

Encroachments and Schedule 6 LRA 2002: unknotting the tangle

Emma Lees*

The position of encroachments under the Land Registration Act 2002 are unclear. Recent decisions of the Court of Appeal in relation to Schedule 6 LRA 2002 – *Baxter v Mannion*¹ and *Best v Chief Land Registrar*² – have begun to put flesh onto the bones of this aspect of the 2002 Act reforms. It is clear from the Law Commission report that changes to the rules on adverse possession were a central focus of the reforms,³ designed to encourage reluctant landowners to voluntarily register their land where a trigger for compulsory registration was unlikely to materialise.⁴ No longer a matter of limitation and extinction of title,⁵ adverse possession is now managed through a warning system from the Land Registry to those at risk of losing title to land.⁶

In introducing these new rules however, the Law Commission fails to address some of the more unusual aspects of (the broad doctrine of) adverse possession (even if, as is argued below, strictly speaking encroachments is not part of the law of adverse possession), and as a result there is some lack of clarity remaining. This article examines the relationship between encroachments (the possession of land, belonging to a landlord, outwith the original demise by a tenant, and the possession of land belonging to a third party consequent on the possession of the demised land) and adverse possession. It makes some suggestions as to how this is catered for under the schedule 6 procedure. It is argued, firstly, that it appears that the tenant who possesses against their landlord is unable to apply to be registered under schedule 6, but may be able to apply on the basis of an estoppel or similar, treating encroachments as a separate, independent doctrine. In other words, this species of encroachment is not part of the adverse possession doctrine. Secondly, a landlord of an encroaching tenant also appears on a strict reading of the Act to be unable to apply to become registered proprietor of the freehold estate, notwithstanding the guidance of HM Adjudicator to the Land Registry.⁷ This species of encroachment does involve adverse possession, but the rules are modified so as to account for the impact of the landlord and tenant relationship.

* University Lecturer, Department of Land Economy, University of Cambridge.

¹ *Baxter v Mannion* [2011] EWCA Civ 120, [2011] 1 WLR 1594.

² *Best v Chief Land Registrar* [2014] EWHC 1370 (Admin).

³ Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Report no. 271), (HMSO, London 2001) at 305 – 311, and Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (Report no. 254) at 244 – 248.

⁴ M Dixon, 'The reform of property law and the Land Registration Act 2002: a risk assessment' [2003] Conv 136, 152.

⁵ Land Registration Act 2002 (LRA 2002), Section 96.

⁶ LRA 2002, Schedule 6, Para 2(1).

⁷ *Dickenson v Longhurst Homes*, HM Adjudicator to the Land Registry REF/2007/1276 at [34].

It is much to be regretted that the HM Adjudicator as was has been reluctant to adopt such an approach to date, and it is hoped that guidance from a higher court will demonstrate that the statutory language of schedule 6 struggles to accommodate the doctrine of encroachments.

Encroachments

The general term “encroachments” is used to refer to two separate issues. Firstly, a tenant can “encroach” upon their landlord’s land. In such circumstances, the tenant may be able to add the land possessed to their lease, but they will not be entitled to a freehold estate in that land arising through their possession.⁸ This, it is argued, is not an example of adverse possession, and is justified through the nature of the landlord and tenant relationship, and not through the creation of a possessory freehold title. Secondly, a tenant may adversely possess land belonging to a third party. In these circumstances, the freehold title will pass not to the tenant, but to the landlord.⁹ The tenant is seen as possessing on behalf of his landlord. This is an example of adverse possession, but the consequences of it are again altered by the landlord and tenant relationship. The term “encroachments” therefore can be seen as generally referring to possession of land without permission where that possession is consequent on a landlord and tenant relationship. The operation of the two different species of encroachments are however explained in different ways, as will be seen below.

Neither of these rules particularly makes sense if they are thought of as being adverse possession strictly speaking, not least because in the former case the possession can be with the consent of the landlord.¹⁰ They are essentially rules in and to themselves, relying on possession, but operating differently from adverse possession as conceived of under the Limitation Act 1980 (in that in neither case is the original proprietor’s title extinguished, leaving only the possessory freehold title conferred by adverse possession onto the possessor). The decision of the final court of Hong Kong however in *Secretary for Justice v Chau Ka Chik Tso*¹¹ suggests however that the relationship between adverse possession and encroachments is a close one, dependent upon issues of

⁸ *Andrews v Hailes* (1853) 2 Ellis and Blackburn 349, 118 ER 797; *Doe v Tidbury* (1854) 14 CB 325; *Kingsmill v Millard* (1855) 11 Ex. 313, 156 ER 849; *Whitmore v Humphries* (1871-72) LR 7 CP 1; *Attorney-General v Tomline* (1877-80) 5 Ch D 766, 15 Ch D 150; *Lewis v Rees* 6 C & P 610; *Tabor v Godfrey* (1895) 64 L J (QB) 245; *Lord Hastings v Saddler* (1898) 79 L T 355; and *Perrott v Cohen* [1951] 1 KB 705.

