[2025] UKFTT 00845 (PC)

REF/2023/0672 & 0673 & 0674

PROPERTY CHAMBER, LAND REGISTRATION DIVISION
FIRST-TIER TRIBUNAL

IN THE MATTER OF REFERENCES FROM HM LAND REGISTRY

BETWEEN

ANITA RELINS

Applicant

and

(1) ANTHONY JOHN GILL
(2) BEDE HOUSE PROPERTY MANAGEMENT COMPANY LIMITED

Respondents

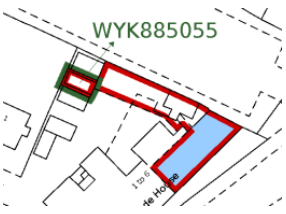
Property Address: Roof terrace adjoining 6 Bede House, College Grove Road, Wakefield WF1 3RN
Title Number: WYK773844 & WYK35966

Before: Judge Laura D'Cruz
Sitting at: Bradford Tribunal Centre
On: 6th & 7th February 2025

Representation: Paul Lakin of Counsel for the Applicant, instructed by Blacks Solicitors; the First Respondent in person

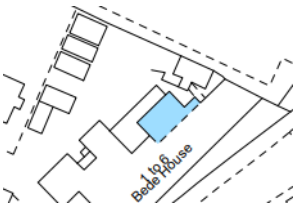
DECISION

1. The Applicant is the registered proprietor of the leasehold interest in Flat 6, Bede House, College Grove Road, Wakefield, registered under title number WYK773844 ("Flat 6"), shown on the title plan extract below. The area shown tinted blue is the upper floor flat only. She purchased Flat 6 in 2015.



Flat 6

2. The Applicant is seeking to be registered as proprietor of a leasehold interest in the roof terrace adjoining Flat 6 ("the Roof Terrace"). The Roof Terrace is shown tinted blue on the Notice Plan extract below.



Roof Terrace: plan

3. It can also be seen on the photograph extract below (the sage green colour).

Roof Terrace: aerial photo

4. As I saw at the site visit, there are presently two access doors from Flat 6 onto the Roof Terrace. There is some dispute as to when the first one was installed, but it was 2003 at the latest. The other was installed by the Applicant in or around 2017.

5. The First Respondent is the registered proprietor of the leasehold interest in 3 Bede House, registered under title number WYK775297 ("Flat 3"), shown on the title plan extract below. The area shown tinted blue is the lower floor only. Flat 3 is directly below the upper floor of Flat 6 and the Roof Terrace: the Roof Terrace is Flat 3's flat roof. He purchased Flat 3 in 2011, having previously lived at Flat 5 from 2008 to 2011.

Flat 3

6. The Second Respondent is the registered proprietor of the freehold titles to Flat 6 and Flat 3, registered under title numbers WYK502255 & WYK35966 respectively. There is presently no registered leasehold title to the Roof Terrace.

7. Previously, the six flats in Bede House were all owned under separate freehold titles. In or around August 2003, Flats 1, 2, 3, 4 & 6 were transferred to the Second Respondent and long leases granted to the respective former owners. The Second Respondent was registered as proprietor of Flat 6 in March 2004, and the Applicant's leasehold interest was registered in September 2004.

8. The then owners of Flat 5, the Whites, did not agree with this arrangement and the freehold to Flat 5 is still owned separately. Flat 5 is located next to Flat 6 and is accessed by an external staircase adjacent to the Roof Terrace.

9. The Applicant and the First Respondent are directors of the Second Respondent. Two of the three remaining directors, Ian Dixon Osborne (owner of Flat 4) and Charles Angus Gibson (owner of Flat 1), gave evidence at the hearing, as did former director Barry Forster (former owner of Flat 6). Lorraine Scargill, daughter of Janet Lee (deceased), former owner of Flat 3, provided a written statement but did not attend to give oral evidence.

10. I pause to note that, somewhat unusually, Mr Ian Dixon Osborne provided two witness statements, one relied on by each side. The statements were not obviously inconsistent, but rather focused on different matters. It was agreed that he would confirm his evidence and then be cross-examined by both sides.

The Applicant's applications and the matters referred

11. The Applicant's position, in very simple terms, is that she and her predecessors have used the Roof Terrace as part and parcel of her occupation of the Flat, and that the land she occupies as a long leaseholder should extend to and include the Roof Terrace as well as the Flat itself. Her objective is to be registered as proprietor of a leasehold interest in the Roof Terrace, whether that be by increasing the extent of her existing leasehold interest, or by becoming registered proprietor of a separate one.

12. This idea of a tenant increasing the extent of their leasehold interest is sometimes described as "*encroachment*", as the tenant is encroaching beyond the extent of the land that is the subject of their lease, or "*accretion*", particularly as in "*an accretion to the lease*", as it is adding to it. I note for completeness that accretion has another technical legal meaning, relating to the changing boundaries between land and water, which was briefly referred to by the First Respondent, but that is not relevant here.

13. The law in relation to encroachment is not the most straightforward, and there is some debate as to its proper basis, as further discussed below. In her bid to be registered as a proprietor of a leasehold interest in the Roof Terrace, the Applicant made a number of applications to HM Land Registry, each without prejudice to the others, in an attempt to cover all bases.

14. There was extensive correspondence between the Applicant's solicitors and HM Land Registry as to which application(s) should be permitted to proceed. Some, but not all, of the applications were taken forward, as further explained below, and HM Land Registry received objections to them. As it was not possible to dispose of the objections by agreement, the matters were referred to the Tribunal for judicial determination. It is noteworthy that it is not *applications* that are referred, but *matters*, which means that different objections to the same application are referred separately.

