it was adopting the minority approach in Ka Chik Tso. Judge Green came to the same conclusion about this being Land Registry’s approach in McGee at [43]. Professor Lees, as we have seen, supports this approach.

30. The notice required the landlord and Upspace to make any objection to the original application by 17 May 2023. On 05 May 2023, the in house solicitors acting for both respondents (“the solicitors”) wrote to Land Registry. I was not shown a copy of the letter, but it may have been a challenge to the suggestion that adverse possession was not the proper basis for the original application.

31. On 12 May 2023, Land Registry replied. The letter repeated that it appeared likely (my emphasis) where a tenant applies against other land held by the same landlord and accepts the presumption set out in that notice, it is not strictly a case of adverse possession, and the tenant can apply to alter to show accretion to their lease.

32. The letter also said that it had carried out an inspection survey which confirmed that the loft was occupied by Mr Hood. The photographs taken were not available at the hearing.

33. Despite the notices and correspondence, on 06 June 2023, the solicitors served a notice in Land Registry form NAP requiring the registrar to deal with the application under the adverse possession requirements of the 2002 Act.

34. This prompted a letter from Land Registry to the solicitors, dated 22 June 2023, saying that the form NAP was inappropriate, as the original application was an application for alteration, and not an application based on adverse possession.

35. This led to the solicitors serving an objection dated 06 July 2023, partly in proper form taking issue with the alleged possession of the loft, but still requiring the matter to be dealt with under the adverse possession provisions in the 2002 Act.

36. By this time, Land Registry had said on no less than four occasions that the original application was not based on adverse possession. No enquiry appears to have been made of Land Registry as to why it took the view that it was “likely” that its approach was correct. From what I have seen, the Land Registry position was never challenged by the respondents in correspondence, or by way of judicial review.

The issue

37. In the light of this, the sole issue to be decided at the hearing was whether Mr Hood had been in legal possession of the roof for a period of 12 years. Legal possession contains two separate elements namely:

- (1) Factual possession, consisting of a sufficient degree of physical custody and

control.

- (2) An intention to possess (“animus possidendi” in Latin), being an intention to exercise such custody and control on one’s own behalf and for one’s own benefit.

Factual possession

38. Lord Browne-Wilkinson expressly agreed in JA Pye (Oxford) Ltd v Graham [2003] 1 AC 419 at [41] with the attempt by Slade J to define this in Powell v McFarlane (1977) 38 P&CR 452, where he said:

“The question what acts constitute a sufficient degree of physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature 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 occupying owner might have been expected to deal with it and that no one else has done so.”

The intention to possess

39. In Pye Lord Browne-Wilkinson said at [42] that once it is accepted that the word “possession” in this context has its ordinary meaning (being the same as in the law of trespass or conversion) it is clear that, at any given moment, the only relevant question is whether the person in factual possession also has an intention to possess. It is wrong to suggest that an intention to own the land or to exclude the owner as well as other people was required.

40. In Pye Lord Browne-Wilkinson said at [43] that the intention to possess requires an 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.

The witnesses

41. Mr Hood provided (a) his form ST1, (b) a statement of case, and (c) a witness statement. These documents all contained relevant evidence. They also contained a great deal of irrelevant matter regarding the proposed development of the loft and airspace, the alleged breaches of Part I of the 1987 Act and without prejudice negotiations. These matters, had it been necessary, I would have ignored.

42. Mr Hood put in written evidence from Mr Delgado, who lives in Iceland. He laid insulation in the loft in 2001, and confirmed that the loft was already in use for storage at that time. He also lived at the flat around 2011 to 2012, and was again able to observe Mr Hood's use of the loft for storage.

43. Mr Hood also put in written evidence from his mother, Christine Hood. She lives in Estepona, Spain. She says that Mr Hood placed his surplus belongings in the loft before sealing it prior to letting the flat out. She remembers, in particular, a large number of fluorescent light tubes being placed in the loft in 2002.

44. Apart from this, most of her witness statement was again irrelevant, dealing with her concerns if the airspace and lofts were to be developed.

45. The only witness called by the respondents, was Ms Helen O'Neill of the solicitors. She has no direct knowledge of what has happened in the flat or the loft, so she takes matters no further.

Mr Hood's use of the loft and the encroachment

46. Mr Hood purchased the flat in December 1994. It was at a time of turmoil in his personal life. He was immediately aware of the loft because the hatch is clearly visible in the corridor within the flat.

47. He spent a few months living in the flat, whilst refurbishing it. Once refurbished, he stored his excess belongings, tools and materials in the loft and then sealed it up by screwing hinges into the underside of the hatch. He then let the flat out to a local authority tenant.

