

# BLUNDELL LECTURES

TOPICAL ISSUES IN PROPERTY LAW

In aid of the benevolent associations of  
the Bar, The Law Society and The Royal  
Institution of Chartered Surveyors

---

## 51st ANNUAL SERIES

### Nine Tenths of the Law?

### Adverse possession and tenant encroachment in the modern world

**Tuesday 2 June 2026**

**Inner Temple, London**

**This paper is solely for the registered attendee of this lecture and is for reference/information only and cannot be copied or reproduced in any form without prior permission from the authors and event organisers.**

**Supported by Falcon Chambers**

## **SPEAKERS**

### **Tribunal Judge Ewan Paton**

Tribunal Judge Ewan Paton has been a full-time Judge of the First-Tier Tribunal, Property Chamber, Land Registration Division since 2021.

He practised for nearly 25 years at the Property and Chancery bar, from Guildhall Chambers in Bristol.

He also previously sat as a fee-paid judge both in the Land Registration Division and in the Residential Property Tribunal Wales.

In 2020 he was the co-editor, and is now the sole editor, of Preston & Newsom's *Restrictive Covenants Affecting Freehold Land* (12th edition 2024).

In his spare time, he is a keen runner, currently trying to do triathlon without drowning or crashing. He was once a finalist on *Mastermind*, and also sings in the Bar Choral Society.

### **Jamie Sutherland, Falcon Chambers**

Jamie Sutherland was called to the Bar in 2010 and has been at Falcon Chambers ever since. His work covers all areas of commercial and residential landlord and tenant law and real property law. He is a co-editor of the last two editions of *Muir Watt and Moss on Agricultural Holdings* and his practice includes a substantial amount of litigation and advisory work in agriculture and rural affairs. Over the years, he has come across adverse possession and tenant encroachment in the context of garages, storerooms, car parks and fields.

# NINE TENTHS OF THE LAW? ADVERSE POSSESSION AND TENANT ENCROACHMENT IN THE MODERN WORLD

## PART 1

### “IT DOESN’T ADD UP”: AGGREGATION AND AN UNINTENDED DIVERGENCE?

By Ewan Paton<sup>1</sup>

“Quite why the law of adverse possession has to be so complicated is probably something to be discussed separately.<sup>2</sup>”

1. This is my contribution to that discussion. This paper addresses one such “complication”: the “aggregation” of successive periods of adverse possession. English law now appears to recognise two different approaches to this issue. This may have produced a surprising, and probably unintended divergence between unregistered and (some) registered land cases, with significant implications for both conveyancing and litigation practice.

In this paper I will consider how we got there, and how we can perhaps get out of it.

#### **Aggregation: the need to add up**

2. It remains true that “Adverse possession is immensely popular<sup>3</sup>.” Many thousands of adverse possession-based applications are made to HM Land Registry each year<sup>4</sup>. Many hundreds are disputed and referred to the Tribunal

---

<sup>1</sup> Judge, First-Tier Tribunal, Property Chamber, Land Registration Division. All views expressed are personal, unofficial and of no authority whatsoever.

<sup>2</sup> Oliver Radley-Gardner KC & Taylor Briggs, “Some issues in the law of adverse possession: The problem of multiple squatters”, (Falcon Chambers, 31<sup>st</sup> October 2024)

<sup>3</sup> Stephen Jourdan KC, preface to 1<sup>st</sup> edition of “Adverse Possession” (2002, Bloomsbury)

<sup>4</sup> These include applications for first registration of unregistered land; registered land applications based on either or both of Schedule 6 LRA 2002 and the “transitional provisions” of Schedule 12 paragraph 18

in which I sit<sup>5</sup>. Such cases are often highly contentious and complicated, and frequently “fight” all the way to a final hearing. On a very rough head count, they comprise around 40% of the published decisions of the Tribunal over the last four years<sup>6</sup>.

3. A common feature of many such cases is that of “successive possessors<sup>7</sup>”. It may be that an applicant for a title is able to establish the requisite period of years all by themselves. Frequently, however, they cannot, and have to stand on the shoulders of others. They may have to rely on, and somehow tack on or “aggregate” to their own, periods of possession by others who went before them.
4. The problems to which this “aggregation” issue may give rise are, as will be seen, far from new. At least the following questions arise:-
  - i) *when* can it be done?
  - ii) *how* must it be done? Is any formality, or proof of any particular matters, required?
  - iii) what is the position *as between* the various possessors themselves?
5. Behind all these questions is a further one of principle or policy – *should* it be allowed? Where i) the paper owner is O, the first possessor is A and the next possessor is B ii) neither A nor B by themselves have possessed for the requisite period, but ii) A’s and B’s possessions when aggregated would suffice, who *should* “win”? Should it be like “Rock-Scissors-Paper”, so that O beats A or B alone (paper title v. insufficient period of possession), A beats B (by being in possession first) but then A+B combined can beat O? And for whose benefit- A, B or A and B jointly?
6. I will suggest that there is currently something of a “fault line” in English law on these issues, which goes back over 100 years and has never been fully analysed or resolved. This has resulted in the divergence trailed in the introduction above, for which no explicit policy basis has been articulated by the courts or the Law Commission.

---

(preserving s75 LRA statutory trusts which arose before 13/10/2003); and Schedule 4 alteration applications based on either an assertion or denial of historic adverse possession.

<sup>5</sup> The Land Registration Division of the First-Tier Tribunal, Property Chamber; successor (since 2013) to the jurisdiction originally conferred by the 2002 Act upon the Adjudicator to HM Land Registry.

<sup>6</sup> Published decisions September 2022 to present: up to 18/8/25, at <https://landregistrationdivision.decisions.tribunals.gov.uk/Public/Search.aspx>; since 18/8/25 at <https://caselaw.nationalarchives.gov.uk/search?tribunal=ftt/pc>

<sup>7</sup> I use this, where possible, in preference to the more pejorative “squatters”.

7. The historical roots of this fault line can be better understood by looking at four cases featuring these characters:

- **The Widow of Essex, The Cottar<sup>8</sup> of Bedford, The Miser of Suffolk and the Forger of Kensington.**

From them, and further Commonwealth cases, I have distilled and named three distinct principles, as follows:

- **“Pass it On”** – aggregation only by legal succession.
- **“Just Add Up”** – aggregation between any possessors, even unrelated.
- **“Give It Up”** – aggregation where prior possessors abandon or relinquish possession.

Let us begin in 1847.

### **Old cases: 1. The Widow of Essex**

8. Simplifying slightly from typically opaque 1840s ejectment law reports: Old Man Carter bought some land in Essex<sup>9</sup> in 1815. He immediately let his son John into possession, as a tenant at will. John then built a cottage on the land and occupied it, for the next 18 years until his death in 1834. Old Man C had granted a term of years mortgage of the land in 1829, to Goody. John’s widow Mary lived on in the cottage after his death. Goody was presumably not paid, and so turned Baddy in 1845 by bringing an action in ejectment against Mary.
9. Mary successfully defended the action, before an Assizes jury and on appeal to the Queen’s Bench (Lord Denman CJ)<sup>10</sup>. She successfully argued that she could add her own period of sole possession (by then around 11 years) to that of her deceased husband John (around 18 years), to produce a period of over 20 years<sup>11</sup> to provide a defence under sections 2 and 7 of the Real Property Limitation 1833 Act to Goody’s action. The only reference to the principle of aggregating these two periods came in counsel’s arguments (“he [John] and the defendant have held continually for twenty years...”). Lord Denman did not say anything at all about this point, focussing instead on a somewhat arcane argument about possible termination of the tenancy at will.

---

<sup>8</sup> A Scottish word for a cottage dweller.

<sup>9</sup> The reports do not say where.

<sup>10</sup> *Doe d. Goody v. Carter* (1847) 9 QB 863, 115 ER 1505

<sup>11</sup> Strictly speaking, 21 years from the first grant of a tenancy at will to John, being “twenty years from the expiration of one year next after the commencement of the tenancy, at which time such tenancy shall be deemed to have determined”: section 7, Real Property Limitation Act 1833

So she could “Just Add Up” periods of possession to *defend* ejectment proceedings brought by a paper owner, or one claiming through him.

10. Shortly afterwards, Goody assigned his mortgage to one Barnard who, it appears, turfed Mary out<sup>12</sup>. So she became an ejectment *plaintiff*, fictional demise and all, and sought to *regain* possession from him, in *Doe d. Carter v. Barnard*<sup>13</sup>

11. She had won first time around as a defendant by “Just Add[ing] Up”, so why shouldn’t she win again as plaintiff? Her 13 years plus John’s 18 made 31. Section 34 of the 1833 Act spoke of the paper title being “extinguished” after 20 years.<sup>14</sup> Had that not therefore conferred upon her a title to her which she could now positively assert against Barnard<sup>15</sup>?

Her alternative argument was “I was there first”: her own prior possession by itself was enough against Barnard, and he could now “shew[] no title himself”.

12. Patteson J. rejected both arguments. He nevertheless *agreed* that Mary *could* potentially have aggregated successive periods of possession so as to provide her with a title to assert as plaintiff - but only if she could prove *legal succession* to the interest of the previous possessor:

“Probably that would be so, if the same person, or several persons, **claiming one from the other by descent, will or conveyance**, had been in possession for the twenty years.” (p952)

13. Under the patriarchal succession law of the time, all of John’s estate, titles and interest had descended to his children as heirs, so Mary could show “..nothing to connect her possession with that of her husband by right of any sort..”. It was just as if she was a ‘stranger squatter’ coming after him:

“..if she be right..the same consequence would follow if twenty persons unconnected with each other had been in possession, each for one year, consecutively for twenty years..”.

---

<sup>12</sup> The report is unclear on this, but refers to him as “the defendant who has turned her out and shews no title himself (p953) – possibly a reference either to some defect in the mortgage assignment, or the title-extinguishing effect of section 34.

<sup>13</sup> (1849) 13 QB 945

<sup>14</sup> It had at that time been interpreted as effecting “...a Parliamentary conveyance of the land to the person in possession after that period of twenty years has elapsed.” In *Doe d. Jukes v. Sumner* (1845) 14 M&W 39, per Parke J. at p42; later disapproved.

<sup>15</sup> As Patteson J. later paraphrased the argument: “..it is said that the 34<sup>th</sup> section [of the 1833 Act] must have some further meaning, and must transfer the right.”

So positively to gain and rely on a title in this way:

“..such twenty years’ possession must be either by the same person or several persons **claiming one from the other**, which is not the case here.”

14. This appears to be the first clear statement of the “Pass it On” principle – the present possessor can only aggregate her own possession with that of a predecessor only by taking some form of conveyance, devise or other disposition of the previous possessor’s inchoate possessory title.
15. As subsequent case law would confirm, Mary *should* have won on her other, “prior possession” argument. But at the time, this was rejected on the later debunked notion of the *ius tertii*. Because there was evidence of “title” in someone else (the heirs of her late husband John), poor Mary had “..by her own shewing proved the title to be in another, of which the defendant is entitled to take advantage.” So B could rely on *his* own present possession, a lack of title in Mary, and a superior third party title.

## II. The Cottar of Bedford

16. That latter point was decisively refuted a few years later in the much better known case of *Asher v. Whitlock*<sup>16</sup>. In 1842 one Williamson enclosed some manorial waste land, then some more in 1850. He built a cottage<sup>17</sup> on it, and lived there until his death in 1860. By his will he devised “the cottage and garden...where I now dwell” to his wife for life so long as she remained unmarried, remainder to his daughter. His widow remarried, to the defendant Whitlock, who moved in with her and the daughter. Both widow and daughter died shortly afterwards. The daughter’s heir-at-law then unsentimentally brought ejectment against Whitlock.
17. Williamson, through whom the heir claimed, had not accrued a period of 20 years’ possession prior to his death. Whitlock, the man now in possession, argued that because Williamson had not accrued 20 years in his lifetime, he had no sufficient “title” to devise to his heirs; so that his own current possession prevailed:

“the case is that of two trespassers, and in such a case, the one last in possession is entitled to keep the land until the person having title ejects him; and the devise of the first confers no title on his devisee.”

---

<sup>16</sup> (1865) LR 1 QB 1 (Queen’s Bench Division)

<sup>17</sup> In Keysoe Row, near Bedford, where it still stands today.

18. Even on the assumption that Whitlock's possession could be regarded as "adverse" to the heirs<sup>18</sup>, the Court nevertheless upheld ejectment on the basis of the *earlier* possession prevailing. Cockburn CJ famously said that:

"..I take it as clearly established, that possession is good against all the world except the person who can shew a good title..  
.... I do not know what equity may say to the rights of different claimants who have come in at different times without title; but at law, I think the right of the original possessor is clear. On the simple ground that possession is good title against all but the true owner, I think the plaintiffs entitled to succeed."

Since the original testator Williamson could have ejected Whitlock, so could now his devisees.

19. Although *Doe d. Carter v. Barnard* was distinguished and by implication disapproved on this point, its other point – "Pass It On" – was confirmed. *Asher* was itself a case in which the heirs had taken a testamentary devise of the inchoate possessory title. Counsel for the successful plaintiff had himself emphasised this distinction:

"In *Doe v. Barnard* , a distinction is clearly drawn by the court between persons who succeed each other in possession, claiming one from the other by descent, devise, or conveyance, and **persons who succeed each other in possession, there being no such relation between them.**"

### III. The "Miser" of Suffolk

20. Williams Jennens died in 1798, 96 years old, a bachelor and intestate. He left real and personal estate worth a then staggering £1.1 million. He was said to be the richest "commoner" in England at the time. Rumours swirled as to the source of his extraordinary fortune. Some believed that the large sums he had loaned to the aristocracy were for gambling or more sinister purposes, or even that he was the illegitimate son of William III. The truth was probably more prosaic<sup>19</sup>.

21. His death, intestacy and huge fortune generated what was perhaps the first and longest-lasting "claims industry" in legal history. Numerous alleged heirs emerged, and dubious "Jennens/Jennings" societies — particularly in the USA

---

<sup>18</sup> Putting to one side an argument that Whitlock was estopped from disputing the heir's title because he had come into possession via the widow and daughter.

<sup>19</sup> See generally Laurence Ince, *Charles Dickens and the Great Jennens Case* (2014, PublishNation). He did lend large amounts to the aristocracy, but had also inherited from several branches of his wealthy family, originally Midlands ironmasters who were later very well-connected at court. His cousin Charles Jennens was a wealthy patron of the arts, and Handel's librettist for the *Messiah*.

— solicited contributions from the gullible in return for shares in an “unclaimed” fortune whose supposed value grew over time.

22. The estate had already been claimed and distributed on intestacy between three aristocratic families<sup>20</sup>. They nevertheless faced a succession of claims over the next 120 years, all of which ended in failure, usually adverse costs orders, and frequently bankruptcy for the plaintiffs<sup>21</sup>. There is credible evidence that Charles Dickens’ *Bleak House* was at least partly inspired by the earlier Jennens litigation.
23. One such doomed claimant, relevant to this paper, was George Willis, who wrote a “conspiracy theory” book<sup>22</sup> in support of his own claim to be the true Jennens heir. On Jennens’ death, Lady Sophia Curzon had taken possession of his Suffolk mansion Acton Place on behalf of her infant son George. She obtained letters of administration on the basis of young George’s entitlement via a distant Jennens aunt. George died in 1805, then Lady Sophia continued in possession, on behalf of George’s brother Richard Curzon, who was later created Earl Howe in 1821. Further Earls succeeded him.
24. Willis alleged that Richard was in fact the illegitimate son of a seamstress, and that an inscription on a tomb had been covertly altered to conceal the fraud against his own ancestor. His claim was struck out, with costs, by which he was bankrupted<sup>23</sup>. Several years later, “His nephew Benjamin Willis foolishly took up this lost cause<sup>24</sup>”, in *Willis v. Earl Howe (No.2)*<sup>25</sup>. He repeated his uncle’s allegations, and brought ejectment against the current Earl Howe, a mere 80 years out of time.
25. To get round this inconvenient obstacle, he argued that for limitation purposes there had been “concealed fraud”(in 1805, by the illegitimate son and the tombstone tampering), and that he (Benjamin) was still in time because he only attained majority in 1887. He was struck out. Undaunted, he appealed.
26. The Court of Appeal, taking the claim at its highest on the facts, dismissed the appeal. The principal and somewhat technical ground was that Willis (and his predecessors) could not show that they were deprived of possession *by* the alleged 1805 fraud, since Lady Sophia and George had *already* been in possession from 1798. Lindley LJ said that “This is a short answer to the

---

<sup>20</sup> The Curzons, Lady Andover and the Lygons (later Beauchamp).

<sup>21</sup> See generally Patrick Polden “*Stranger Than Fiction? The Jennens Inheritance in Fact and Fiction*”, parts 1 and 2 in (2003) 32 Common Law World Review 211, 338

<sup>22</sup> *The Great Jennens Case: Being an Epitome of the History of the Jennens Family* (Harrison & Wills, 1879) (1880) 29 WR 70

<sup>24</sup> Ince, *supra*.

<sup>25</sup> [1893] 2 Ch. 545

Plaintiff's claim." In trying to meet that point, Willis argued that those periods of possession could not be aggregated, in that the taking of possession by the fake ("suppositious") brother Richard in 1805:

"..formed a new departure, and that the statute would begin to run from that entry, and that the previous possession of *George* was not material"

27. In response, Kay LJ provided the passage which would then be cited as authority (and indeed the apparent ratio of the case) for nearly the next 100 years:

"The effect of that would be that if a series of occupiers, **not claiming under one another**, kept out the real owner for 100 years, time would only run against him from the moment when the last of such occupiers entered into possession. I am of opinion that this is not the law. **A continuous adverse possession for the statutory period, though by a succession of persons not claiming under one another, does, in my opinion, bar the true owner.**"

Then, having distinguished those cases in which a previous possessor had abandoned possession<sup>26</sup>:

"But it was not meant that if the possession had not been vacant, but **some one or other had been in adverse possession during the twelve years**, such possession would not bar the true owner, **unless all such occupants could shew a title derived from one another.**"

[emphasis added]

28. This passage significantly advanced "Just Add Up." Reading through its double (or triple) negatives, it collapsed two previous distinctions. First, although Earl Howe was the ejectment defendant, the principle did not rest on that narrow basis, as in the first *Widow Carter* case discussed above. Possession by a "succession of persons" would "bar the true owner", full stop. Second, it removed any requirement that successive possessors "could shew a title derived from one another". It was sufficient that "*some one or other*" had been in possession for the statutory period.

---

<sup>26</sup> *Trustees, Excrs. and Agency Co. v. Short* (1888) 13 AC 793; see now Limitation Act 1980, Sch. 1 para. 8(2)

## Just Add Up (and Give It Up) in Australia and Canada

29. This passage, and this point, received curiously little attention or citation in England and Wales for the next 100 years. As the learned editors of a leading textbook<sup>27</sup> discuss, it was more popular in Australia and Canada. Their courts generally followed the “Just Add Up” principle, and introduced the further refinement of what I have called “Give It Up” – the idea of a previous possessor having “abandoned” or “relinquished” their own inchoate possessory title in favour of the next possessor, allowing them then to aggregate the periods and reap the benefit.
30. There were many, mostly State court Australian decisions over the next 100 years. An early example was *Salter v. Clarke*<sup>28</sup>, in which (albeit obiter) a possession defendant was held entitled to succeed by aggregating in excess of 20 years’ possession by a “string of trespassers” including himself. *Willis v. Earl Howe* was cited with approval on this point. By the time of *Mulcahy v. Curramore Pty. Ltd*<sup>29</sup>, Chief Justice Bowen could state the principle with confidence:

“Where there is a series of trespassers, not deriving title from each other, who have been in adverse possession for a continuous period of 20 years...s34 [of the Real Property Limitation Act 1833] will operate to extinguish title.....It is emphasised that possession by successive trespassers must be continuous to have this effect.”

The further significance of this principle developing in Australia in this time was the existence in most states of Torrens systems of title registration. Many of the successful defendants in these cases were also granted certificates of title.

31. The court in *Mulcahy* also considered the position *as between* the successive possessors. Chief Justice Bowen, positing successive trespassers “A, B, C, D and E”, suggested that the “better view” was that the first in possession had the superior title, but then added:

“That last statement needs qualification.....if the departure of A, B, C and D in each case took place in circumstances constituting an abandonment by each of them, E would indeed have a title in fee simple good against the whole

---

<sup>27</sup> Jourdan and Radley-Gardner, *Adverse Possession* (2<sup>nd</sup> ed. 2011) paragraphs 6-48 to 6-56

<sup>28</sup> [1904] 4 SRNSW 280 (NSW Supreme Court). The plaintiff actually lost on the basis that he had taken a “conveyance of a pretended title” contrary to a statute from the time of Henry VIII.

<sup>29</sup> [1974] 2 NSWLR 464

world.”

32. The question was therefore whether the current incumbent was in possession “wrongfully as against his predecessor”, or “has entered immediately following an abandonment by his predecessor.” On the facts of that case, it was found that the previous possessor of an additional triangle of land must be presumed to have “deliberately abandoned” such possession when he sold his larger adjacent main title to his successor. This was contrary to the outcome in the earlier Victorian case of *Kirk v. Sutherland*<sup>30</sup>, in which the predecessor H was found to have retained, and not abandoned, his possessory title to five and half acres of land adjacent to his main title; so that his subsequent conveyance of it to one of the disputants was effective. The court also declined in that case to imply a conveyance of that additional land with H’s conveyance of his main title, holding that the wording of the Victorian version of section 62 Law of Property Act 1925 were “not appropriate to describe land itself”.

33. The principles were summarised and re-stated in the much later Victorian case of *Shelmerdine v. Ringen Pty. Ltd*<sup>31</sup>. It was by then treated as long settled in Australian law that in a case of successive possessors:

“if there is no gap [in possession], their periods of possession may be aggregated, although there has been no assignment of their possessory rights.” so that “..it is possible to tack the possession of one intruder on to that of another, although there has been no assignment of possessory rights” (p341, per Brooking J.)

This applied at least:

“..where each succeeding occupier was not in possession wrongfully as against his predecessor but entered on his predecessor’s abandonment of possession and indeed with his consent”.