15. I remind myself that the Tribunal's jurisdiction is limited to determining the matters that have been referred to it. Identifying what matters have been referred is complicated by the various applications and objections that have been made and requires detailed consideration.

The Applicant's applications and their treatment by HM Land Registry

16. In terms of the Applicant's forms and documents, I have had sight of the following:

    (a) an AP1 application form dated 14th February 2022 for alteration of the register to increase the extent of the Applicant's leasehold interest, described as being based on encroachment ("the AP1");

    (b) an FR1 application form dated 16th September 2022 for first registration of a leasehold title to the Roof Terrace ("the FR1");

    (c) an ADV1 application form dated 16th September 2022 for a leasehold title to the Roof Terrace based on adverse possession ("the ADV1");

    (d) an ST1 from the Applicant dated 16th September 2022 in support of both the FR1 and the ADV1. This deals with paragraph 5 of Schedule 6 to the Land Registration Act 2002;

    (e) an AP1 application form dated 21st September 2022 which lodges in support the FR1. As far as I can tell, this has not been processed as a separate application but has been treated as the FR1.

17. As explained, the FR1 was accompanied by an ST1, that is, a statement of truth in support of an application based on adverse possession. HM Land Registry has treated the FR1 as an application for adverse possession, as per the correspondence outlined below and also the relevant Case Summaries.

18. In September 2022, HM Land Registry sent a letter in response to the various applications, stating that "*the most suitable application is for first registration of the leasehold estate based on adverse possession*", and giving instructions for the FR1 be "*taken out*" (which I take to mean allowed to proceed). Leasehold title to the Roof Terrace has been given provisional title number YY173129.

19. The letter explained that the ADV1 was not suitable, as follows. An ADV1 is an application to be registered as proprietor of (all or part of) an existing title. However, the Applicant was not applying to be registered as proprietor of an existing title – the Second Respondent's existing title is freehold, and she was applying for a leasehold.

20. It is worth noting that FR1 applications based on adverse possession and ADV1 applications have a certain amount in common, in that they both require the applicant

to demonstrate adverse possession. However, they differ in terms of (1) the necessary period of adverse possession; and (2) whether the objector can require the applicant to additionally meet one of the conditions set out in paragraph 5 of Schedule 6 to the Land Registration Act 2002. The latter, which I will refer to by the shorthand "Schedule 6", only applies to ADV1 applications.

21. The letter further explained that HM Land Registry preferred the analysis of acquiring title by adverse possession rather than by any separate doctrine of encroachment, as the latter would mean the extent of the leasehold title would not correspond with the land demised by the lease.

22. The Applicant's solicitors responded, seemingly accepting the issues with the ADV1 (there was no further correspondence relating to this), but very much wanting to pursue the AP1. This led to further correspondence, and, eventually, in June 2023, HM Land Registry also allowed the AP1 to proceed (albeit backdated to when it was first received and considered, that is, 14th February 2022).

23. HM Land Registry gave notice of the FR1. The First Respondent sent a letter of objection dated 15th November 2022, together with two NAP forms, one on behalf of himself and one on behalf of the Second Respondent.

24. NAP forms deal particularly with Schedule 6, which, as explained above, is not relevant to first registration. HM Land Registry wrote to the First Respondent by letter dated 5th April 2023, explaining that the form was not appropriate, but that it had been sent to the Applicant as it contained argument about the adverse possession itself (and so was, in effect, treated as part of the objection). The letter further explained that an ADV1 application had been made and was still live, but was not currently being progressed, and that formal notice would be served if it was to go forward.

25. I note in passing that it is perhaps not surprising that the (unrepresented) First Respondent addressed Schedule 6 as it is detailed in the ST1 in support of the FR1.

26. Much later, HM Land Registry gave notice of the AP1. The First Respondent sent two letters of objection dated 19th July 2023, one on behalf of himself and one purportedly on behalf of the Second Respondent.

The matters referred

27. HM Land Registry ultimately referred three *matters* to the Tribunal, all on 1st November 2023 as it waited for the AP1 to catch up with the FR1. They have been allocated separate reference numbers, although they have all been dealt with within this one set of proceedings.

28. Firstly, there is the matter that has been given reference REF/2023/0672. This relates to the AP1. The Case Summary gives the details of the application as *Application for*

Alteration of Title made in Form AP1 dated 14th February 2022, and states that the objection was made by a letter dated 19th July 2023 from the First Respondent.

29. I note for completeness that the additional details mention that a separate objection has been made by the First Respondent on behalf of the Second Respondent, and that this is also being referred, but this does not appear to have happened (I suspect some confusion arose because the letter of objection does not expressly say it is on behalf of the Second Respondent, but one of the NAP forms was). I consider issues in relation to whether the First Respondent had authority to act on the Second Respondent's behalf briefly below.

30. Secondly, there is the matter that has been given REF/2023/0673. This is the Second Respondent's objection to the FR1.

31. Finally, there is the matter that has been given REF/2023/0674. This is the First Respondent's objection to the FR1.

32. Importantly, the ADV1 has not been referred to the Tribunal. Indeed, HM Land Registry has not even formally given notice of it to the Respondents or any other parties. This means that Schedule 6 is not something that falls to be considered.

33. This is not a point that has come to light until very late during these proceedings. The ST1, objection, documents accompanying the FR1 Case Summaries (in that they include the ADV1 and NAP), and the parties' statements of case and skeleton arguments all address Schedule 6. Previous orders made by the Tribunal appear to be premised on the basis that the ADV1 has been referred. However, having undertaken a review of the applications, objections, correspondence and Case Summaries, I am not satisfied that it has.