⁹ *Trustees of the Michael Batt Charitable Trust v Adams* (2001) 82 P & CR 32 and *Tower Hamlets LBC v Barrett* [2005] EWCA Civ 923, [2006] 1 P & CR 9.

¹⁰ *Whitmore v Humphries* (1871) LR 7 CP 1 at 5, and S Journal and O Radley Gardner, *Adverse Possession* (Haywards Heath: Bloomsbury Professional, 2011) at [25:29].

¹¹ *Secretary for Justice v Chau Ka Chik Tso* [2011] 2 HKC 441 (CFA (HK)).

relativity of title and extinction,¹² and not, as has previously been considered, on a doctrine akin to (or possibly indeed of) estoppel.¹³ The basis and the operation of the rules is “tangled”.¹⁴ The results of this entanglement in terms of the 2002 Act are discussed below.

The basis for encroachment rules – tenant encroaches on landlord’s land

In order to fully understand how these two branches of encroachments might fit within schedule 6, it is important to attempt to understand what is actually occurring, and what, as a result, the conceptual basis of these rules are. As has been discussed by Merry,¹⁵ the justification for either extending the scope of the demise through adverse possession, or conferral of freehold title onto the landlord rather than conferring freehold title onto the tenant adverse possessor lies possibly in the implied obligations resting on the tenant vis-à-vis his landlord; or possibly in estoppel; or possibly in a restricted understanding of the meaning of extinction in this context; or possibly on none of these. Which of these it is matters for how encroachments will operate in the context of land registration.

In its simplest terms however, as Merry describes:

The principle is that if a tenant goes into and remains in land belonging to the landlord... outside the boundaries of but adjoining or adjacent to the land demised to him, it is to be presumed that the intention of the tenant is to annex to the demise the encroached-upon land so as to enable him to occupy that land as if it were part of the demise.¹⁶

This understanding finds support in the case law. In *Kingsmill v Millard* for example, Parke B reasons 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”.¹⁷ Thus both the fact of possessing, and the intention associated with that possessing are relevant. The justification for the rule therefore is connected with the absence of an intention to hold on one’s own behalf. This in itself would be enough to distinguish the doctrine from adverse possession, but there are other explanations for the operation of the rules, and as noted, the case law does not commit itself to any one of these.

¹² *Secretary for Justice v Chau Ka Chik Tso* [2011] 2 HKC 441 (CFA (HK)) and *Skipwith v Singh* HM Adjudicator to the Land Registry REF/2009/0850 at [10].

¹³ See *Andrews v Hailes* (1853) 2 Ellis and Blackburn 349, *Kingsmill v Millard* (1855) 11 Ex. 313, 156 ER 849, *Perott v Cohen* [1951] 1 KB 705, *Ali v Tower Hamlets LBC* [1996] EGCS 193 although see also *Long v Tower Hamlets LBC* [1998] Ch 197, 203 which acknowledges that the doctrine is not dependent upon any of the traditional features of proprietary estoppel.

¹⁴ per Pennycuick VC, *Smirk v Lyndale Development* [1974] 3 WLR 91, 94.

¹⁵ M Merry, ‘Adverse possession and the principle of encroachment: *Secretary for Justice v Chau Ka Chik Tso*’ [2012] Conv 333.

¹⁶ M Merry, ‘Adverse possession and the principle of encroachment: *Secretary for Justice v Chau Ka Chik Tso*’ [2012] Conv 333 at 335.

¹⁷ *Kingsmill v Millard* 156 ER 849, 851.