34. In Canada, a very similar position was arrived at shortly after *Willis v. Earl Howe*:

“..if there has been a series of persons in possession for the statutory term between some of whom and their predecessors there has been no privity, in

---

<sup>30</sup> [1949] VLR 53, Supreme Court of Victoria, per Lowe J.

<sup>31</sup> [1993] 1 VLR 315, a dispute over a laundry on a small triangle of land, of which a barrister called Sweeney sought to re-take possession with the help of a “stern faced fencer”.

such a case the bar of the statute is complete.<sup>32</sup>

35. One contemporary critic<sup>33</sup> thought it unclear why this followed from *Willis v. Earl Howe*, that the law was otherwise (i.e. “Pass It On” only), and protested that what I am now calling ‘Just Add Up’ would mean that the limitation statute was being “benevolently interpreted in favour of wrongdoers”:

“if the second trespasser only followed close enough on the heels of the first, he would get the benefit of some ‘secret process’ arising from the first trespass, which would be effectual for the purpose of being added to the occupation of the second trespasser.”

36. He appears to have been a lone voice in the Canadian wilderness, because by the time of *Fleet v. Silverstein*<sup>34</sup>, CJHC McRuer could state that there was “abundance of authority” for the proposition that:-

“... where there has been adverse possession by ‘A’ as against ‘B’ which is surrendered to ‘C’ and ‘C’ immediately enters into possession of a right which has been handed over to him by ‘A’ the Statute of Limitations continues to run against the true owner.”

So in that case, a previous owner’s possession of an additional five foot garden strip was held to have been surrendered, and so passed on, to the successor to whom she had sold the main house; entitling the successor to aggregate the periods<sup>35</sup>.

### **The Forger of Kensington<sup>36</sup>**

37. Meanwhile, back in England: in 1970, Christopher Renwick discovered an empty and semi-derelict house in Queen’s Gate Place Mews, South Kensington, neglected by the shareholders of its corporate owner—one of whom had “disavowed worldly affairs altogether by entering a Carmelite nunnery”. Renwick forced entry, made the property habitable, stored vintage cars in its garage, then forged a lease of it to one of his companies to raise

---

<sup>32</sup> *Handley v. Archibald* (1899) 30 SCR 130, per Strong CJ; cited with approval in *Robinson v. Osborne* (1912) 8 DLR 1014

<sup>33</sup> Mr. E. Douglas Armour KC, in a case note to *Robinson v. Osborne* (at p1021 of the report)

<sup>34</sup> [1963] 1 Ont. R 153, High Court of Ontario. See also *Afton Band of Indians v. Attorney-General* (1978) 85 DLR 454, per Hardie JA at p471: “..the law did not require any formal or informal conveyance or assignment of the inchoate possessory rights..”

<sup>35</sup> It was therefore “not necessary” for the court to express a view on whether the predecessor’s inchoate possessory title would also have passed under a conveyancing statute as land ‘held used or occupied and enjoyed...as part and parcel thereof’, although it was suggested that it would.

<sup>36</sup> *Mount Carmel Investments Limited v. Peter Thurlow Limited & Smees* [1988] 1 WLR 1078

mortgage finance. In 1974 he allowed Peter Thurlow Ltd and its directors to occupy the upper parts. When the forgery came to light, he fled, later being convicted and imprisoned.

38. In the meantime the Thurlow company, then latterly one of its directors Ms. Smee, continued in occupation. When the proprietor company fell into less religious hands, it issued possession proceedings in 1983, over 12 years since Renwick's first entry. As a back-up, the company obtained from the now released Renwick an assignment (for £1) of all his title and interest in the property as the original squatter. It then issued a second possession writ in reliance on that title.

39. The possession claim was dismissed at first instance, the judge holding that an apparent admission in the plaintiff's pleadings that "there was continuous possession adverse to the plaintiff up to the date when this action was brought" (for a period in excess of 12 years) barred the plaintiff's title under the Limitation Acts. On appeal, the Court of Appeal (per Nicholls LJ) assumed that this was correct:

"Prima facie, therefore, adverse possession having continued unbroken throughout this period, the plaintiff's title to the property was extinguished before the first writ was issued." (p1082)

This was the first clear re-assertion of "Just Add Up" by an appellate court in a reported English case since *Willis v. Earl Howe*.

40. Much of the appeal was concerned, and the case is chiefly cited on, the plaintiff's ultimately doomed first appeal ground - that a mere letter demanding possession had been sufficient to stop time running. The second appeal ground, on "aggregation", seemed more promising. Why *should* Miss Smee have been entitled to add Renwick's initial four years of adverse possession to her own to defeat the plaintiff and establish title? She, and her company, were the "second squatters" after Renwick. Although they had initially gone in as his tenants, there was "no suggestion that that any licence or tenancy is still subsisting". The plaintiff therefore argued that the defendants' possession became adverse to Renwick, who had a better title than them as the prior possessor - which title he had now assigned to the plaintiff.

41. On admittedly "sketchy facts" and "not without hesitation", the Court of Appeal rejected this argument. Nicholls LJ appeared first to state that what I am now calling "Give It Up" was "well established", but then somewhat confusingly gave "Pass It On" as an example of this:

“...this argument is well founded in this case if, but only if, the defendant's continuation in occupation after Mr. Renwick ended his connection with the property was **contrary to his will**. If squatter A is **dispossessed** by squatter B, squatter A can recover possession from squatter B. and he has 12 years to do so, time running from his dispossession. But squatter A may **permit** squatter B to take over the land in circumstances which, on ordinary principles of law, would preclude A from subsequently ousting B. For example, if A **sells or gives his interest in the property**, insecure as it may be, to B.”  
[emphasis added]

42. It is somewhat difficult to see how Renwick had, on his flight, “permitted” what were then still his tenants to assume possession in their own right. If they were his tenants at will or for rent (as the report suggests), their possession would have been deemed to become adverse to him after a year<sup>37</sup>. Further, Renwick did indeed later “sell[] his interest in the property” - but to the plaintiff, not Thurlow.

43. Nicholls LJ nevertheless agreed with the trial judge that Renwick had not been “dispossessed” by the defendant, but that he had “**abandoned the property to her: he relinquished all interest in the property**” when he fled. He therefore had nothing of his own left to assign to the plaintiff in 1984. The facts that he had previously done nothing himself to seek to recover the property, and then only much later assigned whatever interest he had for £1, were said to support this inference (“This is hardly the action of a man who had retained some interest (in the broadest sense) in the property”).

44. So *Mount Carmel Investments* appeared to confirm that both “Just Add Up” and “Give It Up” applied in English law. It is to be presumed that this also enabled the successful defendant then to obtain her own registered title. Jumping ahead slightly to 2005, Neuberger LJ (as he then was) later restated these principles broadly in *Tower Hamlets LBC v. Barrett*<sup>38</sup>, in a passage referred to in several textbooks<sup>39</sup>:-

“...what bars the paper owner from claiming possession is a continuous period of 12 years of dispossession.... Accordingly, unless there is a hiatus between the periods of possession of successive squatters (in which case paragraph 8(2) of the Schedule [1] would prevent the second squatter being able to rely on the period of adverse possession by the first) the second squatter,

---

<sup>37</sup> Under the then section 9 Limitation Act 1939, although this point does not appear to have been argued.

<sup>38</sup> (2006) 1 P&CR 9 (CA), at paragraph 36.

<sup>39</sup> See e.g. Jourdan and Radley-Gardner, *supra*, para. 6-53, although they accept that “the position in England is not certain”.

**whether he has purchased from the first squatter or dispossessed him in some other way, can rely on the first squatter's period of adverse possession.** This view is supported by *Asher v Whitlock* (1865) LR 1 QB 1 and *Willis v. Earl Howe* [1893] 2 Ch. 545.” [emphasis added]

45. This passage was *obiter* because the successful Barretts in that case did not, in the end, need to aggregate successive periods of possession. They were found themselves to have been in 12 years’ adverse possession of the additional land as lessees, the title arising from which had accrued to their then landlord at that time, and was presumed later to have been transferred to them with the main pub freehold reversion. Neuberger LJ did not distinguish between active “dispossession” and “relinquishment” as in *Mount Carmel*, suggesting that *any* dispossession might suffice.

### **Modern registered land: The Law Commission’s 2001 Report and the Land Registration Act 2002**

46. Meanwhile, by the late 1990s, the substantial restriction of adverse possession of registered land had become a central policy element of the Law Commission’s reform agenda. Their 1998 Consultative Document on Land Registration<sup>40</sup> did not, however, specifically discuss aggregation. There was only a passing reference to the general relativity of title principle<sup>41</sup>.

47. The 2001 Report<sup>42</sup> and draft Land Registration Bill proposed what became (and was unchanged when enacted) Schedule 6 paragraph 11(1) and (2) of the 2002 Act:-

#### **“Meaning of adverse possession**

(1) A person is in adverse possession of an estate in land for the purposes of this Schedule if, but for section 95, 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

---

<sup>40</sup> *Land Registration for the 21<sup>st</sup> Century: A Consultative Document* (LC 254), pp. 200-236

<sup>41</sup> See paragraphs 10.21 to 10.23, also citing *Asher v. Whitlock* on the point that “The squatter can at once deal with his or her estate in all respects as owner, and can sell it or devise it by will.”

<sup>42</sup> *Land Registration for the 21<sup>st</sup> Century: A Conveyancing Revolution* (LC 271, 2001)

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

48. The Law Commission explained paragraph 11(2) as follows<sup>43</sup>:

“However, to satisfy the requirement of 10 years’ adverse possession, the applicant, X, does not in fact have to show that she has herself been in adverse possession for that period. Under the Bill it will suffice that—

(1) X is the **successor in title** of an earlier squatter from whom she acquired **the land**, and, taken together, the two periods of adverse possession amount to 10 years;

[emphasis added]

(2) X has been in adverse possession, has herself been dispossessed by a second squatter Y, and has then recovered the land from Y. In these circumstances, she can add Y’s period of adverse possession to her own to make up the necessary 10 year period.”

49. They then said this<sup>44</sup>:-

“By contrast, where squatter Y, **has evicted** a prior squatter, X, Y cannot add X’s period of adverse possession to his own to make up the necessary 10 year period. **Y is not X’s successor in title**, but has a freehold estate of his own by virtue of his adverse possession. He will be unable to apply to be registered until he can show 10 years’ adverse possession of his own. This is a necessary concomitant of the scheme which we propose. An example will demonstrate the problems which would otherwise result.

X has been in adverse possession for 9 years. Y, a second squatter, **dispossesses** her. If Y could add X’s adverse possession to his own, he would be entitled to apply to be registered as proprietor after 1 year. If his application were successful (as it might be), it would then be necessary to make some provision by which X could recover the land from Y, notwithstanding that Y had been registered as proprietor.”

[emphasis added]

---

<sup>43</sup> At paragraph 14.20.

<sup>44</sup> Paragraph 14.21.

## Giving up on ‘Give It Up’?

50. This “contrast” was made solely with a case of squatter Y “evicting” or “dispossessing” squatter X. Nothing was said about “Give It Up”. There was no discussion of *Mount Carmel Investments* or the Commonwealth authorities. The possibility of X having abandoned or “relinquished” in favour of Y was not considered.
51. This left paragraph 11(1)(a) requiring the applicant to be the “**successor in title**” to a previous possessor – not to another existing title which the applicant may have acquired from that predecessor, but to the subject application land itself: “successor in title to an estate in **the land**”.
52. If read literally and exclusively, this would make “Pass It On” the law applicable to aggregation in Schedule 6 applications, taking us back to 1865 and earlier: namely, that some *conveyance, devise or transfer* of the previous possessor’s inchoate possessory title to the subject land is necessary for these purposes. “Just Add Up”, or even “Give It Up”, would no longer be enough.
53. This is indeed the meaning of paragraph 11(1)(a) now assumed by a number of leading textbooks. Megarry and Wade<sup>45</sup> say of the meaning of “successor in title” in this provision, without further elaboration, that:
- “As where B acquired the land by a conveyance on sale from A...However, if B has dispossessed A without any prior claim to possess, B cannot add A’s period of adverse possession to his own, **because he is not A’s successor in title**. This is different from the position where title is unregistered.”
- Ruoff and Roper<sup>46</sup> agree, and go as far as to say that:
- “the application will need to be supported by evidence of a conveyance of the previous squatter’s unregistered fee simple title in the land to the successor.”
- Jourdan and Radley-Gardner, referring to the Law Commission’s discussion above, consider that this means that aggregation is only possible under Schedule 6 in “limited circumstances”<sup>47</sup>, while noting that “successor in title” is not further defined. Earlier in the work, they offer the gloss that aggregation is only prevented in the case of a squatter who “dispossesses a squatter, rather

---

<sup>45</sup> *The Law of Real Property*, 10<sup>th</sup> edition (2024) paragraph 7-088, fns. 519 and 521.

<sup>46</sup> *Registered Conveyancing*, Vol. 1, para. 33-019

<sup>47</sup> *Adverse Possession*, paragraph 22-29 to 22-32.

than being let into possession by him”<sup>48</sup> although as stated above, the Law Commission did not consider or make that distinction.

### The most recent cases

54. In the meantime, in two further adverse possession cases relating to pre-2002 Act registered land, both the High Court and Upper Tribunal (Lands Chamber) re-stated both “Just Add Up” and “Give It Up” in broad terms.

55. In *Site Developments (Ferndown) Ltd v Cuthbury Ltd*.<sup>49</sup>, one issue was whether a title based on historic adverse possession of some additional land by a succession of companies had passed or could enure for the benefit for other companies to which the main site had later been transferred; which title those companies had now purported to assign to the claimants. Vos J. held that the argument that such title to the additional land had automatically passed with successive transfers of the main site title under the “general words” of section 62 Law of Property Act 1925 “does not work”, since that section was not broad enough to encompass whole areas of land, as the Supreme Court of Victoria had held in a case on an equivalent provision<sup>50</sup>

56. He held, however, that this did not matter, because the successor companies could establish a title<sup>51</sup> by adverse possession, which they had assigned to the claimants. They could do so simply by having succeeded to their predecessor companies in possession to the land. Accepting the argument that “..each of [the] companies took over possession of the Blue Land with the **consent of the preceding squatter**, so that time continued to run and the successor could assert the possession of itself and its predecessors against the owner of the paper title.”, he held that each of those companies had “**voluntarily relinquished** possession and **abandoned further claims** to the...Land on their successive transfers.”<sup>52</sup>

57. More recently, in *Haandrikman v. Heslam*<sup>53</sup>, the Upper Tribunal cited *Site Developments* as authority for the general propositions that:

“successive squatters can **take over from each other** without the need for a deed or for writing.” [22]

“Accordingly, successive squatters in unregistered land, [sic: “and?”] under

---

<sup>48</sup> Paragraph 6-56.

<sup>49</sup> [2011] Ch. 226 (Vos J.)

<sup>50</sup> *Kirk v Sutherland*[1949] VLR 33, per Lowe J. at p36: see above, fn. 30

<sup>51</sup> Strictly speaking the beneficial interest under the section 75 Land Registration Act 1925 statutory trust.

<sup>52</sup> Paragraph 174.

<sup>53</sup> [2021] UKUT 56 (LC), UT Judge Cooke

the 1925 Act regime, can **pass title to each other** after 12 years have elapsed just as can successive squatters before 12 years elapse, **without the need for formal transfer of their legal estate or of the beneficial interest under the section 75 trust.**" [24]

Most of the argument and discussion in that appeal concerned whether there had been a physical break in the continuity of the possession relied upon, not the current applicant's right to aggregate periods of successive possessors if the possession had remained unbroken.

### **The present position: an unintended divergence?**

58. Those recent broad re-statements of principle, when compared with the textbook writers' views on Schedule 6 paragraph 11 as set out above, generate the apparent divergence between the aggregation principles applicable to different types of adverse possession cases.
59. In unregistered land or pre-2002 Act "transitional provisions" registered land application, or alteration applications based on those principles, "Just Add Up", probably qualified by "Give It Up", seems to apply. Applicants can just add a previous possessor's period to their own, even that of a completely unrelated stranger. No formal assignment or conveyance is necessary, and successive possessors can be treated as having "passed title" to each other without any formality at all (*Haandrikman*) – or, perhaps, it can be presumed that the predecessor "abandoned" all title and right immediately at the moment the Applicant took over (*Mount Carmel*), and consensually "relinquished" their possession to the successor (*Site Developments*).
60. That presumption or inference might only be rebutted if the predecessor had emerged and provided positive evidence to the contrary (e.g. that they had been forcibly evicted by, and were in dispute with, the Applicant). In the large majority of cases – typically, those where the subsequent possessor has continued in possession of an additional area of land previously possessed as an adjunct to the main title which the predecessor transferred – no such dispute exists, the previous possessor is either dead or 'onside', so abandonment, relinquishment and so aggregation can easily be found.
61. By contrast, if the textbooks' literal interpretation of Schedule 6 paragraph 11(1)(a) is correct, then in an application relating to registered land, made under Schedule 6 Land Registration Act 2002, we are back to strict "Pass It On". Any Applicant wishing to rely upon the possession of a predecessor would have to file with the application, or produce at trial, some form of conveyance, transfer, assignment from that predecessor, or an assent from

their estate if deceased. In conveyancing, any purchaser with a potential future adverse possession claim to additional land previously possessed by the seller would have to insist on such a disposition being made at the time of sale. The usual helpful statutory declaration would not be enough by itself.

### **“Successor in title” to what?**

62. The further question then arises – a transfer or assignment of *what*, exactly? Paragraph 11(1)(a) speaks of the Applicant having to be “a successor in title to an estate in the land”. The Law Commission did state in the paragraph 14.21 quoted above that the Applicant currently in possession “has a freehold estate of his own by virtue of his adverse possession”, then said in a footnote to this that “As we explain more fully below, para 14.66, every squatter acquires an independent fee simple from the moment that he or she commences adverse possession.”
63. But paragraph 14.66 then stated this principle as applying “where title to land is unregistered”, adding at 14.67 that “Where title is registered, the matter is very different”. The Commission had earlier stated, at the beginning of the chapter, that adverse possession was justified in relation to unregistered land precisely because “...title is relative and rests ultimately on possession”, before adding “None of these considerations apply where title is registered. As we explained in the Consultative Document—‘ Where title is registered, the basis of title is primarily the fact of registration rather than possession’ .
64. What legal “estate in land” does mere possession against a registered title therefore confer? On one analysis the possessor merely acquires a potential statutory right to make a Schedule 6 application against the single, and currently absolute, legal title. The mere passing of five, ten or any greater period of years in itself does not necessarily give them an “unregistered legal estate”<sup>54</sup>, if the fundamental principle of the 2002 Act enshrined by section 95 was that “..adverse possession, by itself, for however long it continues, does not affect the title of a registered proprietor of land.”<sup>55</sup>
65. Whether or not the “every squatter has a fee simple” principle still applies to registered land, any such difficulty could perhaps be got around by a suitably voluminous and all-inclusive transfer or assignment of all title, rights, interests, claims, benefits etc. whatsoever in the subject land. But should this really be necessary? And what if this Schedule 6 paragraph 11 point – that aggregation of periods of possession requires some sort of conveyance or assignment by

---

<sup>54</sup> As per sections 2 and 3 Land Registration Act 2002, and section 1(1) Law of Property Act 1925 (as incorporated by section 133 of the 2002 Act)

<sup>55</sup> Jourdan & Radley-Gardner, *supra*, paragraph 22-06

the predecessor – is “sprung” on an Applicant at or close to a hearing? Could it be cured by execution of an assignment/transfer there and then? The predecessor in possession will frequently be there as a witness, and be generally ‘onside’ for A, but would they require independent advice before signing anything? And would such an assignment then ‘relate back’ to the original Schedule 6 application, or would a fresh application to the Land Registry be required? And if, as is also common, the predecessor is long dead, presumably any such assignment would have to be approved and executed by their personal representatives.

### **Possible solutions?**

66. Such complications might not always be apparent to applicants (and their lawyers) whose case is partly based on a seemingly solid statutory declaration or other evidence of prior possession. This might, however, suggest that this is the wrong analysis, and that the apparent problem may not in fact exist. There are at least two possible alternative analyses.
67. One is suggested by Ruoff and Roper<sup>56</sup>, who after initially taking the strict “Pass It On” view of paragraph 11(2), so that **“the application will need to be supported by evidence of a conveyance of the previous squatter’s unregistered fee simple title in the land to the successor”**, then suggest that:
- “it is also arguable that such a conveyance may be implicit.....from the terms of the transfer; for example if the adjoining land formed part of the curtilage of the registered estate being transferred and that estate was defined in the transfer by reference to a postal address which prima facie encompassed the adjoining land.”**
68. It might be thought that this is tantamount to the argument, for now rejected (by Vos J. in *Site Developments*), that the general words of section 62 Law of Property Act 1925 could carry with them some title to or interest in an additional piece of land. On one view, the prior possession of an additional piece of land might very well, as a matter of language, be thought to be at the very least an “advantage..enjoyed with” the main land under s62(1), or an “interest subsisting for the benefit of the estate” which vests on registration of the main title under section 11(3) Land Registration Act 2002. And if, as argued above, a mere prior period of possession of registered land is not actually an “estate in” that land at all, but merely a potential statutory application right, the force of the “section 62 can’t convey land” objection is

---

<sup>56</sup> At paragraph 33-019

slightly diminished.

69. It may not however be necessary to renew this argument before a higher court if the same outcome can be achieved as a matter of the *construction of the transfer*, as Ruoff and Roper appear to put it. This was the approach taken in two very recent FTT decisions<sup>57</sup>. In *Gowdy v. Leysan*<sup>58</sup>, it was held that there had been an implicit conveyance by the predecessors' executors of any "estate" in the disputed land, along with the transfer of the main title, where that land was fenced in as part of the curtilage of the main property, physically part of the property known by the postal address in the transfer, and there was nothing in the transfer to indicate that the disputed land was *excluded*. In *Gray v. Tusz*<sup>59</sup>, a similar implication was made where the predecessor had supplied a statutory declaration intended to support a future application by her purchaser, the fixtures and fittings sold included a shed on the disputed land, and there was no possible reason or intention for her to retain the disputed land separately.
70. This approach might face the possible objection that a TR1 transfer of registered land, made by reference to a numbered title, leaves little scope for the implication of a transfer of something else (an "estate" or other interest in additional land) which is by definition *not* within that title. Whether the predecessor's enjoyment of, rights or "estate" in such additional land might qualify as an "interest" which "vests" on registration<sup>60</sup> under section 11(3) Land Registration Act 2002 remains open to argument.
71. The other alternative is simpler. Schedule 6 paragraph 11, which is sub-headed "Meaning of 'adverse possession' ", begins at 11(1) by importing the general law, subject only to the effect of section 96:

"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."