34. One of the points anticipated by the previous orders is whether an NAP was submitted on the Second Respondent's behalf. This does not arise given that I am not satisfied the ADV1 has been referred.

35. This is part of a wider point as to whether the First Respondent had authority to act on behalf of the Second Respondent. Initially, the Tribunal named only the First Respondent, but gave the Second Respondent the opportunity to apply to be joined. The Second Respondent confirmed there was not a majority in support of a resolution for it to make such an application, although it has been added so as to be bound by the Decision.

36. In circumstances where the First Respondent has had the opportunity to make all the points he wants to make in his personal capacity (the question of the NAP not arising), and the Second Respondent has chosen not to participate in the proceedings, it seems

to me that nothing turns on whether the First Respondent had authority to act on behalf of the Second Respondent, and I do not consider this further.

The ADV1

37. The approach HM Land Registry has taken is in line with its Practice Guide 4 (adverse possession of registered land), which suggests that, where a tenant is claiming encroachment onto other land belonging to the landlord but not included in their demise (that is, their leasehold title), they can apply using an FR1 for first registration of their leasehold title to the land concerned (although there must be more than 7 years of the lease term left to run – section 3(3)). That is, even where the land is registered, the appropriate application is for voluntary registration of a new leasehold estate (FR1), rather than adverse possession under Schedule 6 (ADV1).

38. Aside from the question of whether encroachment is based upon adverse possession, to which I will return, I agree that an ADV1 is not the appropriate application. This is because, in my judgment, ADV1 applications are concerned with changing the proprietorship of an existing registered estate, whereas here the Applicant is applying to be registered as the proprietor of a new leasehold estate.

39. In a previous order, Judge Paton suggested there was an argument that the Applicant would have to make an ADV1 application as the freehold estate is registered, saying "*Although the basis of the application is that the Applicant seeks only a leasehold title to the land, commensurate with her existing flat lease, the reality is that the landlord's freehold title would be adversely affected and effectively lost by being burdened with a long lease of such land. It might therefore be thought that the policy of the Act would require such an application to be made under it, to give the landlord the opportunity to protect its registered title from such a burden*".

40. I do not consider that this argument can withstand the wording of the legislation. An ADV1 application is an application "*to be registered as the proprietor of a registered estate in land*" (Schedule 6 paragraph 1), and a registered estate means "*a legal estate the title to which is entered in the register*" (section 132). In my judgment, the natural and ordinary meaning of the words is that they are referring to an existing registered estate. Moreover,

    (a) the term "*registered estate*" is in contrast with Part 2 (first registration of title), which uses the term "*unregistered legal estate*";

    (b) paragraph 1(4), which provides that "*the estate need not have been registered throughout the period of adverse possession*", would not be needed if the estate need not have been registered at all;

    (c) this construction is further confirmed by the Explanatory Note, which states, "*Where an application does not rely upon the third condition there is no*

minimum period during which the estate must have been registered – all that is required is that the estate is registered when the application is made (paragraph 1(4))" (paragraph 259).

41. Thus, even if the ADV1 had been referred, I would not have allowed it, as the Applicant is not seeking to be registered as proprietor of an existing registered estate.

A new case

42. I note for completeness that Mr Lakin's skeleton argument raised a new case, which runs as follows. Flat 3 has only been a leasehold since 2004. Any possession of the Roof Terrace prior to that would not be an encroachment from leasehold property. If the Applicant can establish that her predecessors were in adverse possession for 12 years prior to that, she can argue that the freehold title to the Roof Terrace was held on trust for her predecessors and is now held on trust for her, meaning she is entitled to be registered as the freehold proprietor pursuant to Schedule 12 paragraph 18 of the Land Registration Act 2002, albeit she would be content to convert this interest into a leasehold interest on the same terms as her lease. The short answer to this is that it is not the basis of any of the applications that have been made, and so I do not consider it further.

Encroachment

43. The authorities are clear that a tenant can acquire title to land beyond the extent of the land that has been leased to them as an accretion to their lease. For ease, I will refer to the land that has been leased to them as "the demise", and the land encroached upon beyond as "the additional land".

44. What is less clear is the legal principle underpinning the acquisition. In his very thorough closing submissions, Mr Lakin, Counsel for the Applicant, took me through various authorities and commentary relating to encroachment. They generally fall into two camps: some which base the analysis on limitation, essentially treating encroachment as a type of adverse possession; and some which base the analysis on a separate doctrine of encroachment, akin to an estoppel. Mr Lakin urged me to the latter analysis, but submits that the Applicant should succeed in her application either way. The (unrepresented) First Respondent did not express any view, focusing his submissions on factual matters.

45. I have considered all of the authorities and commentary to which I have been referred by Mr Lakin. I have also considered two recent decisions of the Tribunal which have come to my attention since the hearing: a decision of Judge Green in *McGee v Long Term Reversions (Harrogate) Ltd* [2025] UKFTT 00233 (PC) & Judge Brilliant in *Hood v Southern Land Securities Limited & Upspace 8 Limited* (REF/2023/0687). Nothing in these decisions affects the overall outcome of this case, and so I did not consider it necessary to seek any further representations from these parties.

46. I do not propose setting out all of the authorities – *McGee* itself contains a detailed summary at paragraphs 17-38 – but will refer to particular points where relevant in the following analysis.

Legal basis of encroachment

47. I agree with Mr Lakin that encroachment is not based on limitation or adverse possession, but rather is its own separate doctrine which is akin to an estoppel. I say this for the following reasons.