48. The tenant stayed there until 2000. It was vacant for a while and then Mr Hood moved back in himself. Mr Bocanegra helped fit a new kitchen and lay additional insulation in the loft in 2021.

49. Subsequently, in 2002, Mr Hood stored a large number of the fluorescent light tubes in the loft, thinking they might one day be useful for his church. In fact, they have stayed there for the last 23 years.

50. After finishing a university course in 1998, Mr Hood stored his books and other material in the loft, where they have remained ever since. There are other items also in the loft which have been stored for some 25 years.

51. In 2010, Mr Hood remarried and moved out of the flat. His daughter and her husband lived at the flat for a couple of years. His possessions remained in the loft. He subsequently returned to live in the flat and has been there ever since.

52. On four occasions, tradesmen engaged by the freeholder have carried out repairs in the loft.

53. In particular, about 18 years ago, someone attempted to break into the loft from the airspace. Fortunately, because the hatch was screwed down, entry into the flat itself was not possible, and all that was stolen was a dozen or so boxes of the fluorescent light strips stored in the loft. The tradesmen repaired the broken partition between the air space and the loft.

54. In 2013, Mr Hood considered that a roof leak had caused water to come through the bathroom fan, and again tradesmen entered the loft in response. Apart from on these few occasions, none of the freeholders has ever entered, let alone taken possession of the loft.

55. In my judgment, Mr Hood's request to have repairs carried out in no way detracts from his possession of the loft. On the contrary, these activities can only support his case as showing that he was in control of the loft.

56. Mr Hood has provided photographs clearly showing items stored in the loft.

57. It is on the basis of all these facts, which would never have been shifted in cross-examination, that Mr Johnson wisely conceded that Mr Hood had been in possession of the loft for a sufficiently long time to enable him to succeed in these proceedings.

Costs

58. The normal rule in this jurisdiction is that costs follow the event.

59. I asked Mr Hood if he wanted to apply for costs, and he said no.

60. Following that, Mr Johnson invited me to make a costs order against Mr Hood. This was on two bases. First, because he had failed to beat an offer which had been made without prejudice as to costs on 05 February 2025, and then as an open offer on 21 February 2025. Secondly, on the basis that Mr Hood had prolonged matters and caused extra work by insisting this was a case of adverse possession, and adducing much irrelevant evidence, including complaints about the rights of first refusal in the 1987 Act and the construction of the extra floors.

61. I reject the second of these arguments. Mr Hood was not represented, he has a number of issues which lead to him find things confusing and difficult to deal with, and I do not think it would be right to penalise him in the way suggested.

62. As to the first of these arguments, it is necessary to refer to the relevant correspondence. On 05 February 2025, the respondents offered (without prejudice save as to costs) to grant Mr Hood a lease of the loft for storage purposes at a peppercorn rent, but otherwise on the same terms as the lease. This was on the basis that each side agreed to withdraw from the proceedings and bear their own costs.

63. On 12 February 2025, Mr Hood replied by email:

You have taken it too far this time, your misconduct is unacceptable ... how do you even have the nerve to threaten me with extortion and dishonesty?

64. This was an apparent reference to Mr Hood's complaint concerning the rights of first refusal under the 1987 Act.

65. I regard Mr Hood's refusal to engage meaningfully in any way with the offer as being unreasonable, even taking into account his disabilities to which he has drawn my attention. The offer gave him all he wanted in his original application. Regretfully, and after careful consideration, I accept the respondents' submission regarding costs since 05 February 2025.

66. The respondents have provided a summary costs schedule. The sums claimed are all reasonable and proportionate for a case of this nature. It is for a total of £25,693.00. Mr Lawson suggested the appropriate proportion spent since 05 February 2025 was £10,181.00 including VAT, and I agree.

67. Mr Hood then said that now he was being asked to pay costs, he wished to change his mind and ask for his costs. At the time I said no, but on reflection I think I should have allowed his application. After all, he had won, and the without prejudice save as to costs offer was only made very recently. The respondents had unrealistically persisted on advancing a case on adverse possession for far too long (a case they realised they were bound to win, as Mr Hood could not have mounted any of the hurdles in paragraph 5 schedule 6 to the 2002 Act).

68. I shall therefore award Mr Hood his costs up to 05 February 2025. Although he may well have spent far more time (particularly on extraneous issues), I consider that a reasonable and proportionate amount of time spent on the case as a whole up to that date would be 70 hours. He is therefore entitled to £1,330.00, being 70 x £19 per hour, the rate applicable to a litigant in person. This can be off-set against the award to the respondents, making a net figure due to them of £8,851.00.

Dated this 6th day of March 2025

Simon Brilliant



**BY ORDER OF THE JUDGE OF THE PROPERTY CHAMBER OF THE FIRST-
TIER TRIBUNAL**