So why does that not simply import the general law, applicable to unregistered land and pre-LRA 2002 claims under the Limitation Act, on the ability to aggregate; so that "successive squatters can take over from each other

---

<sup>57</sup> *Gray v. Tusz* [2026] UKFTT 00295 (PC), Judge Ewan Paton; *Gowdy v. Leysan* [2026] UKFTT 00451 (PC), Judge Michael Michell.

<sup>58</sup> At paragraphs 61 to 65, citing Ruoff and Roper, above.

<sup>59</sup> At paragraphs 16-21, and 79; on the assumption, not expressly concurred in, that it was necessary to establish this.

<sup>60</sup> In the manner of the former r. 251 Land Registration Rules 1925, headed "Registration vests appurtenances", which included those appurtenances "enjoyed therewith".

without the need for a deed or for writing<sup>61</sup>? Why can't Schedule 6 applicants likewise "Just Add Up"? The various statutory hoops and hurdles to adverse possession applications introduced by Schedule 6 come later in the process, and are not relevant to the threshold issue of whether there is a sufficient period of adverse possession to entitle the application to be made.

72. Paragraph 11(2) begins with the words:

"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..."

73. That is arguably, as drafted, an *additional* category of aggregated adverse possession (the applicant who has an express conveyance or assignment of something from a predecessor) – *adding* "Pass It On" cases to the general "Just Add Up" principle imported from the general law. It does not have to be read as an exhaustive definition.

74. It is true that the Law Commission's discussion in the Report might have suggested otherwise. Is, however, that discussion vitiated as a guide to interpretation of the statute by their failure to consider "Give It Up" - the distinction between hostile inter-possessor eviction and peaceful "relinquishment", particularly in the common "additional strip" type of case mentioned above?

75. I will leave those questions to be further considered, argued and answered by others.

(c) Ewan Paton, 2026. All errors and omissions are my own, and all views personal only.

---

<sup>61</sup> *Haandrikman v. Heslam*, supra, above per UT Judge Cooke.

# **NINE-TENTHS OF THE LAW: ADVERSE POSSESSION AND TENANT ENCROACHMENT IN THE MODERN WORLD**

## **PART 2 – “ADDING ON” – TENANT ENCROACHMENT**

### **JAMIE SUTHERLAND, FALCON CHAMBERS**

1. Imagine that you are the tenant of a flat on a long lease. You have some friends round, and, as it is such a lovely summer evening, you spontaneously decide to go out on to the adjacent flat roof for a drink. It's great fun, so next time you have friends round, you've cleaned the flat roof up a little, and you do it again. Soon you've put a garden table and chairs out there. You start putting plant pots out there. After a while, you put a fence round the edge of the flat roof. You store your bicycle out there. Before you know it, years have passed. The flat roof has become your roof terrace.
2. But it turns out that the flat roof isn't included as part of the demised premises in the lease of your flat. Can you be evicted from the flat roof? Or, given that you've been in possession of it for so many years, can you claim title to it by adverse possession, or add it to the demise under your lease? Does it make a difference if the flat roof belongs to your landlord, or belongs to the freeholder of the adjacent building? Does it make a difference if the flat roof falls within a registered title? Do you need to apply for adverse possession under Schedule 6 to the Land Registration Act 2002 (“the LRA 2002”)?
3. These types of questions arise frequently, and not only in the context of flat roofs. Tenants have taken possession of all types of property outside their demised premises, and have used it for all types of purposes: loft spaces, gardens, building plots, houses, workshops, offices, acres of agricultural land, and gigantic ponds on commercial fish farms.
4. From at least the eighteenth century onwards, the courts have developed a doctrine to deal with such situations, known as tenant encroachment, or accretion to a lease. By this doctrine, a tenant who takes possession of land outside the demised premises can add it to their lease, so that they will be entitled as against their landlord to hold the additional land along with the demised premises until the end of their lease, but so that the landlord will be entitled to recover possession of the additional land along with the demised premises at the end of the lease.
5. There are in fact two types, or species, of encroachment, which operate in two different circumstances:
  - a. firstly, if a tenant encroaches on to land outside his demise, but belonging to his landlord, there is a rebuttable presumption that the land is occupied as an addition to the demised premises. After a sufficient period has passed – and I will consider in due course whether that is the period applicable to claims for adverse possession – the tenant will be entitled to hold the additional land as an annex to the demised premises until the end of his lease, and the landlord will be unable to evict him until then. I will call this first species of the doctrine “encroachment against the landlord”;

- b. secondly, if a tenant encroaches on to land outside his demise, but not belonging to his landlord, there is a rebuttable presumption that the land is occupied as an addition to the demised premises, and that the tenant has taken possession of it on behalf of his landlord. So, if possessory title is acquired against the third party owner of the additional land by adverse possession, that possessory title will belong to the landlord rather than the tenant. The tenant is nevertheless entitled, as against the landlord, to occupy the additional land along with the demised premises until the end of his lease, at which point the landlord will be entitled, as against the tenant, to take possession of the additional land, along with the demised premises. I will call this second species of the doctrine “encroachment against a third party”.
6. The doctrine of encroachment has been developed by judges over the years in a piecemeal, haphazard, and sometimes inconsistent fashion. In *Whitmore v Humphries* (1871) LR 7 CP 1, at 4, Willes J called it ‘a branch of the law which involves considerations of some nicety’. In *Smirk v Lyndale Developments Limited* [1975] 1 Ch 317<sup>62</sup>, at 323G, Sir John Pennycuik V.-C. famously said that the law of encroachment ‘has got into something of a tangle’. Lord Justice Neuberger, as he then was, said in *Tower Hamlets LBC v Barrett* [2005] EWCA Civ 923, [2006] 1 P. & C. R. 9, at [82], that ‘the basis of the doctrine is somewhat obscure and confused’; and, at [112], that the doctrine is one ‘whose unsatisfactory nature is plain’.
  7. I won’t promise to untangle the doctrine with such nicety as to render its nature satisfactory, but I will trace its development, note some of its characteristics, consider its rationale and basis, and discuss its continued role in the modern law of real property.
  8. This is an exciting time to be considering the doctrine of tenant encroachment. In the 2011 case of *Secretary of State for Justice v Chau Ka Chik Tso* [2011] HKCFA 86, a very distinguished panel of the Hong Kong Court of Final Appeal unanimously allowed a claim by tenants to have added land to their lease by encroachment, but the judges were split 3:2 as to the legal basis of the doctrine. The majority considered that encroachment was a type of adverse possession, and operated within the law of limitation. The minority considered that encroachment was based on estoppel.
  9. Of course, *Chau Ka Chik Tso* is not binding in England and Wales, and there has been no binding decision in this jurisdiction since that case as to the proper analysis of encroachment. However, among academics, the minority view in *Chau Ka Chik Tso* has been preferred, including in an article by Professor Malcolm Merry in 2012<sup>63</sup> and an article by Dr Emma Lees in 2015.<sup>64</sup> More recently, a string of three decisions in 2025 from the First-tier Tribunal (Property

---

<sup>62</sup> This is the report of Pennycuik V.-C.’s first instance decision alongside the Court of Appeal decision. The first instance decision was earlier reported at [1974] 3 WLR 91.

<sup>63</sup> Merry, M. “Adverse Possession and the principle of encroachment: *Secretary for Justice v Chau Ka Chik Tso*”, [2012] 76 Conv 333.

<sup>64</sup> Lees, E. “Encroachment and Schedule 6 LRA 2002: Unknotting the Tangle”, [2015] 79 Conv 112. Dr Lees’ article discusses in depth the extent to which encroachment interrelates with Schedule 5 to the LRA 2002.

Chamber) (Land Registration) (“the FTT”) have all followed the minority view in *Chau Ka Chik Tso*, and have also considered how encroachment should be dealt with under the LRA 2002.

10. Before looking at *Chau Ka Chik Tso* and the recent FTT decisions, however, let us look back at the history and development of the doctrine of encroachment, and identify some of its key characteristics. Readers who are less historically curious, or more pressed for time, may wish to pass over the next section, noting only that the leading nineteenth-century case on encroachment is *Kingsmill v Millard* (1855) 11 Exch. 313 and that the leading twentieth-century case is the first instance decision of Pennycuik V.-C. in *Smirk v Lyndale Developments Limited* [1975] 1 Ch 317.<sup>65</sup>
11. This paper deals with the following topics:
  - a. the history and development of the doctrine, at paras 12-54;
  - b. the application of the doctrine to all types of land, not only waste, at paras 55-60;
  - c. the presumption of encroachment being rebuttable, at paras 61-76;
  - d. the doctrine of encroachment applying without the need for possession to be adverse, at paras 77-81;
  - e. the required degree of proximity between the demised premises and the encroached land for the presumption to apply, at paras 82-92;
  - f. the rationale of the doctrine, at paras 93-95;
  - g. the basis of the doctrine of encroachment as between landlord and tenant, at paras 96-126, including discussion of *Chau Ka Chik Tso*;
  - h. the basis of encroachment and the LRA 2002, including discussion of the recent FTT decisions, at paras 127-155;
  - i. encroachment on land belonging to third parties, at paras 156-179
  - j. encroachment where there are successive tenancies of the demised premises, at paras 180-186;
  - k. possession of encroached land by someone other than the tenant, at paras 187-191;
  - l. encroachment as regards leasehold covenants and rent review, at paras 192-194;
  - m. conclusions and practical takeaways, at paras 195-200.

### **The development of the doctrine from the eighteenth century to the early 2000s**

12. Two of the earliest reported cases considering issues of encroachment are from the Summer Assizes on the Oxford Circuit in 1795, and demonstrate that there was a strong judicial scepticism, at least to the second type of encroachment, in its early stages of development. When those courts of assize sat in Stafford, the case of *Doe d. Colclough v Mulliner* (1795) 1 Esp 460 came before Lord Kenyon. In that case, a tenant had encroached on to waste land adjoining the demised premises, but not belonging to his landlord, and used it as garden ground. When the lease ended, the tenant gave up possession of the demised premises, but not of the additional land, and the landlord brought an action of

---

<sup>65</sup> Although Pennycuik V.-C.’s decision was overturned in the Court of Appeal on a narrow factual ground, his summary of the law was approved by the Court of Appeal, per Lawton LJ at 337.

ejectment to take possession of the additional land from the tenant. Lord Kenyon dismissed the claim, with the report stating, at 460-461, that:

‘Lord Kenyon revolted at the idea that the tenant could make the landlord a trespasser; which, he said, would unavoidably be the case, if the landlord could recover in this ejectment. His Lordship laid it down as clear law, that if a tenant inclose part of a waste, and is in possession thereof so long as to acquire a possessory right to it, such inclosure does not belong to the landlord...’

13. When the 1795 Summer Assizes on the Oxford Circuit moved to their next stop, Shrewsbury, another landlord brought an action of ejectment against a tenant who had enclosed two parcels of land on a common neighbouring the demised premises, and had refused to give up the enclosures at the end of the tenancy. That case, *Doe d Challinor v Davies* (1795) 1 Esp 461, came before Baron Thomson, who – like Lord Kenyon before him – was clearly sceptical of any suggestion that the tenant had taken possession of the encroached land on behalf of his landlord, as an addition to the demised premises. However, Thomson B allowed the landlord’s claim, upon previous decisions of other judges being cited to him. The report states, at 461:

‘The learned Judge intimated a strong opinion against the plaintiff in this case; but Mr Leycester mentioning that it had been admitted in a case before Perryn, Barron, at Hereford..., that encroachments by tenants were for the benefit of their landlords; and that the same doctrine had been recognised by Heath and Buller, Justices, upon this circuit: his Lordship, out of deference to such high authorities, declined to nonsuit the plaintiff, which he otherwise would have done; and the plaintiff obtained a verdict.’

14. By 1795, then, judges such as Lord Kenyon and Thomson B remained reluctant to apply the doctrine of encroachment, but it had clearly begun to be recognised in the courts.
15. In the subsequent case of *Bryan d. Child v Winwood* (1808) 1 Taunt 208, the doctrine was recognised as applying where the tenant had encroached on to land belonging to his landlord. In that case, the tenant had spent more than thirty years in occupation of land outside the demised premises which the landlord contended belonged to him. When the tenancy ended, and the landlord sought possession of the additional land from the tenant, Baron Graham directed the jury that, if the enclosure had been made subsequent to the date of the lease, it must be presumed – and more especially so if they found that the enclosed land belonged to the landlord – that it had been taken in as part of the demised premises. The jury found a verdict for the landlord, who recovered the additional land, and an appeal to the Court of Common Pleas was dismissed.

### *Formulation of the principle*

16. As the nineteenth century progressed, the presumption of encroachment became firmly established. In *Doe d Lewis v Rees* (1834) 6 C. & P. 610, Baron Parke<sup>66</sup> said, at 610:

‘It is clearly settled that encroachments made by a tenant are for the benefit of his landlord, unless it appear clearly, by some act done at the time of the making of the encroachments, that the tenant intended the encroachments for his own benefit, and not to hold them as he held the farm to which the encroachments were adjacent.’

17. Parke B’s general statement of principle here recognises that encroachment involves a presumption that a tenant occupies additional land for the benefit of his landlord, which could be rebutted by evidence showing that the tenant occupied the land for his own benefit, and so could acquire his own possessory title in it, to the exclusion of his landlord. In *Doe d. Lloyd, Lord Mostyn v Jones* (1846) 15 M. & W. 560, the presumption was not rebutted, in circumstances where the defendant tenant had purported to convey the additional land to his son, but the plaintiff landlord had not been informed of the conveyance, and the son had not gone into possession of the additional land, which remained with his father. Alderson B said, at 586:

‘The presumption of law being that the tenant incloses for the benefit of his landlord, it is for the defendant to rebut that presumption. Does he rebut it, by shewing a secret conveyance by the tenant to his son, which is not followed by possession? All the public and open acts which appear in this case are such as would induce the landlord to suppose that the presumption was applicable; and the conveyance affords no answer to it.’

18. On the other hand, in *Doe d Baddeley v Massey* (1851) 17 Q.B.R 373, the presumption of encroachment was rebutted, and the tenant was held to have taken possession of the additional land in his own right. In that case, the tenant had asked the landlord for permission to build on additional land outside the demised premises belonging to the landlord; the landlord had declined to give such permission, and told the tenant that if he built there, he must do so on his own account. While the presumption of encroachment was thus rebutted, and the tenant built on the additional land and occupied it more than the limitation period of twenty years then in force, the tenant did not obtain his own possessory title to it, by virtue of certain provisions of the Real Property Limitation Act 1833 and the Real Property Limitation Act 1837, given that the landlord claimed under a mortgage.

---

<sup>66</sup> Parke B would also give an important judgment in the seminal case of *Kingsmill v Millard* (1855) 11 Exch. 313, while he remained a Baron of Exchequer and before his elevation to the House of Lords as Lord Wensleydale.

19. We can begin to see that the presumption of encroachment could operate in circumstances where the tenant might otherwise be able to bar his landlord's rights to the additional land by expiry of the limitation period, and so claim possessory title to the additional land in his own right by adverse possession.<sup>67</sup> The Real Property Limitation Act 1833 had introduced a limitation period of twenty years within which actions must be brought to recover land from a person in adverse possession. Twenty years remained the limitation period for actions to recover land, until it was shortened to twelve years by the Real Property Limitation Act 1874. That twelve-year period was re-enacted in the Limitation Act 1939 and then again as section 15 of the Limitation Act 1980 ("the LA 1980"), which continued to apply to cases of adverse possession of registered land until the coming into force of the LRA 2002 on 13 October 2003, and which continues to apply to cases of adverse possession of unregistered land up to the present day.
20. Returning to our survey of the historical cases, the statute of limitations was referred to in argument in *Andrews v Hailes* (1853) 2 E. & B. 349. In that case, the defendant tenant had been granted a yearly periodic tenancy of a bakehouse, barn and stable, which had continued for 23 or 24 years. More than twenty years before the action was brought, the tenant had built another bakehouse and offices on a portion of waste land on the other side of the road from the demised premises. In July 1850, the plaintiff landlord gave the tenant notice to quit the demised premises and the additional land, and the tenant gave up the demised premises but not the additional land. The landlord brought an action of ejectment. The tenant claimed to be entitled to the additional land in his own right, having enjoyed possession of it for over twenty years, but the landlord obtained a verdict in his favour at the Assizes, which was upheld on appeal.<sup>68</sup> In the appeal court, Lord Campbell C.J. said, at 353-354:

'I am of opinion that the verdict entered for the plaintiff must stand. 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. I do not adopt the doctrine that the tenant steals for his landlord, and that therefore the landlord, at the end of the demise, is entitled to claim the stolen property; but I think that, when the property is taken and used as part of the

---

<sup>67</sup> "Adverse possession" had a different sense under the Limitation Act 1623 and prior to the enactment of the Real Property Limitation Act 1833, but is used here in the usual modern sense in which it has been understood since then. See further Jourdan and Radley-Gardner, *Adverse Possession*, Second Edition (2011), chapter 2, especially paras 2.15 and 2.49 to 2.51.

<sup>68</sup> In his judgment on appeal at 354-355, Coleridge J identified several factors which he considered could rebut the presumption of encroachment, including that the additional land was used for a different trade from that carried out upon the demised premises. However, in the subsequent case of *Kingsmill v Millard* (1855) 11 Exch. 313, during argument, Alderson B considered that use of the additional land for different purposes from those carried out upon the demised premises would carry little weight in rebutting the presumption.

holding, the tenant can as little dispute the title to it as he can dispute the title to any other part of the premises. The strange doctrine, as to stealing for the benefit of the landlord, originated in those cases where the landlord was lord of the manor, and the tenant encroached upon the waste. In such cases it might well be presumed that the tenant approved for the benefit of the lord who had a right to approve: but the idea that he could steal the land of another for his landlord is revolting to me, as it was to my predecessor Lord Kenyon. In the present case, it appears that the defendant got possession of the encroachment by virtue of being tenant of the demised premises, and that he occupied it as part of these premises. They were adjoining; for there was nothing intervening but the road. The manner in which the property was rated goes for nothing, as there was no evidence that the plaintiff was aware of it.'

21. Lord Campbell C.J.'s judgment evidences a continuing judicial discomfort with landlords acquiring title to third party land by virtue of their tenants' encroachment, echoing the sentiments of Lord Kenyon which we have noted from *Doe d Colclough v Mulliner* (1795) 1 Esp 460. However, unlike Lord Kenyon, and in line with authorities since then, he was prepared to find that, as between landlord and tenant, the landlord would be entitled to possession of encroached third party land from the tenant at the end of the tenancy of the demised premises.<sup>69</sup> He did not see encroachment on third party land so much as being for the benefit of the landlord, as against the third party, but rather as being an annexation by the tenant to the demised premises, so that the landlord would be entitled to recover possession of the additional land at the end of the tenancy.
22. Lord Campbell CJ also referred to the doctrine having been applied in cases of encroachment on to waste by tenants of the lord of the manor. Under the manorial system of land ownership which had existed historically<sup>70</sup>, the waste of the manor was land not under the direct cultivation of the lord of the manor or of his tenants, but over which his tenants could exercise common rights of grazing their animals. The lord of the manor would be entitled to "approve" parts of the waste, by enclosing them for his own use or for that of particular tenants, and tenants could also encroach on to the waste themselves. However, Lord Campbell C.J. in *Andrews v Hailes* recognised that the doctrine of tenant encroachment, by which a tenant could add land to their demise by

---

<sup>69</sup> During argument in *Andrews v Hailes* on appeal, Coleridge J noted at 353: 'There have been I believe several cases in which encroachments, made on the land of third persons, have as between landlord and tenant been held to belong to the landlord, but I do not know that they have been discussed in banc, or got into the books of reports.'

<sup>70</sup> At least in some parts of the country; the manorial system was presumed to apply more generally as the common law developed: see *Gadsden and Cousins on Commons and Greens*, Third Edition (2020) at para. 1.07.

encroachment, was of general application, and not limited to waste of the manor.

23. Indeed, in *Kingsmill v Millard* (1855) 11 Exch. 313, Baron Parke<sup>71</sup> confirmed, among other matters, that tenant encroachment was not limited to cases involving waste land, in a general statement of the doctrine that has made *Kingsmill v Millard* one of the seminal authorities on tenant encroachment: judges in many subsequent decisions have begun their review of the authorities with the decision of Parke B in that case.<sup>72</sup>

### *Kingsmill v Millard*

24. The facts of the case are these. One Kingsmill had demised two cottages and adjoining garden ground to one Sheppard in 1799. In 1806, Sheppard assigned the lease to Robbins. In around 1815, Robbins inclosed a strip of waste land between the garden fence and the adjoining highway. In 1816, Robbins assigned the lease to Curtis, but continued to occupy the strip himself. In 1822, Robbins purported to convey the strip to Curtis as freehold, and Curtis built two further cottages on it. The landlord tried to sell some land in 1848, including the two new cottages, but Curtis objected. In 1854, the lease expired, by which time the defendant Millard had succeeded to the tenancy under Curtis's will. The plaintiff landlord Kingsmill (successor to the original Kingsmill) sought possession. At first instance, the judge left the jury to find whether the enclosure of the strip was made for the tenant's own benefit or for that of his landlord; the jury found that it was made by Robbins for his own benefit, and then conveyed to Curtis separately from the tenancy. On appeal, the case was remitted for a retrial with a new direction.

25. Parke B said, at 318-319:

'The rule must be absolute for a new trial. 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 [in *Andrews v Hailes*], 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,

---

<sup>71</sup> Baron Parke, later Lord Wensleydale, had also given a general statement of the doctrine of encroachment in *Doe d Lewis v Rees* (1834) 6 C. & P. 610.

<sup>72</sup> See, e.g., the first instance judgment of Pennycuik V.-C. in *Smirk v Lyndale Developments Limited* [1975] 1 Ch. 317, the leading twentieth century case on encroachment, at 323H.