48. Schedule 6 of the Land Registration Act 2002 has no application, as explained in paragraphs 37-39 above. It would be odd if cases of encroachment upon registered land relied upon the old law of adverse possession, as this would arguably put landlords (facing encroachment under the old law) in a worse position than other landowners (facing adverse possession under the new law). This echoes Judge Paton's policy point.

49. Acquiring title based on adverse possession prior to the changes brought about by the Land Registration Act 2002 is based upon the Limitation Acts, and either, in the case of unregistered land, the paper title owner's title being extinguished, leaving the adverse possessor free to make an application for first registration; or, in the case of registered land, the paper title owner's title being held on trust for the adverse possessor, with the adverse possessor having the right to apply to be registered himself (see Limitation Act 1980 sections 15 & 17; Land Registration Act 1925 section 75; Land Registration Act 2002 schedule 12, paragraph 18). However, where additional land is being treated as an accretion to a lease, a new title over the additional land is being created.

50. This analysis is more in keeping with the authorities. I prefer the approach of the minority in *Secretary for Justice v. Chau Ka Chik Tso* [2011] HKCFA 86.

51. Moreover, whilst the basis of encroachment is possession, *Whitmore v Humphries* (1871) LR 7 CP1 is authority for the proposition that it does not have to be adverse.

52. In *Whitmore,* it was held that the doctrine of encroachment was engaged even where the tenant's possession was with permission. In that case, there was an agreement between landlord and tenant that the land encroached upon would form part of the demised premises. The tenant then allowed a third party into occupation, whom the landlord sought to eject. The third party stood in the shoes of the tenant, meaning this was in effect a dispute between tenant and landlord as to whether the doctrine of encroachment applied or not. It was argued that there was only a tenancy at will of the additional land, which had determined, thereby allowing time to run. This was rejected.

53. Willes J stated, "*The fact that the landlord knows that the tenant is encroaching on his land, and from good nature takes no notice, and does not turn the tenant out, but allows him to hold the encroachment on the same terms as if it had been part of the holding, cannot in good sense put the landlord in a worse position than if the tenant had taken originally without any assent, and by mere wrong unknown to his 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 shew 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*".

54. Brett J put it more simply: "*The tenant gave notice that he intended to encroach in the usual way, and the landlord said he did not mean to interfere. This is nothing but an ordinary case of encroachment…*".

55. This decision makes it hard to reconcile the idea of encroachment being based on anything akin to adverse possession, where permission would be fatal, as the tenant would be unable to demonstrate that his possession was adverse.

56. It is right to note that some of the cases involve encroachment on additional land owned by a third party. It seems to me that, in these cases, there must be adverse possession as against the third party, otherwise the third party would be in a much worse position compared to a standard adverse possession claim.

57. I do not, however, consider that this means encroachment must include adverse possession. Rather, properly analysed, these are cases of mixed encroachment and adverse possession: additional land can only be treated as an accretion to a lease if it can also be shown that the freehold to the additional land is owned by the landlord, which brings in the question of adverse possession as against the third party. The tenant's possession will often be adverse to the third party on the landlord's behalf.

58. This is what happened in *Tower Hamlets v Barrett* [2006] 1 P&CR 9. The court found that the tenant had acquired title to the additional land by adverse possession, albeit on behalf of their landlord. They had later purchased the leased land from their landlord, and this included the landlord's title to the additional land. Neuberger J: "*As a matter of principle, once the 12 years of adverse possession have been established, the paper owner loses his title, and someone, either the landlord or the tenant, acquires it… Once the 12 years are up, one would expect that either the landlord or the tenant obtains possessory title to the land. If it is the landlord who then acquires title, the land is added to the holding comprised in the tenancy; if it is the tenant, then he holds the freehold of the land in possession*" [paragraph 90].

59. It seems to me that other cases which involve or discuss the position where the land is owned by a third party, e.g. *Andrews v. Hailes* (1853) 2 E. & B. 349 and *King v Smith* [1950] 1 All ER 553, assume that the encroachment by the tenant would amount to adverse possession against the third party. This will often be the case. The position is rather more complicated under the Land Registration Act 2002, but that is not something I need consider for the purposes of this Decision.

Test for encroachment

60. The principles were succinctly summarised by J Sumption QC in *Ali v Tower Hamlets* [1996] EGCS 193:

> *(1) There is a presumption that where a tenant encroaches on land not part of the demised premises he does so as tenant of the demised premises, and the land is annexed to the lease.*
>
> *(2) The presumption is a presumption of fact. It may be more or less plausible depending upon the circumstances; it is simply the ordinary inference that will be drawn from the tenant's possession of the land encroached upon and the landlord's generally tacit acceptance of the situation.*
>
> *(3) The presumption will be rebutted if the dealings between the landlord and the tenant are inconsistent with it: for example, (a) where the tenant encroached on land quite independently of his status as a tenant, in which case he may acquire title by adverse possession but will otherwise acquire no title at all; or (b) where the landlord did not accept that the land should be annexed to the leasehold and his conduct, taken as a whole, is consistent with his taking that position.*

61. Encroachment on the additional land means legal possession of the additional land. There is considerable overlap with cases of adverse possession, in which legal possession is also a necessary ingredient, but here the possession need not be adverse.

62. Legal possession involves two separate elements:

    (a) Factual possession. This "*signifies an appropriate degree of physical control… The question what acts constitute a sufficient degree of exclusive 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… Everything must depend on the particular circumstance, but broadly, I think 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"* [Slade J in *Powell v McFarlane* (1977) 38 P & CR 452 at 470-1, cited with approval in *J A Pye (Oxford) Ltd v Graham* [2003] UKHL 30];

(b) An intention to possess. This is the intention "*to exclude the world at large, including the owner with the paper title… so far as is reasonably practicable and so far as the processes of the law will allow"* [Slade J in *Powell* at 471-2, cited with approval in *Pye*].

63. The next issue is when the encroachment bites, or crystallises into an accretion to the lease. Mr Lakin submits that it bites when there has been sufficient acquiescence, a reasonable period of time for the landlord to regain or give up possession of the additional land. The inference is that it would be case specific rather than tied to a particular period of time.

64. This goes against much of the case law. For example, *Tabor v Godfrey* (1895) 64 L.J.Q.B. 245 talks about 12 years. Further, the minority judgment in *Ka Chik Tso* refers to the prescribed statutory period and in effect applies the limitation period by analogy. As summarised in *Megarry & Wade, The Law of Real Property*, "*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*" [7-042].

65. However, this does not seem to have formed part of the reasoning in *Perrott*. In that case, it was held that the landlord was entitled to sue for repairs to the additional land, that is, there had been an accretion. There was no discussion as to when it occurred, but the report includes a statement that the lease was for 12 years less one day, and that the lease was determined by the effluxion of time.

66. There is a certain logic in applying the limitation period by analogy as, up until the expiry of the limitation period, the landlord would be able to take action to recover possession (subject to any other arguments such as proprietary estoppel). In my judgment, encroachment for the duration of the limitation period is sufficient. On these facts, I do not need to consider whether there are circumstances in which a lesser period would suffice.

67. There is however a further argument as to the correct limitation period to apply. The cases talk about 12 years, which accords with section 15 of the Limitation Act 1980, but we have now had the changes brought about by the Land Registration Act 2002. Is the period different where the additional land is registered?

68. In the two recent Tribunal decisions, title to the additional land was registered. In *McGee*, Judge Green considered whether there had been 10 years' possession, whereas in *Hood*, Judge Brilliant considered whether there had been 12.

69. I prefer the analysis that the correct period is 12 years, whether or not the additional land is registered. The analogy is applied by reference to whether the landlord would be able to take action to recover possession. A tenant would only have a defence to an

action for possession under section 98(1) of the Land Registration Act 2002 if they were seeking to be registered as freehold owner, which is a different situation. Judge Green recognised that a tenant would not have such a defence, but considered that they could rely on encroachment as a defence more generally. The defence is essentially the creation of a new leasehold title. I cannot see that the Land Registration Act 2002 has any application to, or has brought about any changes in relation to, treating additional land as an accretion to a lease by the creation of a new leasehold title. The 12 years applied by analogy in the authorities remains unaffected.

The proper application

70. Finally, there is the issue of which is the appropriate application to make: an FR1 for first registration, or an AP1 for alteration of the register. In *McGee*¸ the application was an FR1. In *Hood,* the application was an AP1. Here, we have both.

71. As mentioned above, HM Land Registry Practice Guide 4 suggests an FR1. It is however notable that the Practice Guide does not specify that this should be an FR1 based on adverse possession. Indeed, the Practice Guide acknowledges that, at least on one view, the presumption means that there is no adverse possession. *Ruoff & Roper: Registered Conveyancing* suggests that it should be an application for first registration on the basis of an accretion to a lease [33.029.08].

72. In *Hood,* HM Land Registry's stated position was that, "*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*".

73. In this case, arguably slightly inconsistently, HM Land Registry treated the FR1 as being an application based on adverse possession (although that may be because of the way the application was framed), and only eventually accepted that the AP1 could proceed.

74. I do not consider that an FR1 based on adverse possession is appropriate, as, for the reasons already given, the doctrine is not based on adverse possession. It seems to me that the application could equally be an FR1 based on accretion, or an AP1. But here, as there is no FR1 based on accretion, it must be the AP1 that is the more appropriate.

75. The application for alteration is brought under Schedule 4 paragraph 5(b) of the Land Registration Act 2002, that is, as an alteration for the purpose of bringing the register up to date. This is alteration rather than rectification, meaning that paragraph 6 is not engaged (see paragraph 1). If there is the power to make the alteration, the application must be approved, unless there are exceptional circumstances which justify not making it [*Derbyshire County Council v Fallon* [2007] EWHC 1326 (Ch)].

Conclusion

76. The upshot of the above is that the Applicant must demonstrate, on the balance of probabilities, that she and/or her predecessors in title have been in legal possession of the Roof Terrace for 12 years since the creation of the leasehold title to Flat 6 (anything before cannot properly be described as encroachment by a tenant on additional land beyond the extent of their demise). If she does that, the AP1 will succeed, unless the First Respondent can demonstrate that (a) the presumption does not apply, and/or (b) there are exceptional circumstances which jussucctify not making the alteration.

Legal possession

77. Despite the somewhat complicated procedural issues and legal analysis outlined above, the factual issues and application of the test are relatively straightforward. The two separate elements required to demonstrate legal possession are set out at paragraph 62 above.

78. The Applicant's case is essentially that she can demonstrate legal possession through her own and her predecessors' use of the Roof Terrace as an outside garden area. Although she says this has been the case since at least the mid-1990s, the earlier period is not directly relevant as it predates the leasehold title to Flat 6.

79. The First Respondent objects to the application. It is apparent from the submission documents he submitted ahead of/at the hearing that his objections are largely motivated by concerns in relation to the practical consequences of the use of the Roof Terrace (this being above his property, Flat 3). In one document, he asks for an order directing the Applicant to return the Roof Terrace to its original condition.