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. In this case there are certainly circumstances to be considered by the jury, as to the intent of the tenant to use the encroachment unconnected with the enjoyment of the demised premises. The tenant also makes a conveyance of the encroachment, but as the landlord was not informed of it, it cannot affect him; for he would naturally believe that the tenant intended to hold it with the farm, and would give it up at the end of the term...'

26. Parke B might have become somewhat carried away in his general statement of the principles, going beyond what was necessary for the case before him, and later cases have introduced some limits, which I will explore later. For example, while the additional land need not be immediately adjacent to the demised premises for the presumption of encroachment to apply, it should generally be sufficiently close to the demised premises so that the tenant's opportunity to take possession of it can be attributed to his occupation of the demised premises;<sup>73</sup> and it is questionable to what extent the presumption can be retrospectively rebutted, rather than rebutted prospectively in respect of ongoing possession.<sup>74</sup>
27. Nevertheless, as a general statement of the doctrine of encroachment, Parke B's judgment in *Kingsmill v Millard* has been endorsed in later decisions, including, as we shall soon see, the judgment of Sir John Pennycuik V.-C. in *Smirk v Lyndale Developments Limited* [1975] 1 Ch. 317.

### *Whitmore v Humphries*

28. In considering the degree to which encroachment may be related to the doctrine of adverse possession, we come next to *Whitmore v Humphries* (1871) L.R. 7 C.P. 1.<sup>75</sup> In that case, a cottage and garden adjacent to a common had been demised in 1812. In 1835, the tenant asked the landlord for permission to enclose an adjoining piece of common land, belonging to the landlord. The landlord gave oral consent, and the tenant then built a new house, partly on the demised premises and partly on the enclosed piece of common. No additional rent was paid. When the lease of the cottage and garden determined, the landlord sought possession of everything, including the new house built partly

---

<sup>73</sup> See, e.g., *Tower Hamlets LBC v Barrett* [2005] EWCA Civ 923, [2006] 1 P. & C. R. 9, per Neuberger LJ at [31] and [109].

<sup>74</sup> See, e.g., *Tower Hamlets LBC v Barrett* [2005] EWCA Civ 923, [2006] 1 P. & C. R. 9, per Neuberger LJ at [88]-[91], and the discussion in Jourdan and Radley-Gardner, *Adverse Possession*, Second Edition, 2011, at paragraphs 25.23 to 25.26.

<sup>75</sup> *Earl of Lisburne v Davies* (1866) LR 1 CP 259, decided a few years earlier, was also relevant on this question, and reference will be made to it as appropriate.

on the additional land. At first instance, it was held that the landlord was entitled to the land initially demised by the lease, including the portion of the new house built on the demised garden land, but was not entitled to the portion of the house built on the additional piece of common land. The oral consent of the landlord was taken to be a tenancy at will, which would be deemed to expire after one year under section 7 of the Real Property Limitation Act 1833, so that time had started to run against the landlord from then and his title was barred.

29. On appeal, judgment was given for the landlord for the possession of everything, including the additional piece of common land and the portion of the house built upon it. Willes J considered that the presumption of encroachment applied whether or not the encroachment was made with the assent of the landlord, and that the statute of limitations had nothing to do with it, saying, at 6-8:

‘... 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...

... In the case of *Earl of Lisburne v. Davies* [(1866) LR 1 CP 259] it was assumed that, if the case was to be treated as one of encroachment, the Statute of Limitations did not apply.<sup>76</sup> The case must be governed, if the statute applies to an encroachment on the landlord's land, either by the general provisions of the statute, or the peculiar provision of s. 7. If the general provisions of the statute 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.

Then with regard to the 7th section; that section assumes that the case referred to in it is one which falls within the general scope of the statute.

---

<sup>76</sup> No statute of limitations was expressly mentioned in *Earl of Lisburne v Davies* (1866) LR 1 CP 259, but it was pointed out that the presumption of encroachment would prevent a tenant mounting an adverse claim of his own (per Willes J at 265), and that the tenant would not acquire an absolute title to the fee (per Erle CJ at 264).

It deals with the case of an ordinary tenancy at will, and does not apply to this peculiar case.'

*Attorney-General v Tomline*

30. In *Attorney-General v Tomline* (1877) 5 Ch. D. 750, Fry J at first instance held that the principles of encroachment by a leasehold tenant applied equally to cases of encroachment by a copyhold tenant, and while his judgment was overturned on appeal<sup>77</sup> on a factual ground, his analysis of the principles was not undermined. He saw estoppel as one of the ways of explaining the doctrine, saying at 766-767:

'Another way in which the case has been put is this, that there is a personal incapacity on the part of the tenant to deny that the encroachment was part of his original holding. That view was thus expressed by Lord Campbell in *Andrews v. Hailes*: "... I proceed on what the civil law calls *exceptio personalis*, and the common law an estoppel, and say that the tenant cannot deny this." That is to say, he cannot deny that the land acquired by the encroachment was part of his original holding, and the same view is expressed by Mr. Justice Willes in his elaborate judgment in *Whitmore v. Humphries*, to which I have already referred. He says that the tenant is estopped from denying that the encroachment forms part of his holding, and he fortifies that observation by this, that the tenant is under an obligation to protect his landlord's rights with regard to fences, and that if he adds by encroachment he cannot say as against his landlord that he has made default in discharging that duty of maintaining the fences; and to allow him to say the encroachment was not part of the holding would be to allow him to set up that he had not performed that duty which rested upon him.'

31. Fry J also considered that the encroaching copyhold tenant could not acquire freehold title to the additional land by adverse possession relying on the statute of limitations, saying, at 783-764:

'It follows, in my opinion, ...that the *locus in quo* must be admitted to have been at some time an encroachment; and, it being an encroachment, I think I am not at liberty to give that full effect to the Statute of Limitations which I must have given to it, if it were not proved that the land had been an encroachment. I say that upon the authority of the principle laid down in *Whitmore v. Humphries*, where Mr. Justice Willes uses this language: "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... It follows obviously that the general provisions of the Statute of Limitations do not apply to it." I say that, there being an

---

<sup>77</sup> (1880) 15 Ch. D. 150.

encroachment adjoining a holding, I am not at liberty to give that full effect to the statute which it would have had if it had not been shewn that the land was an encroachment in the neighbourhood of an existing holding...'

32. The cases so far have mostly concerned claims by landlords to recover possession of encroached land from their tenants at the end of the term of the tenancy, which tenants sometimes sought to defend on the basis that they had acquired title to the land by adverse possession.<sup>78</sup>

### *Tabor v Godfrey*

33. However, *Tabor v Godfrey* (1895) 64 LJQB 245 was a case in which the tenant benefitted from the doctrine of encroachment during the term of his tenancy. In that case, in 1881, a landlord had built a terrace of ten houses fronting on to a road in Tooting, with the intention that all of the houses would have a right of way over a strip belonging to the landlord which ran behind their back gardens. However, the landlord's builder had fenced the back gardens of the central two houses so that they each enclosed the section of strip behind them. The tenant of one of the central houses, No. 40, had occupied the strip behind his house as part of his garden since 1881, and in 1895, the landlord claimed possession of it from him. The tenant claimed to have added the strip to his tenancy by encroachment, so that he was entitled to it until the end of his tenancy, or to have acquired title to it by adverse possession, since the twelve-year limitation period introduced by the Real Property Limitation Act 1874 had expired. Charles J held that the strip had been added to the tenancy by encroachment, and that the tenant was entitled to retain possession of it as part of the demised premises until the end of his lease. Charles J said, at 246:

'...I think twelve years have elapsed of occupation of this strip of land inconsistent with the user of it as a right of way; 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 [of limitations]. 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...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

---

<sup>78</sup> Although *Attorney-General v Tomline* (1880) 15 Ch. D. 150 was a claim by the Crown for an injunction and damages against the lord of the manor for exploiting minerals under the additional land, which the Crown alleged he was not entitled to do because it had acquired the land by adverse possession, and which the lord of the manor argued he was entitled to do because the land had been added to the copyhold by encroachment, so that the mineral rights were vested in him.

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. The principle is that he comes in and has it as part of his take, and although the lease excludes it, yet by the way in which the landlord has permitted him to occupy, the encroachment must be taken as included in the demise. I am therefore of opinion that the plaintiffs fail, and that the defendant is in the right as to the strip of ground, for by what has happened the landlord has indicated by the mode in which he has allowed the tenant to use it that the strip is included in the holding...'

34. By the end of the nineteenth century, then, we can see that the doctrine of encroachment was well-established, and that judges had been referring to it for some time as involving an estoppel, and not as operating by way of expiry of the relevant limitation period. An outlying case, *Lord Hastings v Saddler* (1898) 79 LT 355 appears to have held that the presumption of encroachment was limited in its application to waste land, but at least the report, if not the reasoning, is unsatisfactory;<sup>79</sup> it had long been held, including in *Kingsmill v Millard*, that the doctrine applied to land whether waste or not, and the presumption of encroachment in *Lord Hastings v Saddler* could have been rebutted by the fact that the additional land, being gardens on the mainland, was too far from the demised island.

*J.F. Perrott & Co. Limited v Cohen*

35. By the mid-twentieth century, we see continued reference being made to estoppel in cases of encroachment. In *J. F. Perrott & Co Limited v Cohen* [1951] 1 K.B. 705, a tenant had been granted a lease for a twelve-year term from 1936 to 1948, and had occupied adjoining land on which there were lavatories. The landlords discovered this in 1943, and protested via their solicitors. The tenant claimed the lavatories were part of his tenancy. The landlord's solicitor asked the tenant to withdraw this claim, and said he would be in touch with the tenant when he was in a position to make any proposition with regard to the lavatories. He never followed this up with the tenant, and when the lease terminated in 1948, the landlord brought a dilapidations claim against the tenant on the basis that the lavatories had not been left in the standard of repair required by the covenants of the lease. At first instance and on appeal, it was held that the tenant could not deny that the lavatories were included in the lease and subject

---

<sup>79</sup> Pennycuik V.-C. in *Smirk v Lyndale Developments Limited* [1975] 1 Ch. 317, at 328E-329C, declined to follow *Lord Hastings v Saddler*, and considered that something had gone wrong either in the judgment of Lord Russell C.J. in that case or in the report, as Lord Russell referred to matters having been put to the jury by Charles J in *Tabor v Godfrey* (1895) 64 LJQB 245, whereas *Tabor v Godfrey* appears to have been decided by Charles J sitting without a jury.

to the repairing covenants. Somervell and Cohen LJJ cited *Tabor v Godfrey*, and Denning LJ (as he then was) said, at 710:

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 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. The representation was an assertion which was equivalent to a promise or assurance that the terms of the lease should apply to the adjoining piece of land of which he was in possession and is binding on the principle which I endeavoured to state in *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] KB 130. Conversely, if a landlord should allow a tenant to occupy adjoining property, and by his conduct represents to the tenant that it is included in the demise, and the tenant acts on it by using it as such, the landlord cannot afterwards turn round and eject the tenant from it during the term of the lease. That was decided in *Tabor v. Godfrey*. Mr. Wooll, for the tenant, has said that there was no *consensus ad idem* because the landlords wrote a letter showing they did not agree to the use of the lavatories by the tenant; and that therefore there was no contract between them; but the answer to that argument is that it does not lie in the tenant's mouth to say it. He has successfully asserted all these years that the lavatories were included in the lease and he cannot now be allowed to go back on it. I know that this looks like treating an estoppel, almost, as if it were a cause of action, but it is habitually done in cases of waiver: see *Rickards (Charles) Ltd. v. Oppenheim* [1950] 1 KB 616, at 623<sup>80</sup>; and I see no reason why we should not do the same here.'

36. Denning LJ's particular reference to representation and reliance, in his discussion of estoppel as an element of encroachment, does not stand up to scrutiny in all cases, as where the landlord is not aware of the encroachment during the running of any limitation period, or during the term of the lease.<sup>81</sup> However, his statement that encroachment generally is based on a principle

---

<sup>80</sup> This is, of course, a reference by Denning LJ to another of his own judgments in the Court of Appeal.

<sup>81</sup> See Lord Scott of Foscote's discussion in *Chau Ka Chik Tso* at [115]-[118].

akin to an estoppel ties in with the earlier case law which we have considered, and was noted by Ribiero PJ in *Chau Ka Chik Tso* at [50].<sup>82</sup>

### *Smirk v Lyndale Developments Limited*

37. We come next to the leading twentieth-century case on encroachment, *Smirk v Lyndale Developments Limited*, in which Sir John Pennycuick V.-C.'s first instance judgment is reported at [1974] 3 W.L.R. 91, and then again alongside the Court of Appeal decision in the same case at [1975] 1 Ch. 317. Although the Court of Appeal reversed Pennycuick V.-C.'s decision, this was on one factual ground only, and his summary of the law of encroachment was approved.

38. Mr Smirk was a railway driver who was granted a service tenancy of a house in 1955 by the British Railways Board. The Board owned the terrace in which the house was situated, and also a strip of land running behind and parallel to the terrace of houses, separated from their rear gardens by a public footpath. Mr Smirk began occupying a plot on the strip immediately behind his house as garden ground in 1956, and had completed a fence around it by 1959. In 1967, the defendant, Lyndale, purchased the terrace of houses and the strip, and gave Mr Smirk a new rent book with some different terms from those contained in his original rent book. Lyndale subsequently obtained planning permission to build houses on the strip, and when the bulldozers approached in 1973, Mr Smirk issued proceedings claiming possessory title to the plots, or alternatively claiming to have added the plots to his tenancy. Pennycuick V.-C. held that Mr Smirk had been occupying the plot as an addition to his tenancy, but that his rights had terminated with the original tenancy upon the issue of the new rent book in 1967, and that sufficient time had not accrued since then to afford him new rights. On appeal, it was held that the issue of the new rent book simply varied the terms of the existing tenancy, and did not amount to a surrender and regrant: accordingly, Mr Smirk remained entitled to treat the plot behind his house as part of his tenancy.

39. Pennycuick V.-C. summarised the authorities on encroachment, and in an oft-quoted passage, made the following remarks, at 323:

'I turn now to the law applicable where a tenant takes possession of adjoining land - a tenant, during the currency of his tenancy, who takes possession of adjoining land belonging to his landlord. The law on this point, if I may respectfully say so, has got into something of a tangle.'

40. Pennycuick V.-C. began his discussion by referring to *Kingsmill v Millard*, saying, at 324:

---

<sup>82</sup> It may be that *Perrott v Cohen* can be seen as a case of estoppel by representation, as much as or more than as a case of encroachment: the lease was granted on 5 August 1936 for a term expiring on 23 June 1948, so that the twelve-year limitation period after which the tenant would be estopped from denying that the additional land was part of the demise (on Ribiero PJ's analysis in *Chau Ka Chik Tso*), or after which the tenant would have acquired leasehold title to the additional land by adverse possession (on Lord Scott's analysis in *Chau Ka Chik Tso*), might not have expired.

'It will be observed that in his judgment Parke B. in terms states that the presumption that the tenant has inclosed for the benefit of the landlord applies, irrespective of whether the inclosed land is part of the waste or belongs to the landlord; and indeed he uses the word "encroachment" as appropriate in either case. He then goes on to state in terms, following and agreeing what Alderson B. said in the course of the argument, that in order to displace the presumption there must be communication to the landlord. That decision of high authority seems to me to be in accordance with justice and common sense, and unless I were compelled to do otherwise by subsequent authority, I would certainly adopt it. I should add, as is perhaps obvious, as appears in some of the later cases, that the presumption may be rebutted by any form of express or implied agreement or, in some cases, as Parke B. says, by estoppel.'

41. Pennycuick V.-C. next recognises *Whitmore v Humphries* and *Tabor v Godfrey* as being consistent with *Kingsmill v Millard*. He also notes that in *Perrott v Cohen*, Somervell LJ and Denning LJ based their judgments on estoppel. He declined to follow *Lord Hastings v Saddler* and preferred the decision in *Kingsmill v Millard*.

42. Pennycuick V.-C. therefore applied the principle in *Kingsmill v Millard* and held that the plot was to be regarded as added to the tenancy; however, he then found that the supposed break in the tenancy on the issue of a new rent book in 1967 defeated Mr Smirk's claim. That second finding, as noted above, was overturned on appeal, but there was no challenge to Pennycuick V.-C.'s discussion of, or conclusion on, the issue of encroachment. Lawton LJ said at 337:

'... Pennycuick V.C. was required to consider in detail the law relating to encroachments by tenants on the land of their landlords. He described the law as being in something of a tangle, and untangled it in a way which has met with the approval of both the plaintiff's and defendants' counsel; on that aspect of this case there has been no dispute and, for my part, I accept Pennycuick V.-C.'s statement of the law as being correct.'

#### *The Tower Hamlets cases and Trustees of the Michael Batt Charitable Trust v Adams*

43. Moving towards the turn of the millennium, we come to one of the most prolific contributors to the development of encroachment, the London Borough of Tower Hamlets. In less than a decade, between 1996 and 2005, the local authority was party to two encroachment cases in the High Court, and another which reached the Court of Appeal.

44. In the first case, *Long v Tower Hamlets* [1998] Ch. 197, [1996] 3 WLR 317, Mr James Munby QC, as he then was, sitting as a Deputy High Court judge, dismissed two arguments advanced by the tenant's counsel seeking to confine the doctrine of encroachment, namely, that it was limited in application to waste, and secondly that it only applied if the tenant was estopped by active words or

conduct from denying that the additional land was part of his tenancy. Mr Munby QC referred to *Kingsmill v Millard* and *Smirk v Lyndale* and continued, at 204:

‘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.<sup>83</sup> 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.’

45. The next case involving the local authority, *Ali v Tower Hamlets London Borough Council* [1996] EGCS 193, was heard by Mr Jonathan Sumption QC, as he then was, sitting as a Deputy High Court Judge. Between 1990 and 1991, Tower Hamlets had built a five-storey extension on the end of a five-storey block of flats, adding an extra room to each end flat. Mr and Mrs Ali held a long lease of the ground-floor end flat which they had acquired by exercising the right to purchase. The council wrote to Mr and Mrs Ali offering to sell them the new room at the end of their flat, or allowing them to refuse it, in which case the council would incorporate it into the flat above or use the room itself, with an access from outside. To cut a long story short, Mr and Mrs Ali could not raise funding to buy the room, but the council connected it to their flat anyway, and Mr and Mrs Ali began using it. Around five years later, the Alis issued proceedings claiming to have added the room to their flat by encroachment.

46. Mr Sumption QC considered what he described as ‘a line of authority relating to encroachments by lessees and tenants which is probably best regarded as forming part of the law of proprietary estoppel’. Referring to *Perrott v Cohen*, he said:

‘Lord Justice Denning and, rather more cryptically, Lord Justice Somervell, rationalised what had originally been a rather arcane principle of the law of landlord and tenant as a form of, or akin to, estoppel by implied representation, and this is certainly the form in which the doctrine can most easily be accommodated within modern legal conceptions.’

47. On the facts, Mr Sumption QC found that the Alis were not entitled to claim the room as an annex to their lease by encroachment, because the presumption had been rebutted by the understanding between the parties that the Alis would have to pay for the room if they wished to add it to their lease. He did not refer

---

<sup>83</sup> Note the summary in *Smirk v Lyndale* itself, which referred to communication between the landlord and the tenant, e.g. at 330 per Pennycuik V.-C.

to the fact that the Alis had only had use of the room for around five years since it was built.

48. The third Tower Hamlets case, *Tower Hamlets London Borough Council v Barrett* [2005] EWCA Civ 923, [2006] 1 P. & C. R. 9 in the Court of Appeal, followed only a few years after the entirely separate High Court case of *Trustees of the Michael Batt Charitable Trust v Adams* (2001) 82 P. & C. R. 32. These two cases are among the very few reported decisions considering claims to have acquired a third party's land by adverse possession where the doctrine of encroachment on to that land by a tenant was said to have taken place.
49. In *Trustees of the Michael Batt Charitable Trust v Adams*, an appeal to the High Court, the disputed land formed part of farmland, adjacent to a house and garden. Until 1952, the house, garden, disputed land, and farmland all belonged to a Mr Forbes, but that year he sold everything to Mr Adams Senior, who then sold the house, garden, and disputed land to Brown & Wade Limited, while retaining the rest of the farmland. At that time, the disputed land and the rest of the farmland were all held under one agricultural tenancy, for which Mr Adams Senior continued to receive all the rent. In 1960, that tenancy terminated, and Mr Adams Senior let the rest of the farmland, but not the disputed farmland, to Mr Higgs. Mr Higgs, however, used the disputed farmland, and, after Mr Adams Senior conveyed the farmland to his son in 1987, Mr Higgs surrendered the farmland to Mr Adams Junior in 1988. The defendant charitable trustees had held paper title to the house, garden and disputed land since 1998. In these proceedings, Mr Adams Senior, in his capacity as Mr Higgs' former landlord, claimed to have acquired title to the disputed land by adverse possession through Mr Higgs' occupation, and by the presumption of encroachment.
50. Laddie J held that the claim failed. While Mr Higgs had been in factual possession, he did not have the intention to possess the disputed land. He believed it belonged to his landlord and that his landlord was allowing him to use it at will: he had no intention to exclude anyone or to possess it in his own right. Laddie J also held that the presumption of encroachment was only binding between landlord and tenant, and not on third parties, so that Mr Adams Senior could not acquire title by adverse possession against the owner of the disputed land through Mr Higgs' possession. Finally, Laddie J held that the presumption that title acquired by a tenant passes to his landlord only bites at the end of the tenancy, so that it was Mr Adams Junior, rather than Senior, who would have benefitted from the presumption, if it had bound third parties.
51. Encroachment on to third party land was considered again in *Tower Hamlets v Barrett* [2005] EWCA Civ 923, [2006] 1 P. & C. R. 9, a Court of Appeal case in which Neuberger LJ gave the judgment of the court. Tower Hamlets claimed possession from the Barretts of an area of land adjacent to the Palm Tree public house. The area belonged to the council, and the freehold of the pub had belonged for many years to the brewers, Trumans. The Barretts had taken a lease of the pub from Trumans in 1977, and thereupon installed a gate in the fencing around the area, and began storing items there; they also maintained

the fence. In 1980-1 and 1984-5, there had been unconcluded negotiations between Trumans and the council for the sale of the area to Trumans, and Trumans had written a without prejudice letter to the council acknowledging the council's title to the area in 1985. In 1993, the Barretts purchased the pub from Trumans. At first instance, the Barretts had been ordered to give up possession of the area to the council, but this was overturned by the Court of Appeal. It was held that the Barretts had encroached on the area from 1977 onwards, and that, by virtue of the presumption, they had therefore acquired possessory title for their landlord, Trumans, by 1989/1990; given that Trumans had not been in possession in 1985, their letter that year acknowledging title had not started time running again; finally, when the Barretts subsequently purchased the reversion to the tenancy of the pub from Trumans in 1993, there was a presumption that this included the reversion to the area, which had been added to their tenancy by encroachment.