80. As explained during the hearing, the Tribunal is only concerned with whether the Roof Terrace should be treated as an accretion to Flat 6's lease or not. The First Respondent's concerns are understandable, but they do not have a bearing on the dispute the Tribunal has to determine.

81. The First Respondent has however raised various relevant challenges to the application, which I group together as follows:

    (a) whilst he accepts that there has been some use of the Roof Terrace, he says this has intensified since the Applicant's occupation of Flat 6, and that historically the use was not sufficient to amount to possession;

    (b) he particularly says there is no evidence of use prior to 2003, and there is no evidence from the tenants who occupied Flat 6 prior to the Applicant;

    (c) he argues that there is in any event a gap in possession, from when former owner Mrs Thomas passed away (2011) to when the Applicant moved in (2015), meaning that the Applicant cannot demonstrate the relevant period;

(d) he argues that there has not been exclusive possession of the Roof Terrace – it has only been fenced recently, and he himself has accessed it regarding maintenance;

(e) he avers that the use of the Roof Terrace has been with permission and so cannot be adverse.

Exclusive possession & access

82. I deal firstly with the question of exclusive possession. I remind myself that the Applicant must show an appropriate degree of physical control of the Roof Terrace and an intention to exclude the world at large so far as is reasonably practicable.

83. The First Respondent argues that the Roof Terrace has only recently been fenced and so has not been enclosed for a sufficiently long period. It is correct that many cases of (adverse) possession involve acts of enclosure. Acts of enclosure demarcate the land which is being possessed, demonstrating the extent of the factual possession and the intention to possess. However, they are not a prerequisite. The Roof Terrace is by its nature a well-defined area. Its edges act as a natural boundary, with or without fencing.

84. The First Respondent also argues that it is possible to access the Roof Terrace other than through Flat 6, by climbing onto it over a wall from the external staircase to Flat 5, which he has done himself. He also mentions window cleaners.

85. The Applicant has to show an appropriate degree of physical control and an intention to exclude the world at large *so far as is reasonably practicable* (emphasis added). She does not have to physically exclude everyone from the Roof Terrace at all times.

86. There are two obvious access points to the Roof Terrace – the doors from Flat 6, one has been in place since at least 2003, the other since 2017. Insofar as the First Respondent argues the latter was an unauthorised alteration, I cannot see that anything turns on this when there was an alternative door already in use.

87. In contrast, gaining access from the external staircase to Flat 5 is not obvious, and requires an element of climbing. I consider accessing the Roof Terrace from the external staircase to be akin to climbing a fence or a wall to access an area which is otherwise inaccessible.

88. In any event, the First Respondent's evidence is that he has accessed the Roof Terrace this way for the purposes of inspection/maintenance, giving the Applicant advance warning. This raises the possibility that his access has been on behalf of the Second Respondent for the purposes of inspection/maintenance and/or has been with the Applicant's implied permission as a matter of good neighbourliness. Any access by window cleaners would be with the implied permission of either the Applicant or the Second Respondent.

89. I am not satisfied that either the earlier lack of fencing, or the First Respondent's access to the Roof Terrace, is fatal to the Applicant's application.

Period of use

90. I turn next to the First Respondent's arguments that there is no evidence of use prior to 2003, and that there is a gap in possession from when Mrs Thomas passed away to when the Applicant moved in.

91. In relation to the former, evidence of use prior to 2003 is not essential, as that predates the leasehold title to Flat 6. I do however consider it as part of the factual background to the dispute.

92. In terms of the pertinent history of the ownership of Flat 6, it was owned by a Mr Barnard from 1997, sold to the Thomases in 2003, inherited by their son Mr Barry Forster in 2011, and then tenanted out between 2012 and 2015 when it was purchased by the Applicant.

93. I summarise the evidence of use before the Applicant's period of ownership as follows:

(a) Mr Ian Dixon Osborne (Flat 4). His evidence is as follows:

i. He remembers the people living in Flat 6 using the Roof Terrace right back to the late 1970s and early 1980s. His mother lived there from 1979 to 1992, during which time he was a frequent visitor. Flat 4 was then rented out, until he and his wife moved in in 2007;

ii. He remembers the Thomases having seats out there, and the later tenants having plants and deck chairs;

iii. In cross examination, he said he did not recall the first of the two doors onto the Roof Terrace being installed – he thought it was there during at least part of his mother's ownership;

iv. He says it never occurred to him that the Roof Terrace was not part of Flat 6.

(b) Mr Barry Forster (former owner of Flat 6, which he inherited from his mother Mrs Thomas). His evidence is as follows:

i. The Roof Terrace was used in the late 1990s by a previous owner and family friend Mr Barnard, and then by his mother and stepfather. He says they (both Mr Barnard and the Thomases) kept garden furniture on the Roof Terrace and would sit there in nice weather;

ii. In cross-examination, he confirmed that he had not seen Mr Barnard using the Roof Terrace himself, but said he was "*famous for enjoying life"* and that his mother had been to drinks parties on it;

iii. He says the Roof Terrace was key to his mother and stepfather's decision to buy Flat 6. They resurfaced the Roof Terrace in 2003;

iv. In cross-examination, he said that, when he rented out Flat 6, there was nothing expressly mentioned about the Roof Terrace, but he noted there was a door onto the Roof Terrace and assumed the tenants would want to use it;

v. In cross-examination, he said he was not aware of a conversation with Mrs Lee, and that he could not remember the Thomases saying they had to ask for permission.