52. At [30]-[31], Neuberger LJ considered that the doctrine was too well-established in case law to be overruled, at least in the Court of Appeal, even though none of the previous cases<sup>84</sup> appear to have been concerned in fact with encroachment on to a third party's land. Nevertheless, he expressed himself sceptical about the application of the doctrine, especially over land belonging to a third party, unless it was very close to the demised land and occupied by the tenant together with the demised land.
53. At [107]-[112], Neuberger LJ considered that practicality favoured extending the doctrine so that if the landlord sold the reversion to the tenant, this would include the reversion to land which had been added to the tenancy by encroachment. Additional land on which tenants have encroached usually adjoins the demised land, has been enjoyed with it, and should remain with it.
54. This survey of the history of encroachment has therefore brought us into the twenty-first century. There have been other cases since *Tower Hamlets v Barrett*, including *Chau Ka Chik Tso* in Hong Kong and numerous decisions in the FTT, but we will consider these shortly when we turn to examine the basis of encroachment, and – by reference to the FTT cases – its inter-relationship with the LRA 2002.

### **Encroachment not limited to manorial waste, but applies to all land**

55. Having traced the history of encroachment chronologically, I now turn to consider the doctrine thematically, and to identify some of its key characteristics.
56. The first characteristic to note is that the doctrine is not limited to manorial waste land, but can apply generally to all land.
57. In *Andrews v Hailes* (1853) 2 E. & B. 349, Lord Campbell C.J. considered, at 353-354, that the doctrine of encroachment had originated in cases where the landlord was lord of the manor, and the tenant had encroached upon the waste

---

<sup>84</sup> Apart from *Trustees of the Michael Batt Charitable Trust v Adams* (2001) 82 P. & C. R. 32, which Neuberger LJ considered.

of the manor, which the lord was entitled to “approve” or enclose, and that in such cases, the tenant might be presumed to have approved for the benefit of the lord.

58. However, in the leading nineteenth-century case of *Kingsmill v Millard* (1855) 11 Exch. 313, Baron Parke stated that the doctrine applied ‘whether the inclosed land is part of the waste, or belongs to the landlord or a third person’. *Kingsmill v Millard* was approved and applied in the leading twentieth-century case of *Smirk v Lyndale Developments Limited* [1975] 1 Ch 317, per Pennycuick V.-C. at 324F-G, 329C and 332G.<sup>85</sup>
59. Suggestions that the doctrine applies only to waste persisted in the cases, but can be confidently rejected. In the outlying case of *Lord Hastings v Saddler* (1898) 79 LT 355, the court appears to have held that the presumption of encroachment only applies to waste land, but Pennycuick V.-C. declined to follow that case in *Smirk v Lyndale* at 329C, noting at 328F that the case is ‘singularly unsatisfactory’. In one respect, Pennycuick V.-C. notes at 328H-329A that something appears to have ‘gone very seriously amiss’ in Lord Russell C.J.’s judgment in *Lord Hastings v Saddler*, or in the report, as Lord Russell C.J. refers to Charles J having referred matters to the jury in *Tabor v Godfrey* (1895) 64 LJQB 245, whereas Charles J appears to have tried the latter case sitting alone without a jury.
60. As late as 1996, the bold submission was made in *Long v Tower Hamlets London Borough Council* [1998] Ch. 197, [1996] 3 W.L.R. 317 that the doctrine of encroachment only applies to waste land, but Sir James Munby QC, as he then was (sitting at that stage as a Deputy High Court Judge), roundly rejected it, holding that *Kingsmill v Millard* and *Smirk v Lyndale* were clear and binding, and demonstrated that the principle applies whether or not the land encroached upon is waste.

### **The presumption of encroachment is rebuttable**

61. Whether or not the land encroached upon belongs to the landlord or to a third party, the presumption that the tenant possesses it as an annex to the demised premises, and on behalf of the landlord, can be rebutted.
62. In the early case of *Doe d. Lewis v Rees* (1834) 6 C. & P. 610, Baron Parke said at 610 that:
- ‘It is clearly settled that encroachments made by a tenant are for the benefit of his landlord, unless it appear clearly, by some act done at the time of the making of the encroachments, that the tenant intended the encroachments for his own benefit, and not to hold them as he held the farm to which the encroachments were adjacent.’
63. How can the presumption be rebutted, to demonstrate that the tenant holds the additional land in his own right, so that he may claim his own possessory title to it?

---

<sup>85</sup> As already noted, Pennycuick V.-C.’s own summary of the law was approved by the Court of Appeal in the same case at [1975] 1 Ch 317, per Lawton LJ at 337G, although his decision was overturned on a narrow factual ground.

64. Coleridge J, in *Andrews v Hailes* (1853) 2 E. & B. 349, made some remarks as to how he considered the presumption might be rebutted, at 354-355:

‘I have but little to add: but I think it important to observe that, in my opinion, the presumption is one depending on the inference to be drawn from the facts. It is the tenant's duty to preserve his landlord's boundary: if, at the end of the term, that boundary has been confused by enclosing adjacent ground, a very strong presumption arises that the enclosed land is part of the holding: and the tenant is not entitled to meet it by shewing that, though he occupied the enclosure as part of the holding, it was an encroachment. But, when it appears that the case is of this nature, all the facts must be weighed. The contiguity of the premises or their separation; the unity of occupation or not: all facts of that kind are to be weighed. If, for instance, the buildings on the encroachment had been occupied for the purpose of carrying on a trade quite unconnected with the occupation of the farm demised to the defendant, that would have been a fact to be weighed...’

65. In *Kingsmill v Millard* (1855) 11 Ex. 313, however, Alderson B considered that the fact that the tenant occupied the encroached land for the purposes of a different trade from that carried on upon the demised premises would not rebut the presumption. He said, in the course of argument, at 315-316:

‘In [*Andrews v Hailes*] my Brother Coleridge seems to have considered that the circumstance of the buildings on the encroachment being occupied for the purposes of a trade wholly unconnected with the occupation of the demised premises would be a fact to be weighed as rebutting the presumption, but in my opinion, it would not be entitled to much weight. It seems to me that the acts of the tenant to rebut the presumption should be such acts as in a manner set the landlord at defiance, for instance, if the tenant gave the landlord notice of a conveyance and he did not interfere: but if the landlord had no knowledge of it, what is there to undeceive him in supposing that the tenant occupies the waste as part of the holding?’

66. In my opinion, Alderson B's view is to be preferred. In order for the tenant to rebut the presumption, there must be some circumstance which would give the landlord notice that the encroachment was not to be considered as an addition to the demised premises: merely using the encroached land for another purpose may often be insufficient, but the tenant purporting to convey the encroachment to a third party, to the landlord's knowledge, often would be sufficient.

67. Indeed, a conveyance of the encroached land by the tenant has been considered as a means of rebuttal in several of the cases. However, it is important for the landlord to be aware of the conveyance. In *Doe d Lloyd, Lord Mostyn v Jones* (1846) 15 M & W 580, the tenant had conveyed the encroached

land to his son, but without notifying the landlord and without the son taking possession. Alderson B said at 586:

‘The presumption of law being that the tenant incloses for the benefit of his landlord, it is for the defendant to rebut that presumption. Does he rebut it, by shewing a secret conveyance by the tenant to his son, which is not followed by possession? All the public and open acts in this case are such as would induce the landlord to suppose that the presumption was applicable; and the conveyance affords no answer to it.’

68. In *Kingsmill v Millard* itself, the original encroaching tenant had made a conveyance of the additional land to his successor tenant, but this was not communicated to the landlord. Parke B said at 318-319:

‘if the tenant conveys [the additional land] 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. In this case there are certainly circumstances to be considered by the jury, as to the intent of the tenant to use the encroachment unconnected with the enjoyment of the demised premises. The tenant also makes a conveyance of the encroachment, but as the landlord was not informed of it, it cannot affect him; for he would naturally believe that the tenant intended to hold it with the farm, and would give it up at the end of the term...’

69. Another possible way to rebut the presumption would be for the tenant to show that he had purchased the encroached land from a third party, rather than the landlord. In *Earl of Lisburne v Davies* (1866) LR 1 CP 259, the encroached land had been enclosed by one of the tenant’s labourers over the course of around three years, and the tenant then paid him and took occupation of the land. In that case, it was held that the labourer had enclosed the land on the tenant’s behalf, and that the payment to him had been payment for his work in fencing the land, rather than payment for the land itself, so the presumption of encroachment was not rebutted. However, in other factual circumstances, a tenant who acquired the land from a third party other than the landlord may be taken not to be occupying the land as an addition to the tenancy, provided of course that the landlord was aware of how the tenant had acquired the land.

70. The presumption can also be rebutted by the landlord conducting himself in such a way as to show that the additional land is not being occupied as an annex to the demised premises. Indeed, in *King v Smith* (1880) 5 Ch D 750, Roxburgh J said, at 766-767, that the presumption could be rebutted:

‘... by proving that the landlord and the tenant so conducted themselves as to show that the landlord treated the encroachment as not enduring for her benefit.’

71. In *Doe d Baddeley v Massey* (1851) 17 Q.B.R 373, the tenant had asked for permission to build on adjoining land, but the landlord declined to give permission, stating that if the tenant built there, he must do so on his own account. The tenant did accordingly, and occupied the buildings on the additional land, and it was held that the presumption was rebutted.
72. Following his review of the authorities in *Ali v Tower Hamlets London Borough Council* [1996] EGCS 193, Mr Jonathan Sumption QC (as he then was), sitting as a Deputy High Court Judge, said:
- ‘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 otherwise will 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.’
73. At what stage can the presumption be rebutted? In *Kingsmill v Millard*, Parke B appeared to suggest at 318 that the presumption would apply up until such time as it had been rebutted, whenever that might be. He said:
- ‘... if the tenant has disclaimed his landlord’s title to the inclosure, from that time it will cease to be part of the holding... 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 the farm, yet circumstances may afterwards occur by which it may be severed from the farm’.
74. As we have seen, however, in his own earlier decision of *Doe d. Lewis v Rees*, Parke B had considered that rebuttal could be shown ‘by some act done at the time of making the encroachments’.
75. In the context of encroachment against a third party, in *Tower Hamlets LBC v Barrett* [2005] EWCA Civ 923, [2006] 1 P. & C. R. 9, Neuberger LJ (as he then was) considered that the presumption of encroachment could not be retrospectively rebutted after possessory title had been acquired against a third party: after the 12 year limitation period had expired with the tenant in possession of the additional land, either the landlord would be entitled to possession, assuming that the presumption applied, or the tenant would be entitled to possession, assuming that the presumption had been rebutted. The presumption could not be rebutted subsequently so that the 12 years’ possession already made out would give the tenant possessory title free of the landlord’s interest.
76. In my view, the correct conclusion is that the presumption can be rebutted prospectively, so that if it is rebutted, the tenant must make out the requisite period of adverse possession from then in order to be entitled to acquire his own possessory title to the additional land, outside and separate from his interest in the demised premises.

## Tenant's possession need not be adverse as against the landlord

77. Another key characteristic of the doctrine is that the presumption of encroachment can apply, and the tenant can acquire leasehold title of the additional land as against his landlord, without the tenant's possession needing to be adverse against the landlord.

78. In *Whitmore v Humphries* (1871) LR 7 CP 1, the tenant asked the landlord for permission to enclose a piece of common land belonging to the landlord, adjacent to the demised cottage and garden. The landlord gave his oral permission and the tenant built a house partly on the demised garden and partly on the enclosed common. It was held that in the Court of Common Pleas, on appeal, that the presumption of encroachment applied. Willes J said at 5-6:

'The rule is based upon the obligation of the tenant to protect his landlord's rights, and to deliver up the subject of his tenancy in the same condition, fair wear and tear excepted, as that in which he enjoyed it. There is often great temptation and opportunity afforded to the tenant to take in adjoining land which may or may not be his landlord's, and it is considered more convenient and more in accordance with the rights of property that the tenant who has availed himself of the opportunity afforded him by his tenancy to make encroachments, should be presumed to have intended to make them for the benefit of the reversioner, except under circumstances pointing to an intention to take the land for his own benefit exclusively. 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. It might be otherwise if the rule applied only to land belonging to the landlord, because in that case the assent of the landlord might be taken to create some new relation; but when it is considered that the rule is a general one, it does not appear that the fact of assent has any distinct bearing on its operation. The authorities point to the same conclusion as the nature of the rule itself. It is distinctly stated in the ruling of Graham, B., in the case of *Bryan d Child v Winwood* [(1808) 1 Taunt 208], that an encroachment may be with the lessor's consent, and it is clear from the report of the case of *Doe [d Colclough] v. Mulliner* in which Lord Kenyon is said to have protested against the doctrine of encroachment, that he was dealing there with an encroachment as existing independently of any question of assent or dissent by the landlord...

... 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...'

79. Brett J put matters very simply in *Whitmore v Humphries* at 9:

'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.'

80. If, however, the landlord can be interpreted as having given the tenant a mere licence to occupy the additional land, not as part of the demised premises, that will rebut the presumption, as the tenant will then occupy the land pursuant to the licence rather than as an addition to the demised premises. In *Ali v Tower Hamlets LBC*, Mr Jonathan Sumption QC held that the tenants, the Alis, had not acquired leasehold title to an extra room added to their flat by the local authority, as they had not accepted the local authority's position that they would have to pay for the room. He said:

'... The local authority's express position in the course of the negotiations of 1990 and 1991, which they have never abandoned, is, however, consistent only with the view that Mr and Mrs Ali are not leaseholders of the extra room but licensees. The gratuitous transfer of title to the extra room was the one thing which the local authority said that they were not prepared to contemplate.'

81. Overall, therefore, if the landlord consents to the tenant's occupation of the additional land, in a manner not inconsistent with the additional land being added to the demise, then the presumption of encroachment will apply.

### **The proximity of the additional land to the demised premises**

82. Another factor to be considered is how proximate the additional land must be to the demised premises in order for the presumption of encroachment to apply.

83. In *Kingsmill v Millard* (1855) 11 Exch 313, Parke B perhaps expressed himself too widely when he said of the presumption at 318 that:

'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.'

84. In fact, while the additional land need not be adjacent to the demised premises, the presumption will not apply if it is too far distant.

85. In *Andrews v Hailes* (1853) 2 E & B 249, the presumption was held to apply when the additional land was on the other side of a highway from the holding.

86. In *Earl of Lisburne v Davies* (1866) LR 1 CP 259, the tenant encroached on to four acres of land separated from the holding by a small river or stream called the Flur, together with a small strip of land on the far side of the Flur and a mountain fence. The Flur was sometimes a deep stream and sometimes so shallow that a child could walk across, but carts could not pass between the farm and the encroached land without crossing a bridge some distance away and passing through inclosures belonging to third parties. The presumption of encroachment was nevertheless held to apply, the distance not being sufficient to rebut it. Erle CJ said at 264-265:

'I take it also that Cae-Rhos, if it had been inclosed by the defendant, is sufficiently near to the boundary of his farm to fall within the decisions which have been referred to, and which have laid it down as clear law, that a tenant inclosing waste land contiguous or adjoining to land which he holds of another, does not thereby acquire an absolute title to the fee, but is presumed to do so for the benefit of his landlord, so that it should go at the end of the term to the landlord as part of the holding. I think the distance here is not great enough to found a distinction. In some of the cases, the intervention of a road has been held to be immaterial. A small river intervenes here between the farm and the inclosed piece of land. But all depends upon the nature of the river. The intervention of a stream like the Rhine or the Rhone would probably rebut the *prima facie* presumption, when a small insignificant stream would not.'

87. Willes J said at 266:

'...The other part of the defendant's argument may be put thus. As the land inclosed is not contiguous, in the sense of being conterminous with his holding, the general presumption ought not to apply. No doubt, an incroachment may be at such a distance that it can in no sense be said to be connected with the occupation of the land under the landlord. If the land incroached belonged to the same landlord, the presumption might not apply. It would apply or not according as it might appear that the land was so near to the holding that by reason of that proximity the tenant gained the opportunity of annexing it, and the fact that the circumstances of the enjoyment might induce the landlord to wink at the incroachment. But here, there being nothing but the river and a strip of waste interposed

between the defendant's farm and the inclosure, there is nothing to remove the land to such a distance as to make that circumstance weigh against the ordinary presumption.'

88. Montague Smith J said at 268:

'I entirely agree in the conclusion of fact which has been arrived at by the rest of the Court. Mr. T. Allen says that to bring the case within the presumption upon which the plaintiff's claim rests, the incroachment must be contiguous in the sense of being immediately adjacent to or communicating with the land held of the landlord. I think the law is not so. Distance may be an element in forming the presumption, but is not, perhaps, the most important one. In many cases the question does not depend upon the relative distance, but upon the whole of the circumstances under which the incroachment is made. In that way only can the element of distance form a material ingredient.'

89. I would suggest that distance is important insofar as it goes to whether or not the tenant can be taken to have occupied the encroached land by reason of being tenant of the holding. If the encroached land is so far distant from the demised land that the tenant's opportunity to possess it cannot be taken to be connected to his occupation of the demised premises, then the presumption may not apply.

90. In *Lord Hastings v Saddler* (1898) 79 LT 355, a tenant had been granted a lease of an island, and occupied two parcels on the mainland, between half a mile and a mile from the island. It appears from the report of the case that Lord Russell CJ and Wills J rejected the application of the doctrine of encroachment on the basis that it only applied to waste, although that had been held to be incorrect as early as *Kingsmill v Millard* (1855) 11 Exch 313.<sup>86</sup> However, another basis on which the presumption could have been held not to apply was that the encroached parcels on the mainland were too distant and separate from the demised island.

91. In *Tower Hamlets LBC v Barrett* [2005] EWCA Civ 923, [2006] 1 P. & C. R. 9, Neuberger LJ was considering a case of encroachment on land immediately adjacent to and adjoining the demised pub. In his general discussion of the principles of encroachment, he considered that the land subject to the presumption of encroachment should be close to the demised premises. He said, at [31]:

'I would be sceptical about the application of the doctrine (especially in relation to land owned by a third party), unless the land to which possessory title is acquired is very close to the demised land and occupied by the tenant together with that demised land. That appears to

---

<sup>86</sup> See further the discussion on this unsatisfactory point in *Lord Hastings v Saddler* above, where I consider the principle that the doctrine is not limited to manorial waste.

accord with principle, in that Willes J. in *Whitmore's* case at 5 referred to the “opportunity afforded to the tenant to *take in adjoining land* .” He went on to explain, on the same page, that the doctrine was not only “in accordance with the rights of property”, but was also based on the fact that it was “convenient”. It is hard to see how convenience could be invoked in a case where the two pieces of land are not very close and are used and occupied together.’

92. Overall, then, for the presumption to apply, it appears that the additional land must usually be sufficiently close to the demised premises that the tenant’s opportunity to encroach on it arose from his occupation of the demised premises.

### **The rationale behind the doctrine**

93. This leads nicely to considering the rationale behind the doctrine of encroachment, and why it has been applied by judges over so many years.

94. In *Whitmore v Humphries* (1871) LR 7 CP 1, Willes J explained the rationale of the doctrine at 5:

‘The rule is based upon the obligation of the tenant to protect his landlord’s rights, and to deliver up the subject of his tenancy in the same condition, fair wear and tear excepted, as that in which he enjoyed it. There is often great temptation and opportunity afforded to the tenant to take in adjoining land which may or may not be his landlord’s, and it is considered more convenient and more in accordance with the rights of property that the tenant who has availed himself of the opportunity afforded him by his tenancy to make encroachments, should be presumed to have intended to make them for the benefit of the reversioner, except under circumstances pointing to an intention to take the land for his own benefit exclusively. 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.’

95. In *Tower Hamlets LBC v Barrett*, Neuberger LJ offered the following rationale for the presumption at [109], which was expressly adopted by Ribiero PJ in *Chai Ka Chik Tso* at [22]:

‘the doctrine summarised by Parke B. in *Kingsmill's* case appears to be based in part on fairness and in part on practicality. The tenant will normally have been able to encroach on the adjoining land because he was the tenant of his landlord’s land: hence the perception that it is just that he should acquire possessory title of the adjoining land for the benefit of his landlord (see e.g. per Willes J. in *Whitmore's* case, cited above). Further, the land to which possessory title is acquired will often be small, will often adjoin the demised land, and will normally have been

enjoyed for at least 12 years together with the demised land. Thus, it would normally be much more practical for the freehold of that land to be vested in a person who owns the demised land (i.e. the landlord), rather than in someone who (after the end of the tenancy concerned) has no interest in it (i.e. the tenant).'

### **The basis of encroachment as between landlord and tenant**

96. Having considered the history of the doctrine and having identified some of its key characteristics, I now turn to consider its basis.
97. Of course, where there has been encroachment of the second type, on to a third party's land, then the question of whether possessory title has been acquired against the third party, by either the landlord or the tenant, will depend on the law of adverse possession I will consider how this works in practice later.
98. However, what is the basis of encroachment as between the landlord and the tenant, i.e. how does the additional land come to be considered as part of the demised premises, so that the landlord cannot evict the tenant from it until the end of the term of the lease, and so that the tenant cannot continue to hold it after the end of the term of the lease?
99. Many of the cases, as we have seen, refer to encroachment being based on estoppel<sup>87</sup>, and to the statutes of limitations having no application to cases of tenant encroachment.<sup>88</sup> However, the law has developed in a haphazard and piecemeal way, and cases have recognised that it is important for encroachment to endure for a certain period of time in order for the landlord to be bound to treat the additional land as part of the demised premises, therefore opening the door to an analysis that the doctrine is based on adverse possession and the expiry of limitation periods.<sup>89</sup>

### *The principles of adverse possession, pre-LRA 2002*

100. As a reminder, until the reforms brought about in relation to adverse possession of registered land in England and Wales by the LRA 2002, adverse possession of registered and unregistered land in this jurisdiction was governed by limitation periods; and the adverse possession of unregistered land is still so governed. As noted above, the twenty-year limitation period for actions to recover land enacted in the Real Property Limitation Act 1833 was shortened to twelve years by the Real Property Limitation Act 1874, and that twelve-year

---

<sup>87</sup> *E.g. Andrews v Hailes* (1853) 2 E. & B. 349 per Lord Campbell CJ at 353-354; *Kingsmill v Millard* (1855) 11 Exch. 313 per Parke B at 318-319; *J. F. Perrott & Co. Limited v Cohen* [1951] 1 K.B. 705 per Denning LJ at 710; *Smirk v Lyndale Developments Limited* [1975] 1 Ch. 317 per Pennycuik V.-C. at 324F-G, approving *Kingsmill v Millard*; *Long v Tower Hamlets LBC* [1998] Ch. 197 per Sir James Munby QC at 204; and *Ali v Tower Hamlets LBC* [1996] EGCS 193, per Mr Jonathan Sumption QC.

<sup>88</sup> *E.g. Whitmore v Humphries* per Willes J at 6-8, *Tabor v Godfrey* (1895) 64 LJQB 245 per Charles J at 246.

<sup>89</sup> See *e.g. Tabor v Godfrey* (1895) 64 LJQB 245 and *Smirk v Lyndale Developments Limited* [1975] 1 Ch. 317, where Pennycuik V.-C. considered that the tenant's tenancy had been surrendered and regranted upon the issue of a new rent book by a purchaser of the reversion, and that sufficient time had not elapsed since then for the additional land to have been added to the new tenancy. Pennycuik V.-C.'s decision on this point was reversed by the Court of Appeal, who considered that the issue of the new rent book amounted only to a variation of the existing tenancy, and not the grant of a new tenancy.

limitation period was re-enacted in the Limitation Act 1938 and then as section 15(1) of the Limitation Act 1980, which remains in force.

101. Section 15(1) of the LA 1980 provides that:

‘(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.’

102. Time will begin running against a paper-title owner of land, so that his right of action will be barred at the expiry of the limitation period, if a person is in adverse possession of the land. Possession will be adverse if it is wrongful, *i.e.* without any permission from the paper-title owner or other proper basis. As to what constitutes possession itself, this has been authoritatively considered in *J. A. Pye (Oxford) Limited v Graham* [2003] 1 A.C. 419, approving the approach of Slade J in *Powell v McFarlane* (1977) 38 P. & C. R. 452. Possession has two elements: actual possession (*i.e.* a sufficient degree of physical custody and control), and an intention to possess, or – to use the Latin expression – *animus possidendi* (an intention to exercise such custody and control on one’s own behalf and for one’s own benefit).

103. What happens when adverse possession has been enjoyed for the limitation period and the paper-title owner’s right of action has been barred? Subject to certain exceptions relating to settled land and land held on trust, section 17 of the LA 1980 provides that ‘at the expiration of the period prescribed by this Act for any person to bring an action to recover land... the title of that person to the land shall be extinguished’.

104. Section 75(1) of the Land Registration Act 1925 provided that, in cases of registered land, the paper-title owner’s registered title would not be extinguished by expiry of the limitation period, but rather it would be held on trust for the person in adverse possession. In practice, this was as good as extinguishment for present purposes: the person in adverse possession with the beneficial interest in the land could apply to be registered with possessory title in place of the registered paper-title owner.

105. Of course, section 96 of the LRA 2002, which came into force on 13 October 2003, disapplied the limitation period under section 15 in cases of registered land, and provided instead for adverse possession to be dealt with under the scheme in Schedule 6 to the LRA 2002. Under paragraph 18 of Schedule 12 to the LRA 2002, a person who had completed twelve years adverse possession of registered land before 13 October 2003, so that the land was held on trust for them as at that date, may still apply to be registered as proprietor; but where twelve years’ adverse possession of registered land had not been completed prior to 13 October 2003, Schedule 6 to the LRA 2002 will apply. I will consider later how encroachment might interact with the LRA 2002 provisions, but the starting point in considering whether encroachment – as

between landlord and tenant – is a type of adverse possession lies in a consideration of limitation periods.

*Secretary of State for Justice and Chau Ka Chik Tso*

106. The basis of encroachment was considered in detail by the Hong Kong Court of Final Appeal in *Secretary of State for Justice v Chau Ka Chik Tso* [2011] HKCFA 86. The judicial panel in that case comprised Mr Justice Bokhary PJ, Mr Justice Chan PJ, and Mr Justice Ribeiro PJ, all Permanent Judges of the Court, and Mr Justice Litton NPJ and Lord Scott of Foscote NPJ, both Non-Permanent Judges of the Court.
107. The facts may be summarised as follows. In 1916, the Crown granted a long lease of 18 acres of land in Yuen Long for a term of 75 years from 1 July 1898 to 30 June 1973, with a right of renewal for a further term of 24 years less three days to 27 June 1997. By 1924, the tenants had occupied a further 6.67 acres of Crown land to the north, and used the demised land and the additional land for a commercial fish farm, with large ponds extending across the demised land and the additional land. Crown leases in Hong Kong had generally been granted for the same duration as this lease – *i.e.* for a term of 75 years from 1 July 1898, renewable for a further 24 years less three days to 27 June 1997 – so enabling the tenants to extend the lease to three days before the UK would hand control of Hong Kong back to China at midnight on 1 July 1997. On 19 May 1969, about four years before the initial terms were due to expire, and so as to avoid the administrative headache of so many individual renewals, the New Territories (Renewable Government Leases) Ordinance was passed, automatically deeming the renewal options to have been exercised and the leases to have been extended. On 19 November 1984, another statutory provision was passed, the New Territories Leases (Extension) Ordinance was passed, automatically extending Crown leases to 30 June 2047, and so for fifty years after British rule in Hong Kong would end on 1 July 1997.
108. The tenants in this case had continued using the demised land and the additional land in Yuen Long for fish farming since 1924, and the parties were agreed that the principle of encroachment applied; however, the Hong Kong government, successor to the Crown as landlord, contended that the renewal of the lease in 1973 had reset time running under the Limitation Ordinance, and, as the limitation period of 60 years applicable to Crown land had not expired between 1924 and 1973, or since 1973, the government was entitled to recover possession of the additional land. This raised a question as to the relevance of the limitation period.
109. The court unanimously held that the additional land had been added to the demise by encroachment, and that the tenants were entitled to possession of it along with the demised premises until the expiry of their lease in 2047. The court held that the renewal of the lease in 1973 had not interrupted the tenants' entitlement to the additional land by encroachment.

110. The Hong Kong Limitation Ordinance works similarly to the LA 1980. Section 7(1) provides a sixty year limitation period for the Crown to bring actions to recover land, with section 7(2) providing a twelve year period in other cases. Section 17 of the Limitation Ordinance, like section 17(1) of the LA 1980, provides that at the expiration of the limitation period for any person to bring an action to recover land, the title of that person to the land shall be extinguished.
111. However, the court was split as to the basis for encroachment. The majority of the court – *i.e.* Lord Scott of Foscote NPJ, with whom Mr Justice Bokhary PJ and Mr Justice Litton NPJ agreed – considered that encroachment was a true form of adverse possession operating through the application of the limitation period, although, at the expiry of the limitation period, the encroaching tenants would acquire only a leasehold title to the additional land that would be co-terminous with their lease of the demised premises, rather than a possessory title equivalent to the freehold held by their landlord. The minority – *i.e.* Mr Justice Ribeiro PJ, with whom Mr Justice Chan PJ agreed – considered that encroachment was based on an estoppel, binding the landlord and tenant to treat the additional land as an annex to the premises: the limitation period was not directly in play in the minority’s reasoning, save that the estoppel would bite after it had expired so as to prevent the tenant from claiming title to the additional land by adverse possession, and so as to prevent the landlord from evicting the tenant from the additional land before the expiry of the lease.
112. Lord Scott, in the majority, considered that encroachment was a true form of adverse possession, operating through a (limited) application of the limitation period. His reasoning can be summarised as follows:
- a. at [109]-[110], Lord Scott noted that the encroachment presumption – that land outside the demised premises is occupied by the tenant as an addition to the demised premises – is binding on the tenant from the outset, unless there are facts to rebut the presumption. However, Lord Scott expressed the view that the presumption does not bind the landlord unless and until by his conduct or his acquiescence he has accepted it, or unless and until the limitation period has expired. Therefore, unless he is otherwise bound by the presumption, the landlord can treat the tenant as a trespasser, and evict him from the additional land, before the limitation period has expired;
  - b. at [111], it seemed to Lord Scott to follow that, for so long as the landlord was entitled to treat the tenant as a trespasser on the additional land and evict him, the tenant’s possession was adverse for limitation purposes. So, if the limitation period expires, and the landlord has not evicted the tenant from the additional land, the tenant will no longer be a trespasser and the landlord will no longer be able to evict him, for the time being;
  - c. continuing at [112], he considered that the effect of the tenant’s adverse possession on the additional land was necessarily limited by the unrebutted presumption. His presumed intention is to occupy the additional land as an annex to his or her demised land, so that upon

expiry of the lease, he will be obliged to deliver up the demised premises and the additional land to his landlord. To that extent, the tenant's possession is not adverse to the landlord. Lord Scott considered that it is no part of the function of the limitation legislation to give long enjoyed possession of land an intention not intended by the possessor; and he said that he knew of no authority to the contrary;

- d. concluding at [113], Lord Scott considered that if a lessee entered and remained in possession of land belonging to the lessor and adjacent to the demised premises, with the intention – presumed and unrebutted, or simply proved – of adding the additional land to his tenancy, then his possession is adverse to the landlord: unless the lessor has consented, he is a trespasser. However, it is a limited adverse possession, for it accepts the lessor's right to recover the land at the termination of the lease. It is adverse only for the limited purpose of acquiring a title during the continued currency of the lease. In such a case, there is no reason why, if the possession continues uninterrupted for the requisite limitation period, the tenant should not acquire a leasehold title: and the limitation legislation applies to effect this;
- e. at [115]-[120], Lord Scott considered that the doctrine of encroachment could not be understood as operating by way of an estoppel by representation. Often the landlord would not know during the limitation period that the tenant was occupying the additional land, so there could be no relevant representation by the tenant to the landlord on which to base the estoppel. In some cases, Lord Scott said, the facts might justify an estoppel, but not in all;
- f. at [123], Lord Scott considered that section 17 of the Limitation Ordinance, which provides for the owner's title to be extinguished on expiry of the limitation period, was consistent with his conclusions. He said:

'This provision requires that the title in question be identified. If the adverse possession that has been established has been adverse possession by a person, necessarily a trespasser, who claims, or who is presumed by the encroachment presumption to claim, only a term of years and not outright ownership, then the right of the owner to possession during that term of years is extinguished and the owner's title becomes a reversionary interest. All that is extinguished is the right during that term of years to enjoy the property free from that term of years. It cannot, in my opinion, possibly have been the intention of the legislators to give to the adverse possession of a possessor, whose intentions are limited to acquiring a leasehold title for a term of years only, an effect which extends beyond that intention. I would, for my part, decline to attribute to the legislators so perverse an

intention and would, in a case like the present one, limit the effect of s.17 accordingly.’

113. Mr Justice Ribiero PJ, in the minority, offered an alternative analysis of the doctrine of encroachment:

- a. at [31], he considered that two principal themes run through the authorities. The first involves a rebuttable presumption that the tenant occupies the land in question as an addition to the land demised by his lease. The second involves an estoppel preventing the tenant from denying that presumption. The authorities recognise that it is a distinct species of estoppel which arises from the relationship between the parties, and the fact that the tenant is able to make the encroachment only by virtue of being given the demised land by his landlord: the tenant is estopped, in particular, from claiming that he has barred his landlord’s right of action and extinguished his landlord’s title by adverse possession;
- b. at [33]-[39], he considered cases in which the presumption and estoppel had been referred to. The judgment of Lord Campbell CJ in *Andrews v Hailes* (1853) 2 E. & B. 349 at 356 gives a clear illustration of the presumption and estoppel in action:

‘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.’

Parke B’s seminal judgment in *Kingsmill v Millard* (1855) 11 Exch. 313 at 318 also refers to the presumption and the estoppel:

‘It is laid down in all the cases – whether the enclosed land is part of the waste, or belongs to the landlord or [a] third party – that the tenant has inclosed it for the benefit of his landlord, unless he has done some act disclaiming the landlord’s title... if the landlord is allowed to remain under the belief that the encroachment is part of the [demised holding], the tenant is estopped from denying it, and must rend it up at the end of the term as a portion of the holding.’

In *Whitmore v Humphries* (1871) L.R. 7 C.P. 1 at 4 and 8, Willes J referred to the presumption, the estoppel and the non-application of the limitation legislation:

‘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...

... 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.'

- c. at [40]-[41], Mr Justice Ribeiro PJ considered that Willes J's judgment offered a route to explaining encroachment, and said:

'40. ... 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 landlords 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.'

- d. at [42]-[63], Ribiero PJ discussed subsequent cases considering the doctrine, all consistent with it being based on a presumption and an estoppel, and with the limitation legislation not applying. He referred to the first instance judgment of Fry J in *Attorney-General v Tomline* (1877) 5 Ch. D. 750, and also to the judgment of Cotton LJ on appeal in the same case<sup>90</sup>, who said at 160-161:

'... looking at the circumstances in which these questions as to accretions as between landlord and tenant have arisen, it may well be that they rest upon the principle that the lessee, being in a fiduciary position, is not at liberty to dispute his landlord's title to encroachments, the absolute title of the tenant to which might materially depreciate the value of the original premises...'

Mr Justice Ribiero also referred to the decision of Charles J in *Tabor v Godfrey* (1895) 64 LJQB 245, who held at 246 that the estoppel was binding on the landlord, as well as the tenant:

'The principle is that [the tenant] comes in and has [the encroached land] as part of his take, and although the lease excludes it, yet by the way in which the landlord has permitted him to occupy, the encroachment must be taken as included in the demise. I am therefore of opinion that the plaintiffs fail, and that the defendant is in the right as to the strip of ground, for by what has happened the landlord has indicated by the mode in which he has allowed the tenant to use it that the strip is included in the holding...'

Mr Justice Ribiero also noted Denning LJ's remarks in *J.F. Perrott v Cohen* [1951] 1 K.B. 705 that the principle underlying encroachment is 'not perhaps strictly an estoppel, but it is akin to it'. Ribiero PJ continued at [51]:

'this is significant since an estoppel (or something akin to an estoppel) which prevents the tenant from contending that his

---

<sup>90</sup> (1879) 15 Ch.D. 150.

possession is adverse to the landlord, prevents him from saying that time has started running for limitation purposes at all.’

e. Mr Justice Ribiero’s conclusion is at [64]:

‘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.’;

f. finally, Ribiero PJ remarked at [70]:

‘... I also note that doubt has been cast on whether estoppel by representation has anything to do with the doctrine. I would only state that for my part, I do not consider the cases to be concerned with any estoppel by representation. The estoppel the authorities refer to appears to me to arise out of the presumption based on the relationship between the parties. It is, in my view, a species of estoppel by convention – a presumed convention based on the presumption applicable to both parties that the encroaching tenant’s occupation of the encroached upon land is an addition to his demise.’

#### *Chau Ka Chik Tso: discussion*

114. *Chau Ka Chik Tso* is, of course, not binding in this jurisdiction, but is persuasive. In my opinion, the view of the minority is to be preferred.

115. Both Lord Scott NPJ and Ribiero PJ consider how the presumption of encroachment interacts with the limitation legislation. Lord Scott’s view is that the presumption limits the effect of the limitation legislation, so that the tenant acquires only a leasehold title in the additional land co-terminous with his lease

of the demised premises; Ribiero PJ considers that the presumption operates to estop the tenant from relying on the limitation legislation at all.

116. Lord Scott's view could be seen as bringing some order to a doctrine that has developed in a haphazard way, but Ribiero PJ's view is far more consistent with earlier authorities, in England and Wales and elsewhere. His judgment refers to the wealth of English authorities which refer to encroachment depending on estoppel. It could be argued that these earlier authorities, including *Smirk v Lyndale*, provide binding authority in this jurisdiction that encroachment is based on estoppel.
117. Ribiero PJ also refers, at [82], to *Amatek Ltd v Googoorewan Ltd* (1995) 176 CLR 471, in which the High Court of Australia, at 475-476, considered that:
- '[the cases on encroachment are] founded on a kind of estoppel as between the landlord and the tenant which precludes the tenant from denying the landlord's title not only to the land demised but also to land of which the tenant got possession by virtue of being tenant of the demised premises'.
118. Although not cited in *Chau Ka Chik Tso*, Mr Recorder Seymour SC, sitting as a Judge of the High Court of Hong Kong in the Court of First Instance, also considered encroachment to be based on estoppel in *Lau v Wong* [2006] HKCFI 1096.
119. Lord Scott's view, that encroachment is a form of adverse possession which works through the operation of limitation periods, faces serious hurdles. Ribiero PJ, at [66]-[70] in his judgment, explains why he considers that encroachment could not operate as part of the Hong Kong Limitation Ordinance, and his points apply with equal force in this jurisdiction to the LA 1980:
- a. section 7 of the Limitation Ordinance, like section 15(1) of the LA 1980, provides for an owner's right of action to be barred upon expiry of the limitation period. This is an absolute and permanent bar, not a time-limited bar which lasts only to the expiry of an encroaching tenant's tenancy, at which time the landlord's right of action could revive and he could be entitled to claim possession of the encroached land;
  - b. section 17 of the Limitation Ordinance, like section 17(1) of the LA 1980, provides for an owner's title to be extinguished upon expiry of the limitation period. However, that is not what happens upon encroachment: the landlord's title in the encroached land is not extinguished, but converted into a reversionary interest. Besides what Ribiero PJ says here, I would additionally note that the limitation legislation is aimed at barring and extinguishing an owner's rights, not in creating new rights and estates for an adverse possessor;

- c. the law of limitation in principle bars a person's entire interest in land at the expiry of the limitation period; it does not apply to bar their interest during the period of a tenancy;
  - d. there is no suggestion in any of the authorities that a possessor's intention should influence the title which they acquire through adverse possession;
  - e. generally, the authorities favour treating encroachment as some form of, or akin to, estoppel, and an approach which turns on an application of the limitation legislation does not give sufficient weight to these authorities.
120. There are additional reasons why encroachment does not sit comfortably within the scheme of adverse possession and the operation of limitation periods:
- a. as discussed above, the doctrine of encroachment can operate even where the tenant's possession of the encroached land is not adverse to the landlord, but enjoyed with the landlord's permission – see, e.g., *Whitmore v Humphries* (1871) LR 7 CP 1;
  - b. as pointed out in Jourdan and Radley-Gardner, *Adverse Possession: First Supplement to the Second Edition* (2017), para. 25-1J, Lord Scott's view that the tenant's presumed or proved intention to occupy the additional land as an annex to the demised premises could limit the title which they would acquire upon expiry of the limitation period is inconsistent with those cases where squatters have held a mistaken belief that they hold a tenancy, and the title they acquire by adverse possession has not been similarly limited: see, e.g. *Tower Hamlets LBC v Barrett* per Neuberger LJ (as he then was) at [42], and *Ofulue v Bossert* [2009] UKHL 16, [2009] 1 A.C. 990.
121. Such objections to Lord Scott's view tend strongly in favour of preferring Ribiero PJ's view. Lord Scott himself did recognise that, in some cases, land may be added to leases by estoppel, but he considered that would not apply in all cases. Although Lord Scott did not refer to them, some of the English decisions previously understood as exemplifying the doctrine of encroachment are perhaps best seen as cases of estoppel operating outside the doctrine of encroachment. In *J. F. Perrott & Co Ltd v Cohen*, where the Court of Appeal considered that the additional land occupied by the tenant had been added to the tenancy, there was perhaps no room for the operation of the encroachment doctrine on either Lord Scott or Ribiero PJ's analysis: the lease in that case appears to have been granted on 5 August 1936 for a term of twelve years less one day from 24 June 1936 to 23 June 1948, so that the presumption of encroachment would not have had time to bite. Similarly, in *Ali v Tower Hamlets*, the tenants claimed to have added a room to their flat by encroachment after approximately five years' possession, and while Jonathan Sumption QC did not mention this as a reason for rejecting their claim, it would appear to fall far short

of the period required on any analysis of the doctrine of encroachment, so that their claim would have to stand or fall on the question of estoppel.

122. Admittedly, there are questions which arise around casting encroachment as a form of estoppel:

- a. in terms of binding the landlord and/or the tenant, there will often not be any representation or acquiescence sufficient to found an estoppel, as commonly understood: in *Chau Ka Chik Tso* itself, where the tenants had begun occupying the additional land by 1924, the Crown landlord was not aware of their occupation of the 1980s, when detailed maps of the area were first produced. Therefore, it is difficult to see how the tenants could have represented to the landlord that they were holding the additional land as an extension to the demise, or how the landlord could have acquiesced in such an extension, or represented to the tenants that they were accepting it as an extension to the demise, without having any knowledge of it;
- b. even an estoppel by convention requires communication of the shared assumption or convention between the parties (see *Rivertrade Limited v EMG Finance Ltd* [2015] EWCA Civ 1195), which cannot occur in cases where the landlord is unaware of the encroachment;
- c. it may be difficult to show any form of detrimental reliance, or unconscionability, in cases where the landlord is unaware of the encroachment, and where the tenant has had use of the encroached land without paying any additional rent for it;
- d. the only form of estoppel which would entitle a tenant to acquire a proprietary interest would be proprietary estoppel, but seeing the doctrine of encroachment as a form of proprietary estoppel does not work. The remedy which will be given for a proprietary estoppel is within the discretion of the court, whereas encroachment – when made out – always give rise to a leasehold interest in the additional land co-terminous with the lease of the demised premises.