(c) Mr Charles Angus Gibson (Flat 1). His evidence is of the Roof Terrace being used from 2006, when he bought Flat 1. He has lived there intermittently, albeit not for the last 5-7 years. However, he has a garage nearby and visits regularly. His evidence is that he regularly saw the Thomases using the Roof Terrace, sitting out most days in the summer. He accepted there was only minimal furniture until the Applicant's ownership. He has always assumed the Roof Terrace was part of Flat 6.

(d) The First Respondent (Flat 5 from 2008-2011; Flat 3 since). The First Respondent accepts that the Thomases used the Roof Terrace, but says that the use was minimal – in terms of furniture, he said there was a table, two chairs, pots, and maybe a bench.

94. There is no real reason to gainsay any of this evidence (there was a criticism of Mr Forster, whose written statement stated the Thomases purchased Flat 6 in 2000, but I am satisfied this was a mistake as to a date and does not undermine the substance of the rest of his evidence). Indeed, the First Respondent appears to accept that there was use historically. It is not right to say that there is no evidence of use before 2003 given the evidence of Mr Osborne and Mr Forster.

95. Also, while it is correct that there is no evidence from the tenants who occupied Flat 6 before the Applicant themselves, there is evidence of them using the Roof Terrace: Mr Osborne particularly mentions deck chairs.

96. The First Respondent notes, correctly, that the acts of a tenant are to be considered acts on behalf of their landlord, but seems to suggest that the acts of these tenants do not count because they were neither tenants of Mrs Thomas nor the Applicant. However,

they were tenants of Mr Forster, who was the intermediate owner. The Applicant is entitled to rely on acts of her predecessors in title and/or their tenants if those acts are on their behalf.

97. The First Respondent also points to a gap when there was no occupation of Flat 6 between 2011-12. I will return to this point when I have considered whether the use is sufficient to constitute possession.

98. I am satisfied that the occupants of Flat 6 have been using the Roof Terrace in some way shape or form (which I go on to consider below) since the late 1970s/early 1980s.

Sufficiency of use

99. I turn next to the suggestion that the Roof Terrace has not been used enough to amount to possession. In particular, the First Respondent tries to downplay how often it was used prior to the Applicant's intensified use.

100. It is right to note that the evidence of use going back to the late 1970s/early 1980s is somewhat limited. I accept Mr Osborne's evidence that the Roof Terrace was used by the occupants of Flat 6 at that time, but the extent of that use is not very clear.

101. This is in contrast with the period from 1997 onwards, where there is evidence of Mr Barnard, then the Thomases, and then the tenants, and then the Applicant, using the Roof Terrace as a garden area – keeping garden furniture there and sitting out in good weather.

102. I remind myself that the degree of physical control required to constitute factual possession depends on the nature of the land, and that I should consider whether it has been dealt with as an occupying owner might be expected to deal with it.

103. It seems to me that the Roof Terrace has been used in exactly the way an occupying owner might be expected to deal with it. It may not have been used much outside of pleasant summer days, but that can be said of many owner-occupied gardens.

104. Moreover, the fact that the Applicant has intensified the use, putting out more furniture and ornaments, does not mean that the less intense use was not itself sufficient.

105. For the avoidance of doubt (this was not a point that I understood to have been made by the First Respondent, but I deal with it for completeness), I am also satisfied that it is the whole of the Roof Terrace that has been possessed, even if only parts of it have been used at any given time. It is a well-defined area that obviously forms one parcel of land, and I accept that acts on one part amount to possession of the whole.

106. I find that the Applicant can demonstrate use of the Roof Terrace amounting to possession from at least 1997 onwards.

107. I return to the question of the gap in occupancy in 2011-12. I do not consider that the gap in occupancy is enough to amount to a break in possession: during that time, the Roof Terrace was only (reasonably) accessible from Flat 6, and there is no suggestion that it was abandoned by Flat 6 or that anyone else took possession of it.

Permission

108. The First Respondent argues that use of the Roof Terrace has been with permission, meaning that the Applicant cannot demonstrate that possession was adverse.

109. For reasons that I have already given, I do not consider that the Applicant is required to show that the possession is adverse (see *Whitmore v Humphries* (1871) LR 7 CP1 and paragraphs 50-58 above). This means that the question of permission is irrelevant.

110. However, in case I am wrong, I will consider the evidence. If permission is relevant, it would be for the First Respondent to demonstrate on the balance of probabilities that use of the Roof Terrace was with the permission of the Second Respondent.

111. The First Respondent's case is that, prior to 2003, Mrs Janet Lee (who then owned Flat 3) gave the occupants of Flat 6 permission to use the Roof Terrace. In 2003, she reached an agreement with the Thomases, that they would resurface the Roof Terrace in return for being able to use it. He says that use since the freehold was transferred to the Second Respondent in 2004 has been with the Second Respondent's "*tacit permission*", the suggestion being, I think, that it has carried over from Mrs Lee.

112. None of this comes from the First Respondent's own knowledge. Rather, he relies on emails from 2003, the witness statement of Ms Louise Scargill, and evidence from Mr Osborne and the Applicant.

113. In terms of the emails, there is an email from Lynda to Philip Elliot, both then flat owners, which states that Mrs Lee has given her approval for the Thomases to use the Roof Terrace. There is also Philip Elliott's reply, which refers to permission for use of the Roof Terrace having already been granted by the owner, but it is wholly unclear whether that is something that was already within his own knowledge, or if he is just repeating back what he has just been told.

114. I also note that, at around this time, Mr Osborne wrote a letter to Lynda dated 7th July 2003, in which he talks about use of the Roof Terrace during whole of the time since 1979, stating it "*has been used, mainly during the summer months, by the occupants of Flat number 6 who have an access door onto it*".

115. Ms Scargill's evidence is that her mother gave the occupants of Flat 6 permission to use the Roof Terrace between 1991 and 2003. However, she prefaces this by saying "*I understand from emails dated 2003*", indicating that this evidence is not from her own knowledge, but what she has gleaned from elsewhere.

116. She also refers to a verbal agreement between her mother and the Thomases in 2003, that the Thomases could use the Roof Terrace (which was in need of repair) if they resurfaced it. She says they carried out the resurfacing, and then later installed a door that gave access onto the Roof Terrace. She goes on to say that, on the conversion to leasehold, the use was with the full agreement of the Second Respondent.

117. I have some concerns in relation to Ms Scargill's evidence. It is not clear where her knowledge of an agreement comes from: was she present at the time of the agreement, expressly told about it later, or is it her understanding from other sources? It is also not clear on what basis she can say the later use was with the full agreement of the Second Respondent. Finally, her reference to a door being installed is not consistent with the letter from Mr Osborne from 2003 or his oral evidence. Ms Scargill did not attend to give oral evidence and so none of this could be tested.

118. Mr Osborne's written evidence was that he thought Mrs Lee gave Mr Thomas permission to use the Roof Terrace. In cross-examination by the First Respondent, he confirmed he was aware that the Thomases were allowed to use the Roof Terrace in exchange for resurfacing. In cross-examination by the Applicant, he said that he had no direct evidence of Mrs Lee giving permission, but that the source was the emails, which led him to believe that permission had been given.

119. The Applicant was cross-examined in relation to whether she had been given permission to use the Roof Terrace. She said that she thought she had permission, based on the Roof Terrace being mentioned in the sales particulars and from talking to other residents. However, she confirmed there was no discussion or correspondence in which she asked for or was expressly granted permission.

120. The evidence of permission is scant. There is no direct evidence of Mrs Lee expressly granting permission. Even if there was an approval or an agreement, the precise terms or words used are unknown, and may not have amounted to express permission. I bear this in mind particularly because the Thomases wanted to resurface the Roof Terrace at the time, such that any discussions may have been in respect of works being carried out rather than use itself.

121. In any event, there is no basis for saying that permission was given by the Second Respondent once it became the freeholder in 2004. The First Respondent himself described it as tacit permission, but I do not consider that is sufficient to show that the possession was not adverse. He also, rather confusingly, suggested there might be an implied tenancy – this is not very far off what the Applicant is in fact claiming.

122. I am not satisfied that the First Respondent is able to demonstrate on the balance of probabilities that the Applicant's/her predecessors' use of the Roof Terrace was with permission.

Conclusion

123. For all of the above reasons. I satisfied that the Applicant can demonstrate 12 years' legal possession of the Roof Terrace since the creation of the leasehold title to Flat 6.

Presumption

124. Having established the requisite legal possession, the Applicant can rely on the presumption that Roof Terrace should be treated as an accretion to her lease. This is only a presumption, and it can be rebutted. The First Respondent did not argue that the presumption is rebutted on these facts, but I bear in mind that he was unrepresented and that this particular point may have been lost in the somewhat complicated legal analysis.

125. For completeness, I note that I cannot see that there is any basis for rebutting the presumption: the Applicant does not claim to have encroached on the Roof Terrace on her own account, and there is no evidence that the Second Respondent did not accept the Roof Terrace should be annexed to the Flat. In relation to the latter, I note there was 12 years' possession well in advance of this dispute arising, so the recent objections made by the First Respondent and the question of whether or not they were on behalf of the Second Respondent is immaterial.

126. It seems to me that these facts are a classic case of "*the tenant's possession of the land encroached upon and the landlord's generally tacit acceptance of the situation*" [*Ali v Tower Hamlets* [1996] EGCS 193; paragraph 60 above].

Exceptional circumstances

127. For all of the reasons given above, I am satisfied I have the power to direct an alteration of the register. I should do so unless there are exceptional circumstances. The First Respondent did not argue that there were exceptional circumstances, but again I bear in mind that he was unrepresented and that this particular point may have been lost in the somewhat complicated legal analysis.

128. For completeness, I do not consider that any of the arguments put forward by the First Respondent to challenge the application amount to exceptional circumstances. I do not see that there is anything out of the ordinary course or unusual in what has happened. I understand the First Respondent has concerns about the practical consequences, but I do not consider that to be exceptional.

Conclusion

129. For the reasons give above, I am satisfied that the Roof Terrace is an accretion to the lease of Flat 6, and that the Chief Land Registrar should give effect to the AP1.

130. I shall direct the Chief Land Registrar to give effect to the original application of the Applicant dated 14th February 2022 for alteration of the register as if the objection of

the Respondent had not been made, and to cancel the original application of the Applicant dated 29th September 2022 for first registration based on adverse possession.

131. I turn to consider costs. Ordinarily, the unsuccessful party will be ordered to pay the costs of the successful party: see rule 13(1)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and paragraph 9.1(b) of the Practice Direction. Here, that would mean an order that the First Respondent pay the Applicant's costs, unless there is some good reason to make a different order. I know of no reason why it would not be just to make the usual order in this case.

132. My preliminary view is therefore that the First Respondent should pay the Applicant's costs of the proceedings (from the date the matter was referred, 1st November 2023), to be summarily assessed if not agreed.

133. Any application for costs should be sent to the Tribunal and the other side by 5pm on 28th July 2025, and should include an estimate of the amount of costs sought. Further directions will then be given as appropriate.

Dated this Monday 30th June 2025

Laura D'Cruz

BY ORDER OF THE TRIBUNAL