123. Nevertheless, it seems to me that encroachment can be considered as operating as a form of estoppel between a landlord and tenant. There is of course an estoppel between landlord and tenant in relation to the demised premises which prevents the tenant from denying the landlord's title to the demised premises – see *Woodfall's Law of Landlord and Tenant*, looseleaf edition, at para. 1.034. It would seem fair to extend this estoppel to prevent both landlord and tenant from denying that additional land occupied by the tenant is an annex to the demised premises: as we have seen, part of the rationale of the doctrine is that it applies where the tenant has taken the opportunity to encroach on to the additional land given to him by his occupation of the demised premises. In those circumstances, it seems fair to estop the tenant from arguing that he has acquired his own possessory title to the additional land after the limitation period has expired, and confine him to a leasehold title co-terminous

with his lease of the demised premises; and it seems fair in turn to estop the landlord in those circumstances from evicting the tenant from the additional land until the end of his lease: this is an important contribution by Ribiero PJ to the analysis. Even if the landlord has been unaware of the encroachment, provided – as appears to be the case – that the doctrine is limited to land sufficiently close to the demised premises that the tenant has been given the opportunity to encroach by his lease, it seems fair for the landlord to be bound by the tenant’s leasehold interest over the additional land if he has not otherwise used or protected the land: this seems a fair *quid pro quo* for the fact that the landlord will not lose his title altogether by adverse possession. Whether Lord Scott NPJ or Ribiero PJ’s analysis is preferred, the landlord would be entitled to evict the tenant from the additional land before the limitation period has expired.

124. Even if the principle of encroachment is not seen strictly as an estoppel, it could in any event be considered as an independent, free-standing doctrine, somewhat akin to an estoppel, or perhaps to the acquisition of an easement by prescription by lost modern grant.<sup>91</sup>

125. I would note that while prescription by lost modern grant requires prescriptive use for a period of 20 years, whereas a shorter period of twelve years appears sufficient to acquire leasehold title by encroachment, the limitation period for actions to recover land was in fact twenty years when the doctrine of prescriptive easements by lost modern grant developed – the limitation period was shortened to 12 years by the Real Property Limitation Act 1874. As the doctrine of encroachment has continued to develop since then, seeing encroachment as a way to acquire leasehold interests by lost modern grant on the basis of twelve years’ possession no longer seems out of step with limitation periods.

126. Overall, it seems clear in my view that encroachment does not operate by a limited application of the limitation legislation, but rather as a separate doctrine, being an estoppel or something akin to an estoppel, or to acquisition of rights by long use.

### **Encroachment between landlord and tenant and the LRA 2002**

127. In this jurisdiction, the basis of encroachment has been considered by the FTT, both before and after the decision in *Chau Ka Chik Tso*. An additional complication in England and Wales arises from the sweeping changes to the workings of adverse possession brought about by the LRA 2002, and that statute’s disapplication of limitation periods in cases of adverse possession. As we shall see, the FTT has recently provided a helpful route through the LRA 2002 for encroachment claims between landlord and tenant.

128. Of course, as noted above, encroachment cases of the second type, on land belonging to a third party rather than the landlord, *must* involve adverse

---

<sup>91</sup> See the discussion by Oliver Radley-Gardner in his article, ‘Encroaching Tenants: Problem Solved?’, 26 September 2025, at: <https://www.falcon-chambers.com/publications/articles/encroaching-tenants-problem-solved>.

possession if the third party is to lose his title – I will consider encroachment against third parties below; for now, I am considering only encroachment as between landlord and tenant.

129. As a reminder, section 96(1) of the LRA 2002 provides that no period of limitation under section 15 of the LA 1980 shall run against any person, other than a chargee, in relation to an estate in land the title to which is registered. Accordingly, adverse possession of registered land is no longer governed by the expiry of the 12-year limitation period under section 15(1) of the LA 1980.

130. Instead, section 97 of the LRA 2002 provides that Schedule 6 to the LRA 2002 shall have effect to govern claims of adverse possession of registered land.

131. Para. 1(1) of Schedule 6 provides that:

‘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.’

132. Under para. 11(1), “adverse possession” in this context has the same meaning as it did before the LRA 2002 came into force:

‘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 would run in his favour in relation to the estate.’

133. Para. 2 of Schedule 6 requires the registered proprietor of the estate to be given notice of the adverse possession application. Although the Schedule does not explicitly say so, the registered proprietor may object to the application on the basis that the applicant has not been in adverse possession for ten years. Additionally, or alternatively, para. 3 of Schedule 6 provides that the registered proprietor may require the application to be dealt with under paragraph 5. If the registered proprietor does not require the application to be dealt with under paragraph 5, and does not otherwise successfully challenge the applicant’s claim to have been in adverse possession, then the applicant will be registered as proprietor of the estate in place of the current registered proprietor under para. 4.

134. If the current registered proprietor does require the application to be dealt with under paragraph 5, then the applicant will only be entitled to be registered as proprietor if any of the three conditions set out in subparagraphs 5(2) to (4) are met. These may respectively be termed “the estoppel condition”, “the other reason condition”, and “the boundary condition”, and are set out as follows:

‘(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.’

135. If the applicant has been in adverse possession for at least ten years, and makes out any one of these conditions, he will be entitled to be registered as proprietor. If he does not make out one of these conditions, he will not be entitled to be registered as proprietor.

136. If a person’s application is rejected because he has not met any of the conditions under paragraph 5, then para. 6 provides that he may make a further application to be registered as proprietor, and will be registered as proprietor, if he remains in adverse possession for a further two years. Effectively, then, the current registered proprietor is given a two-year period after defeating an adverse possession application under para. 5 to evict the squatter; if he does not do so, then the squatter will be entitled to be registered as proprietor if he remains in adverse possession for that further two years. A period of twelve years is therefore still in play under Schedule 6, albeit that twelve years’ adverse possession alone is not enough to obtain title: the squatter must complete at least ten years before applying to be registered, and the registered proprietor then has an opportunity to defeat his application and evict him; only if the registered proprietor does not defeat his application and does not evict him within a further two years would a twelve-year total entitle the squatter to be registered.

137. If encroachment is properly understood as a type of adverse possession, based on the expiry of limitation periods, as held by Lord Scott in *Chau Ka Chik Tso*, then how would it be affected by the reform of adverse possession brought

about by the LRA 2002? As discussed by Professor Emma Lees in her article<sup>92</sup>, encroachment does not fit neatly into the LRA 2002 scheme.

138. If encroachment is based on the expiry of the limitation period for an action to recover land, then section 96 of the LRA 2002 would prevent a tenant acquiring a leasehold title in the encroached land by that route<sup>93</sup>, and the tenant would have to make an application under Schedule 6 to the LRA 2002. One of the chief problems with this is that Schedule 6 provides for the applicant to be registered as proprietor of the estate of which they are in adverse possession, the estate of the landlord. However, by encroachment, a tenant acquires a leasehold estate in the encroached land, co-terminous with their lease in the adjoining demised premises. Schedule 6 therefore does not appear to accommodate encroachment, unless some limited application is given to the effect of registration under Schedule 6, following the lead of Lord Scott's view of the operation of limitation in encroachment cases in *Chau Ka Chik Tso*.

139. If Schedule 6 does apply, then assuming the landlord required the application to be dealt with under paragraph 5 of Schedule 6, the tenant would need to make out one of the conditions in that paragraph. There is no obvious basis on which the "other reason" condition under paragraph 5(3) would apply. The estoppel condition under paragraph 5(2) might arguably apply, but probably not if encroachment is seen as having been based on adverse possession rather than estoppel so that a Schedule 6 application is necessary. The most likely condition to apply would be the boundary condition under paragraph 5(4). In order to satisfy that condition, the tenant would have to show that the encroached land was "adjacent to land belonging" to the tenant, and that the tenant had reasonably believed for a period of ten years that the land "belonged" to him. There must be a query here as to what "belonging" and "belonged" means in these circumstances. Assuming it means that the tenant is registered proprietor of a leasehold estate in the demised premises, to which the encroached land is adjacent, and that he reasonably believed that the encroached land belonged to him as part of that registered leasehold estate, then the boundary condition could arguably apply.

140. FTT decisions before *Chau Ka Chik Tso*, and a decision after, proceeded on the basis that encroachment is a type of adverse possession, and that tenants would have to grapple with Schedule 6. However, as we will see, recent decisions have tended the other way, and that is to be welcomed.

141. In *Skipwith v Singh* REF/2009/0850, the lessee of a flat applied to be registered as leasehold proprietor of a loft above the flat by way of encroachment. The lessee, Mr Skipwith, filled in one of the standard forms produced by HM Land Registry ("HMLR"), a form ADV1: that is the standard

---

<sup>92</sup> Lees, E. "Encroachment and Schedule 6 LRA 2002: Unknotting the Tangle", [2015] 79 Conv 112. Dr Lees' article discusses in depth the extent to which encroachment interrelates with Schedule 5 to the LRA 2002.

<sup>93</sup> Professor Lees does suggest that the limitation period applicable to encroachment might arguably be the twelve-year period under section 8 of the LA 1980, for actions on a specialty. If that is right, then section 15 of the LA 1980 never applied to encroachment and section 96 would not disapply it.

form to apply to be registered as proprietor of a title by adverse possession under Schedule 6, although Mr Skipwith had modified the form by hand to say that he was applying to register the loft by accretion to his leasehold estate in the flat. The lessee's counsel submitted that encroachment allowed an applicant to apply to be registered as proprietor without completing the limitation period, as it was based on a type of estoppel. That is, of course, a different analysis from that put forward by Ribiero PJ in *Chau Ka Chik Tso*, which is that the estoppel bites after the limitation period has expired to prevent the lessee from claiming title by adverse possession. The Deputy Adjudicator to HM Land Registry who decided *Skipwith v Singh*, Mr Owen Rhys, rejected this argument and found that encroachment should be dealt with under Schedule 6. As the landlord had failed to require the application to be dealt with under paragraph 5, and ten years' adverse possession was made out, the application was successful; and Mr Rhys considered, *obiter*, that even if paragraph 5 had been invoked, the lessee would have satisfied the boundary condition, as the loft was adjacent to the flat and the lessee had reasonably believed that the loft formed part of the demise.

142. Following the replacement of the Adjudicator to HM Land Registry with the FTT, and more importantly following *Chau Ka Chik Tso*, Judge Owen Rhys heard another encroachment case in 2020, *Patterson v Thomas* [2021] UKFTT 0135 (PC). In that case, the lessees of a flat had applied to be registered as proprietors of a small piece of land which they had added to their garden. They had initially applied in form ADV1, but HMLR did not proceed with that application or give notice of it to the landlord, but instead asked the Pattersons to resubmit their application in form FR1, a form for first registration, seemingly on the basis that the Pattersons were not applying to be registered as proprietors of their landlord's estate by adverse possession, but rather were applying for registration of a new leasehold title to the encroached land by way of encroachment.

143. However, Judge Rhys considered that encroachment was part of the law of adverse possession. He said, at [7]-[8]:

'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<sup>94</sup>, was the subject of detailed analysis in a decision of the Hong Kong Court of Final Appeal in *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

---

<sup>94</sup> *Chau Ka Chik Tso* did not in fact give any particular consideration to the application of encroachment to registered land, and certainly did not consider how encroachment would fit within the LRA 2002, Hong Kong operating on an entirely different system of land registration.

adverse possession, albeit that there are certain anomalies present which take it outside the conventional application 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 of the lease, since it becomes subject to an additional burden, namely the addition of the encroachment to 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 the 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 the LRA 2002.'

144. Judge Rhys proceeded to consider the case under Schedule 6, on the basis that the Pattersons had advanced a case under the boundary condition in para. 5(4) – having initially prepared their ADV1 application – and on the basis that the landlord had been able to respond. He found that the boundary condition was not made out, as the applicants had not reasonably believed the land belonged to them for a period of ten years, having been put on notice that it was outside their lease.

145. There was evidently a conflict between HMLR's approach – that encroachment on to the landlord's land can be dealt with outside Schedule 6 – and Judge Rhys's approach – that encroachment is a type of adverse possession requiring to be dealt with under Schedule 6. Indeed, successive editions of HMLR's *Practice Guide 4: Adverse Possession of Registered Land*, have included the following text, at paragraph 11.2 in the latest update issued on 2 February 2026:

'Particularly where the encroachment is onto other land belonging to the landlord but not included in the demise, as opposed to being onto land belonging to a third party, the tenant may be content to accept that the presumption applies. In this case, you can apply on form FR1 for first registration of their leasehold title to the land concerned. It is necessary, for the purposes of this application, that there is more than 7 years of the applicant's lease term still to run: section 3(3) of the Land Registration Act 2002.'

146. Subsequent to *Patterson v Thomas*, three FTT cases in 2025 have now considered that encroachment is not based on adverse possession, and does not require to be dealt with under Schedule 6.

147. In *McGee v Long Term Reversions (Harrogate) Limited* [2025] UKFTT 00233 (PC), the McGees applied to acquire leasehold title of the loft above their flat by encroachment. Initially, they applied using a form ADV1, but following a requisition raised by HMLR, submitted an application in form FR1. The landlord contended that the application required to be dealt with under Schedule 6. Ultimately, the application was successful and the applicants were registered as proprietors.
148. Judge Colin Green considered the authorities, including *Smirk* and *Chau Ka Chik Tso*. He accepted, at [19], that *Smirk* was binding in this jurisdiction, at least up to Court of Appeal level, and, at [38], he preferred the reasoning of Ribiero PJ in *Chau Ka Chik Tso*, which he considered to be consistent with *Smirk*. At [45], he did not consider that encroachment could be dealt with under Schedule 6, as that entitles an applicant to apply to be registered as proprietor of an existing registered estate of which he has been in adverse possession, whereas a tenant who is encroaching is entitled to be registered as proprietor of a new leasehold estate in the encroached land. At [52], Judge Green did not consider that Schedule 6 could be construed so as to deal with encroachment applications in the way it had been in *Skipwith v Singh*. At [53] to [56], he considered that encroachment gives rise to a leasehold estate by estoppel, as the tenant is estopped from relying on adverse possession or making an application under Schedule 6: this would see the estoppel bite after ten years, rather than twelve, so as to prevent the tenant from otherwise applying under Schedule 6. At [61], he took a different view from Judge Rhys in *Patterson v Thomas* as to the application of Schedule 6, and found that it did not apply. At [92] to [95], he considered that the applicant was entitled to use form FR1 for an encroachment application, in order to register a new leasehold estate under section 27(2)(b)(i) of the LRA 2002. He also noted that a form AP1 could also be used, with encroachment being pursued as an application to update the register under paragraph 5(b) of Schedule 4 to the LRA 2002, to register the leasehold estate which has arisen by encroachment: as this alteration would not involve correcting a mistake, it would not amount to rectification of the register under paragraph 1 of Schedule 4.
149. In *Hood v Southern Land Securities Limited* [2025] UKFTT 00726 (PC), another lessee had applied to be registered as proprietor of the loft above his flat, this time using a form AP1, applying to update the register under paragraph 5(b) of Schedule 4. Mr Simon Brilliant, sitting as an FTT Judge, allowed the application, considering whether the applicant had been in possession of the loft for at least twelve years, and finding that he had. In that case, HMLR had proceeded on the basis that the application was not one for adverse possession falling within Schedule 6, but rather to update the register, and since the landlord did not challenge that view in correspondence or by seeking judicial review, the FTT proceeded on the basis that it was correct.
150. In *Relins v Gill* [2025] UKFTT 00845 (PC), Judge Laura D’Cruz considered a case of encroachment on to a roof terrace belonging to the landlord. Again, the tenant’s application to be registered as leasehold proprietor

of the roof terrace was successful. Judge D’Cruz, at [50], preferred the minority analysis in *Chau Ka Chik Tso*, and noted at [51], on the authority of *Whitmore v Humphries*, that possession for the purposes of encroachment does not need to be adverse. At paragraphs [63] to [66], she discusses when encroachment bites, or crystallises into an accretion to the lease, and – albeit without expressly referring at this juncture to Ribiero PJ’s judgment in *Chau Ka Chik Tso* – finds that it will be the limitation period, applying by analogy. She says, at [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).’

151. She then goes on to consider whether the period should now be 12 years or 10, in light of the LRA 2002. She considers that in the doctrine of encroachment, the limitation period applies by analogy, and in the course of her discussion at [67]-[70], opts for 12 years, saying at [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.’

152. Judge D’Cruz’s preference for 12 years seems the safer option to follow.

153. At [74]-[75], Judge D’Cruz considers that an encroachment application can be brought either under an FR1, relying on first registration by accretion, or an AP1, seeking to update the register under paragraph 5(b) of Schedule 4 to the LRA 2002.

154. From these three FTT decisions, it appears that a tenant can apply to register a leasehold interest in encroached land owned by their landlord, co-terminous with their existing lease, either as an application for first registration in form FR1 or as an application to update the register in form AP1. Of course, application can only be made to register a leasehold interest in the encroached land if the tenant has more than seven years remaining on their lease, given

that only leases over seven years may be registered under the LRA 2002 and that leases for a term not exceeding seven years are overriding interests.<sup>95</sup>

155. I would note that seeing encroachment as an estoppel does not work quite so neatly, perhaps, with the LRA 2002 as with the LA 1980: while there is some value to the landlord in the tenant being estopped from making an application for adverse possession after the twelve-year limitation period has expired under section 15(1) of the LA 1980, the value may be more questionable if a tenant is estopped from making an application under section 97 of the LRA 2002 and Schedule 6, as under Schedule 6, the tenant's success would be predicated (assuming the landlord so required) on success under one of the conditions in paragraph 5. Perhaps, then, the FTT cases in 2025 favour again seeing encroachment as an independent doctrine.

### **Encroachment on third party land**

156. So far, we have been considering the basis of encroachment as between tenant and landlord, and considering why, as between the parties to the lease, encroached land is regarded as an addition to the demise, whether the land belongs to the landlord or to a third party.

157. However, how do matters stand as against the third party on whose land a tenant has encroached? In order for the third party to lose their title to land, there must be adverse possession against them: they are not party to the leasehold relationship and should not be affected by the presumption of encroachment. The presumption does affect matters as between the landlord and tenant, however, in that the tenant's encroachment is regarded as being on behalf of his landlord as against the third party, so that any title acquired against the third party by adverse possession will belong to the landlord, with the tenant being entitled as against the landlord to hold the encroached land as part of the demised premises until the end of their lease.

158. However, judges have been reluctant to allow a tenant's encroachment to render the landlord a trespasser on a third party's land, with the result that the landlord acquires title by adverse possession. As we have noted, in the 1795 case of *Doe d Colclough v Mulliner* (1795) 1 Esp. 460, Lord Kenyon 'revolted at the idea that the tenant could make the landlord a trespasser'. In *Andrews v Hailes* (1853) 2 E & B 249, Lord Campbell CJ said:

'I do not adopt the doctrine that the tenant steals for the landlord, and that therefore the landlord, at the end of the demise, is entitled to claim the stolen property; but I think that when the property is taken and used as part of the holding, the tenant can as little dispute the title to it as he can dispute the title to any other part of the premises.'

159. In *Kingsmill v Millard* (1855) 11 Exch. 313, Parke B said that:

---

<sup>95</sup> LRA 2002 sections 3(3), 4(1)(c), and 27(2)(b), and Schedule 1, paragraph 1 and Schedule 3, paragraph 1.

'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 [in *Andrews v Hailes*] that the encroachment must be considered as annexed to the holding.'

160. These cases proceed on a relativity of title: the landlord would not be able to acquire possessory title as against the third party by the tenant's encroachment, but would have standing to evict the tenant from the encroached land at the end of the tenancy, even though the encroached land belonged to a third party rather than the landlord.

161. However, later cases made clear that a landlord could acquire possessory title against a third party pursuant to his tenant's encroachment. Most of the older cases had been between the landlord and tenant, but later cases involved the third party on whose land the tenant had encroached.

162. In *Batt v Adams* (2001) 82 P. & C. R. 32, as noted above, the landlord of an encroaching tenant, Mr Adams Senior, claimed to have acquired title to the encroached land by adverse possession, as against the third-party owner of the encroached land, the Trustees of the Michael Batt Charitable Trust. The pre-LRA 2002 case was decided on the basis of adverse possession by expiry of the limitation period.

163. Laddie J approached matters on the basis that the tenant would have to make out adverse possession. He found that the tenant, Mr Higgs, did not have the necessary intention to possess, because he assumed that the encroached land belonged to his landlord, and that his landlord permitted him to use it at will. Mr Higgs therefore did not have the intention to possess the land as an owner himself, or even as part of his tenancy. On that basis, there was no adverse possession by Mr Higgs on which Mr Adams Senior could rely, and his claim failed.

164. Laddie J considered the other issues raised in the case, however, including the question of how the presumption of encroachment applies in relation to land belonging to third parties. He rejected a submission that the presumption had no application in relation to land belonging to third parties, but considered that it only operated as between the landlord and the tenant, and did not bind the third party. Laddie J considered, at [40]-[41], that there was substance in the following point made by the third party's counsel, Mr Brock:

'... If the presumption applies, does it bind the third party? The limited scope of the submission should be noted. What Mr Brock is arguing is that the third party, in this case the appellants, may have lost title to land by adverse possession but it is only the tenant who can advance the claim. As between the tenant and his landlord title acquired by adverse possession must pass to the latter, but as between them and the third party, it is the tenant who must make the claim.'

165. At [42]. Laddie J considered that:

‘There is no relationship between the landlord and the third party. On the face of it, there is no reason why the presumption should bind the third party.’

166. However, Laddie J did not consider the point to be significant in the case before him, as the tenant Mr Higgs had been involved as a witness, supported Mr Adams Senior’s claim, and could have been joined to the proceedings if necessary.

167. Finally, Laddie J considered the fact that the reversion to the tenancy had been transferred by Mr Adams Senior to his son, Mr Adams Junior, by the time the claim for adverse possession had been made. Laddie J accepted Mr Brock’s submission that title by adverse possession would pass to the landlord at the end of the tenancy (Mr Adams Junior), and would not be vested in the landlord at the end of the 12-year limitation period (Mr Adams Senior). Laddie J said, at [48]:

‘With some hesitation, I have come to the conclusion that Mr Brock is correct on this point. It is true that the third party’s title is extinguished after 12 years’ adverse possession. However the question is not whether title has been extinguished, but who has acquired it. The effect of the presumption is to pass the title from the tenant to his landlord. However, a number of cases demonstrate that the presumption is rebuttable. Parke B. expressly said that the tenant could defeat the presumption by conveying title to the acquired land before the end of his tenancy. This would be impossible had title immediately passed to the landlord. Mr Asprey faces up to this by inviting me to say that Parke B.’s judgment on this point was both *obiter* and wrong. I am not prepared to do so. *Kingsmill v. Millard* had been accepted as good law for a long time. If it is to be qualified, that is better done at a higher level. Furthermore, I do not think that the approach which Mr Brock has invited me to take is conspicuously irrational, at least so far as rights over third party land are concerned. As indicated at paragraph 33 above, the reason for the existence of the presumption is less compelling where title to third parties’ land is concerned than when the title is to the landlord’s own land. Consistent with the fact that the presumption is rebuttable, there is nothing inherently unfair in the tenant being able to demonstrate both during the 12-year period and subsequently, that he intends to acquire title by adverse possession for his own benefit and against the interests of his landlord. If that is so, then the logical time at which to assess whether the presumption works to the landlord’s advantage is the end of the tenancy.’

168. Laddie J therefore held that, if the tenant Mr Higgs had been in adverse possession of the encroached land, title would have passed to Mr Adams

Junior, his landlord at the end of the tenancy, rather than Mr Adams Senior, his landlord when the limitation period would have expired.

169. Encroachment against third-party land was considered again shortly afterwards in the Court of Appeal in *Tower Hamlets LBC v Barrett* [2005] EWCA Civ 923. In that case, the Barretts had been tenants of a pub owned by the brewery, Trumans, and had occupied land adjacent to the pub belonging to Tower Hamlets from 1977. In 1993, the Barretts purchased the reversion to the pub from Trumans. In short, Neuberger LJ, giving the judgment of the Court, held that 12 years' adverse possession had been made out by 1989/90, and that Trumans was entitled to a possessory title of the land at that stage owing to the presumption. However, when the Barretts purchased the reversion to the pub in 1993, the reversion to the encroached land vested in Trumans was deemed to go with it.
170. Neuberger LJ held that a written acknowledgment of title by Trumans to Tower Hamlets in 1985 had not started time running again. Section 29(2) of the LA 1980 provides that the accrual of time in relation to adverse possession starts afresh in the event of an acknowledgment of the paper owner's title 'by the person in possession of the land'. However, Neuberger LJ (at [95]-[96]) considered that Trumans were not in possession of the land as at the date of the acknowledgement, but that the Barretts were; and although the presumption as between Trumans and the Barretts was that the Barretts' possession was on behalf of Trumans, that was not binding on Tower Hamlets as a third party.
171. Neuberger LJ also considered that the landlord's entitlement to the possessory title acquired by the tenant would bite at the end of the limitation period, and not at the end of the tenancy. He therefore took a different view from Laddie J in *Batt v Adams*, and considered that if the presumption that the tenant acquired title for the landlord was to be rebutted, that would have to be during the 12 years of the limitation period, and not at some point after that and before the end of the tenancy. He said at [88]-[91]:
- '88. Furthermore, and to my mind crucially, the notion that there is uncertainty as to who owns the freehold between the expiry of the 12 years and the determination of the tenancy concerned seems more than strange. Yet that is the effect of Mr McDonnell's argument, and it is fair to say that it is supported by the decision of Laddie J in *Batt v Adams* [2001] 2 E.G.L.R. 92 at paras 43 to 48. The basis of this argument appears to be that the application of the doctrine is rebuttable, and that events after the expiry of the 12-year period can be taken into account when deciding whether such a rebuttal is established.
89. Dicta in a number of cases on this topic, including, in particular, *Tomline's* case, clearly indicate that the conduct of the parties, even after the 12-year period has accrued, can be taken into account when deciding whether the doctrine applies in a

particular case. However, I do not believe that it follows that the issue of whether the tenant has acquired possessory title to land for himself or his landlord can remain in limbo after the expiry of that period until the tenancy between them expires. Equally, I do not accept that it necessarily means that the ownership of the land could oscillate between the tenant and his landlord between the expiry of the 12 years and the determination of the lease, depending on what the parties do or say during that period.

90. 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. The ownership of land should not, in my view, be in limbo, or be treated as being in limbo, save where statute requires 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.
91. The subsequent acts and statements of those parties may be relevant as casting light on what they intended or believed at the end of (and indeed during) the 12-year period (and in an extreme case they may give rise to a subsequent estoppel). That, in my judgment, is, on proper analysis, the reason that the court in *Tomline's* case relied on the acts of the parties subsequent to the expiry of the limitation period. To interpret the reasoning in that case as establishing that the conduct of the parties subsequent to the expiry of the 12 years can be directly relied on to establish who had title at the end of the 12 years (save for the purpose of raising an estoppel) would, in my view, be wrong in principle. It would also be inconsistent with what was said by Parke B in *Doe d. Lewis v Rees* (1834) 6 C. & P. 610, in a passage cited with approval in *Doe d. Croft v Tidbury* (1854) 14 C.B. 304 at 325. He said that encroachments made by a tenant enured for the benefit of his landlord, “unless it appears clearly by some evidence *at the time of the making of the encroachments* that the tenant intended the encroachments for his own benefit ...” (emphasis added).’
172. Although not expressly said in so many words, it would appear to have been Neuberger LJ’s view that any application for registration of title to a third party’s encroached land by adverse possession after the 12 years have expired could be made by the landlord, in reliance on the tenant’s adverse possession. In my own view, if the tenant applied for and obtained a registered possessory title, the operation of the doctrine would entitle the landlord to apply to have the

freehold title transferred to his name, assuming he could bring himself within relevant provisions of the LRA 2002.

173. *Batt v Adams* and *Tower Hamlets v Barrett* were both decided under the scheme of adverse possession which operated by limitation periods. How does encroachment work against third parties under the new scheme of adverse possession introduced by the LRA 2002? Assuming a third party's encroached land is registered, then adverse possession against their land would have to be obtained under Schedule 6 to the LRA 2002.
174. On one view, it would seem impossible for either landlord or tenant to apply to be registered as proprietor of a third party's encroached land under Schedule 6 to the LRA 2002. Schedule 6 entitles a party to apply to be registered as proprietor of an estate of which they have been in adverse possession; under the presumption, however, the tenant is only entitled to a leasehold estate co-terminous with their lease, and not the estate in the encroached land held by the third party. On the other hand, the landlord appears to be precluded from applying because an application under Schedule 6 is to be made by the person in adverse possession – and the tenant, rather than the landlord, has been in adverse possession.
175. However, the better view might be that the landlord can, and should, make any application under Schedule 6 in relation to a third party's encroached land. In *Dickenson v Longhurst Homes Limited* REF/2007/1276, a case heard by Mr Michael Mark sitting as a Deputy Adjudicator to HM Land Registry, it was held that the landlord was the appropriate party to make an application under Schedule 6 in relation to a third party's encroached land.
176. In that case, the Dickensons had been in adverse possession of land near their house, which they occupied as garden ground. However, many years previously, they had sold their house to their daughter, who had rented it back to them. Mr Michael Mark held that any application to be registered as proprietor of the land would have to be made by their daughter. The point was not academic. If the daughter had made her own application, Longhurst, the third-party owner, could have required the application to be dealt with under paragraph 5 of Schedule 6 to the LRA 2002, and none of the conditions would have been made out.
177. The Law Commission also considers that applications to acquire a third party's encroached land by adverse possession should be made by the landlord rather than by the tenant. The LRA 2002 did not make any express provision for encroachments, and the doctrine of encroachment was not dealt with in the Law Commission report which preceded the LRA 2002, *Land Registration for the 21<sup>st</sup> Century: A Conveyancing Revolution*, Law Comm No. 271. In their report, *Updating the Land Registration Act 2002*, Law Comm No. 360, the Law Commission did consider encroachments. The Law Commission said at paras 17.139-17.140:

- '17.139 We have come to the view that schedule 6 in fact already allows for a landlord to make an application based on adverse possession by his or her tenant.
- 17.140 The LRA 2002 changes the consequences of adverse possession for registered land. It does not, however, change the meaning of adverse possession. Adverse possession in the LRA 2002 means the same as it does under the Limitation Act 1980: whether a period of limitation runs in a person's favour. The LRA 2002, like the regime which applies in unregistered land, does not require a person personally to be in adverse possession in all cases. Therefore, if the presumption has not been rebutted, the landlord should be considered to be in possession of the land vicariously, based on the tenant's possession. We agree with Christopher Jessel that a landlord would be able to qualify as a person who has "been in adverse possession of the estate" in order to make an application under paragraph 1 of schedule 6. We therefore do not think that reform is necessary.
- 17.141 Moreover, we think that it would risk creating uncertainty if we made this point express on the face of the LRA 2002. In our view, schedule 6 relies on the general law and so allows for applications by a person in vicarious possession. If we made a landlord's vicarious possession through his or her tenant express in schedule 6, we would risk casting doubt on whether a person in another situation of vicarious possession was in fact in possession and so able to apply.'

178. The Law Commission's comments recognise that under the general law of adverse possession, a person may vicariously be in possession of land by granting tenancies over it – see, *e.g.*, *Heigh v West* [1893] 2 QB 19, at 31.

179. Overall, then, it appears that where there has been encroachment on a third party's land, any application to be registered as proprietor of the land by adverse possession should be made by the landlord, in reliance on the possession of the tenant.

### **Successive tenancies**

180. How does encroachment operate if the tenant relies on occupation of the additional land, during the period of two or more consecutive tenancies of the demised premises, as founding a right to annex the additional land to the demise by encroachment?

181. In *Smirk v Lyndale* [1975] 1 Ch 317, at first instance, Sir John Pennycuik VC held that the tenant was unsuccessful in adding a plot of garden ground to

his tenancy by encroachment, because he found that the issue of a new rent book by a purchaser of the reversion in 1968 amounted to a new tenancy of his house, and stopped time running. He said, at 333:

'It seems to me, however, that the break in the tenancy necessarily negates this claim. Whatever accrued or accruing right the plaintiff may have had in 1968 to include the blue plot in his tenancy from British Railways, this right must have determined with his tenancy under British Railways, and obviously no new right can have accrued against the defendants during the short time in which they have been his landlords. There can be no ground for treating a period of two different tenancies as continuous for present purposes. Contrast the position where a possessory title is acquired by successive squatters, or against successive freeholders. The tenant, so long as the presumption applies, can do no more than acquire an addition to the subject matter of the tenancy and his interest in that additional subject matter must necessarily determine together with his interest in the original subject matter.'

182. The Court of Appeal reversed Pennycuick V.-C.'s decision on the basis that the issue of the new rent book amounted only to a variation of the existing tenancy, not the grant of a new tenancy, so that encroachment had carried on during the course of the one tenancy.

183. However, as a matter of principle, it does not seem right that a tenant who encroaches on land over the course of successive tenancies must start time running again on each successive tenancy to make good an encroachment claim. A similar issue arose in *Secretary of State for Justice v Chau Ka Chik Tso* [2011] HKCFA 86, where during the sixty-year limitation period applicable in Hong Kong to claims for possession of Crown land, the encroaching tenants' tenancy had been renewed in 1973: the option to renew contained in the lease had been automatically exercised pursuant to the Hong Kong Renewal Ordinance. As will be recalled, Ribiero PJ considered in that case that the tenant was estopped from claiming adverse possession of the additional land as against his landlord at the end of the limitation period, because of the presumption of encroachment. Ribiero PJ found the passage from Pennycuick V.-C.'s judgment problematic, as he explained at [54]-[55]:

'54. I have to confess that I find this an unsatisfactory passage. In so far as the passage may suggest that a necessary ingredient of the doctrine is that time must accrue so that the Statute of Limitations operates to bar the landlord's action, I respectfully disagree. As stated previously, while I recognize that the limitation period is important in a practical sense since the doctrine only becomes relevant where the tenant might otherwise be able to set up a possessory title based on adverse possession, my view is that it is by virtue of the doctrine and not of any provisions of the

Statute of Limitations, that the tenant acquires a leasehold interest in the encroachment area and prevents recovery by the landlord until the end of his tenancy.

55. Secondly, even if it were thought necessary for time to accrue for limitation purposes, such accrual must surely relate to the period of the tenant's occupation of the land rather than the duration of the lease or leases under which the adjacent demised land was held during the period of the encroachment. I would accordingly with respect decline to adopt Pennycuick VC's reasoning contained in the cited passage.'

184. The Hong Kong government's counsel, Mr Chan SC, relied on the passage in Pennycuick V.-C.'s judgment as supporting a "no adding up rule" for cases of encroachment. However, Ribiero PJ rejected this argument at [78]-[81], saying:

'79. Mr Chan SC relies on the passage as the basis for rejecting the respondents' claim to a leasehold interest over the encroached upon land. He submits that Pennycuick VC was right to recognize a "no adding up rule", that is, a rule whereby the Court refuses to add up the initial and renewed tenancy terms, treating them as continuous for the purposes of exceeding the limitation period in the context of the encroachment doctrine. Mr Chan submits that such a rule logically follows from what he calls "the coterminous rule", namely, the well established rule that any leasehold interest acquired under the doctrine by an encroaching tenant expires coterminously with his tenancy. Since, Mr Chan argues, a tenant whose occupation of an encroachment has matured into a leasehold interest must surrender up the land on expiry of his tenancy, a tenant whose tenancy has run for less than the limitation period ought logically to be treated as having acquired nothing, and must set the clock ticking afresh under the subsequent tenancy. As Mr Chan puts it, the rights acquired by the encroaching tenant can only attach to a particular tenancy.

79. I cannot accept that argument. It appears to me to proceed on a mistaken view of the nature of the encroachment doctrine. Because of the presumption and the estoppel, the tenant is precluded from asserting that his occupation is by way of adverse possession and so prevents him from relying on the Limitation Ordinance against his landlord. In this way, the doctrine prevents the tenant from acquiring what might otherwise be the statutory rights flowing from adverse possession under the Ordinance. The leasehold interest acquired by the encroaching tenant is the result of applying the presumption and estoppel to both the tenant and the landlord under the doctrine. It does not depend on the tenant

somehow “clocking up” time under an undivided tenancy as suggested by the “no adding up rule”.

80. Even if, which I do not accept, acquisition of the leasehold interest depends upon the accrual of an uninterrupted period of time exceeding the limitation period, such accrual would have to relate to the period of occupation of the area of encroachment and not to the duration of the lease over the demised land. It would not depend or whether the tenancy of the adjacent demised land was granted under a single lease or under two back-to-back leases.

81. It therefore does not matter that the effect of the Renewal Ordinance was to determine the tenancy at the end of its original 75 year term and then immediately to deem a fresh tenancy granted for 24 years less the last three days. The respondents and their predecessors in title occupied the land encroached upon seamlessly for over 60 years. The doctrine therefore came into play, precluding any claim by the respondents based on adverse possession since they occupied the encroachment areas throughout as Government lessees and are presumed to have occupied those areas as an annex to their demised holdings, estopped from claiming otherwise.

185. Ribiero PJ was of course in the minority in *Chau Ka Chik Tso*. Lord Scott of Foscote NPJ, in the majority, also rejected Mr Chan SC’s submissions as to the “no adding up rule”. At [126], he expressed no view on whether Pennycuik V.-C.’s submissions as to the no adding up rule were correct, but noted the case was distinguishable in any event, as the tenancy in *Chau Ka Chik Tso* had an express renewal option, which had been deemed to be exercised. However, beyond that, and on the footing that, in his view, encroachment depended on the expiry of a limitation period, he expressed views similar to Ribiero PJ’s. At [125], he considered it artificial to split up the government’s right of action, and the accrual of time against it, in respect of the encroached land, by reference to the renewal of the tenancy. He said, at [125]:

‘... it seems to me unacceptably artificial to regard the Government as having acquired in 1924 a right of action to recover possession of the 6.67 acres that became spent on 30 June 1973 and as having acquired a fresh, identical right of action on 1 July 1973. The right of action acquired in 1924 was the same right of action, in respect of the same land, exercisable for the same reason, as the right of action exercisable on 1 July 1973. The notion that the deemed grant of the demised land made under s.4 of the 1969 New Territories (Renewable Government Leases) Ordinance had determined the original right of action and given rise to a new identical one seems to me misconceived. The trespass was the same wrongful act before and after 1 July 1973 and the potential

right of action the Government had to remedy that wrongful act was the same right of action before and after that date.'

186. However encroachment is analysed, therefore, it seems to me that additional land can be added to a tenancy by encroachment even if the period of encroachment stretches across two or more successive tenancies of the demised premises: the encroached land itself is occupied continuously as an annex to the demised premises during those tenancies.

### **Possession of additional land by someone other than the tenant**

187. One issue that can arise in practice is where the encroached land is allegedly in the possession of someone other than the tenant.

188. Obviously, if land outside the demised premises is in the possession of someone with no connection to the tenant, then there is no room for the presumption of encroachment to apply, and the person in possession may acquire possessory title subject to the usual rules for adverse possession.

189. However what is the situation if – for example – the additional land is in the possession of a director of the tenant company, or the additional land is in the occupation of a company of which the tenant is director? Alternatively, the situation might be that the additional land is in the possession of a group company of the tenant. Might such situations be relied upon to rebut the presumption of encroachment and allow the person or company in possession of the additional land to acquire possessory title to it as against the landlord by adverse possession?

190. In *O'Neill v Fuller, Smith and Turner Plc* [2024] UKFTT 00250 (PC), a company had taken an assignment of the lease of a pub. At the same time, the company's sole director alleged, he had separately taken an assignment of possessory rights over adjoining unregistered land used as a beer garden. The director further alleged that, a short time later, he had granted a written licence to the company to use the beer garden. The director applied to be registered as proprietor of the unregistered land by adverse possession. The freehold owner of the pub, the brewer Fullers, contended that the licence was fraudulent, that the beer garden had been in the possession of the company, and that therefore Fullers had acquired title to the unregistered land by adverse possession, the tenant company's possession having been on behalf of its landlord. The FTT found that the licence was genuine, and not fraudulent, and that the director had taken an assignment of possessory rights over the unregistered land in his own name from the previous tenant of the pub. Accordingly, it found that the presumption did not apply and that the director was entitled to be registered as proprietor by adverse possession.

191. If there are clear facts which show that the additional land is in separate possession from the demised premises, such as a licence between the possessor of the additional land and the tenant allowing the tenant to use the additional land, then the presumption of encroachment may potentially be

rebutted. However, in many cases, I would suggest that possession of the encroached land by a person or entity connected with the tenant would not rebut the presumption. The presumption operates where the opportunity to possess the encroached land has arisen from the tenancy. If a party connected to the tenant takes possession, it can arguably be assumed that they have done so via the tenancy, and potentially under the implied licence of the tenant. In such circumstances, it seems to me that the presumption would still apply.

### **Leasehold covenants and rent reviews**

192. Where additional land has been added to the demise by encroachment, it follows that it will be subject to all of the terms of the leases, including covenants binding on the landlord and tenant, as well as options to renew or break, and forfeiture clauses. In *White v Wakley* (1858) 26 Beav 17, encroached land was held to be subject to the leasehold covenants, but the analysis in that case was based mostly on implied contract. In *J. F. Perrott & Co. v Cohen* [1951] 1 K.B. 705, a tenant's repairing obligations were held to apply to encroached land.

193. Taking matters on first principles, it would seem that the leasehold covenants would bite after sufficient time had passed for the additional land to be added to the premises by encroachment: if the landlord sought to enforce covenants against the tenant before that time had passed, this might give rise to an earlier estoppel that the additional land has been annexed to the demise.

194. In *Kensington Pensions Developments Ltd v Royal Garden Hotel* [1990] 2 EGLR 117, it was held that premises added to a tenancy by encroachment were to be considered as part of the demised premises for the purposes of a rent review clause, which is clearly correct.

### **Conclusions and takeaways**

195. Following the discussion above, what conclusions can be drawn, and what practical points can be taken away?

196. Although the majority in *Secretary of State for Justice v Chau Ka Chik Tso* [2011] HKCFA 86 regarded the doctrine of encroachment as being part of the operation of the limitation legislation, the better view appears to be that taken by the minority, that encroachment operates as an estoppel, or something akin to an estoppel. The best view is likely that it is an independent doctrine, where, after 12 years, both landlord and tenant are bound to proceed on the basis that the additional land has been added to the demise. It will then be subject to the covenants and other terms of the lease.

197. Encroachment operates where the tenant occupies land belonging to the landlord, which is presumed to be an addition to the demised premises. Where such land is registered, it has been held in the FTT decisions of *McGee v Long Term Reversions (Harrogate) Limited* [2025] UKFTT 00233 (PC) and *Relins v Gill* [2025] UKFTT 00845 (PC) that the tenant can apply to register the additional land as an annex to the demised premises as an application to

update the register under paragraph 5(b) of Schedule 4 to the LRA 2002, in form AP,1, or as an application for first registration of a leasehold estate, in form FR1. While in the former case, the FTT considered that such an application could be made after ten years, on the basis that the tenant is then estopped from making an application for adverse possession under Schedule 6, in the latter case, the FTT considered that a 12-year period would continue to apply by analogy – and that is likely the safer view.

198. Encroachment also operates where the tenant encroaches on to land belonging to a third party, in which case the landlord is entitled to any possessory title acquired against the third party by adverse possession, and the land is treated as part of the demised premises as between the landlord and the tenant. Although it was held in *Trustees of the Michael Batt Charitable Trust v Adams* (2001) 82 P. & C. R. 32 that an adverse possession application against the third party should be made by the tenant, the better view appears to be that contemplated in *Tower Hamlets LBC v Barrett* [2005] EWCA Civ 923, [2006] 1 P. & C. R. 9 and *Dickenson v Longhurst Homes Limited* REF/2007/1276, that the application should be made by the landlord.

199. It can also be noted that the doctrine of encroachment can apply to all land, not just waste, and that the presumption of encroachment is rebuttable. Possession against the landlord need not be adverse for encroachment to apply (*Whitmore v Humphries* (1871) LR 7 CP 1). The additional land must be sufficiently close to the demised premises for the presumption to apply, so that the tenant can be regarded as having taken the opportunity to encroach from his tenancy of the demised premises. Despite indications to the contrary in *Smirk v Lyndale Developments Limited* [1975] 1 Ch 317, the better view is that occupation of additional land across successive tenancies can amount to encroachment, without the tenant having to rely solely on time after the grant of the succession tenancy.

200. Given the FTT's welcome recent decisions in 2025, it is likely that encroachment will be relied on increasingly in the future.

Jamie Sutherland  
Falcon Chambers  
2 June 2026