For example, in *Perrott v Cohen*, Denning LJ argues that, “[t]he principle underlying the cases on encroachment is not perhaps strictly an estoppel, but it is akin to it”.¹⁸ In *Andrews v Hailes* the court went further, with Lord Campbell CJ stating that, “I proceed on what the civil law calls exceptio personalis, and the common law an estoppel”.¹⁹ Again, in *Kingsmill v Millard*, per Parke B: “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”.²⁰ If indeed this were to be a true estoppel, the operation of the principle would be out of step with other situations of estoppel given the fact that the landlord need never know of the tenant’s possession, such that no representation of any type could be said to have been made.²¹ It is perhaps more accurate then to consider this as akin to estoppel, rather than estoppel *strictu sensu*. Certainly this approach receives support from the minority in the recent Hong Kong case of *Secretary for Justice v Chau Ka Chik Tso*²² and from *Batt v Adams*. Here Laddie J states that:

The presumption arises out of the relationship between landlord and tenant. It is because of their relationship that title acquired by one is treated as being acquired for the other. It arises as a kind of estoppel out of the relationship.²³

As noted it is also possible to conclude that these rules are based on the implied obligations which rest on the tenant vis-à-vis his landlord. The tenant is unable to deny that he holds the encroached land subject to these obligations.

Finally, it is important to discuss the possibility that this is adverse possession, albeit with slightly different rules, and that limitation of title is what is happening here. It cannot be extinction of freehold title, since freehold title remains, but as Merry describes, “[w]hat was extinguished therefore was the owner's right during the term of years to enjoy the property free from the term of years”.²⁴ This approach receives support in the Hong Kong decision of *Secretary for Justice v Chau Ka Chik Tso*, but also in the approach of HM Adjudicator to the Land Registry in *Skipwith v Singh*:

In effect, [council for the applicant’s] doctrine disapplies the Limitation Act to a landlord's right to recover his adjoining land from an encroaching tenant. In my view, and with due deference to Mr Gallagher’s ingenuity, this is a wholly misconceived argument, which has no basis in authority, is manifestly unjust, and would lead to an

¹⁸ *Perrott v Cohen* [1951] 1 KB 705, 710.

¹⁹ *Andrews v Hailes* (1853) 2 Ellis and Blackburn 349, 353.

²⁰ *Kingsmill v Millard* 156 ER 849, 852.

²¹ *Long v Tower Hamlets LBC* [1998] Ch 197, 203.

²² *Secretary for Justice v Chau Ka Chik Tso* [2011] 2 HKC 441 (CFA (HK)).

²³ *Batt v Adams* (2001) 82 P & CR 32, [41].

²⁴ M Merry, ‘Adverse possession and the principle of encroachment: *Secretary for Justice v Chau Ka Chik Tso*’ [2012] Conv 333 at 337.

absurd result... Accordingly, the Applicant's claim must stand or fall by the application of the law of adverse possession simpliciter, both pre- and post- the 2002 Act.²⁵

Notably, even if the rules are based on limitation, the operation of the rules is slightly but importantly different from adverse possession. Most importantly, there is no requirement in encroachments against a landlord that the possession be adverse. Consent of the landlord is irrelevant.²⁶ Relatedly, the principle cannot be one of extinction of title for the very reason that the landlord's title is not extinguished. It cannot simply be that the title is extinguished but the tenant is estopped from asserting that extinction since in such cases there would be no freehold estate in the land. Nor is it a classical estoppel.

Thus, the most likely scenario is that this is an independent doctrine which relies on possession, but not on limitation or adverse possession in the strict sense. Nor is it a true proprietary estoppel, but something akin to it in the nature of a specific rule based on certain presumptions as to intention arising from the landlord and tenant relationship. It is therefore, in this author's opinion, best understood as a doctrine separate from adverse possession (since it does not operate through the creation of a possessory freehold title resulting from possession, and the consequential extinction of the paper owner's title through lack of use). The justification for the rules lies not therefore in the justifications given for adverse possession, but in the landlord and tenant relationship itself. As will be seen, the conclusion that this is not based on limitation has very important consequences for the operation of schedule 6.

Encroachments as an independent doctrine and schedule 6

What does this mean in terms of registered land? Before exploring this issue in detail, it is necessary first to explain process established by the LRA 2002. Section 96 LRA 2002 stipulates that limitation of title, as expressed in the Limitation Act 1980, no longer applies to registered land. Instead, the process of obtention of title through adverse possession is now regulated by schedule 6. The process in brief is that, firstly, the adverse possessor, after 10 years in adverse possession of the land, is entitled to make an application to the Land Registry to be registered as proprietor. At this point, the Land Registry will send a notification of the application not only to the registered title-holder, but also to other interested parties, such as a registered chargee. The title-

²⁵ *Skipwith v Singh* HM Adjudicator to the Land Registry, REF/2009/0850 at [12]. See also [10].

²⁶ *Whitmore v Humphries* (1987) 1 LR 7 CP 1, 5 and S Journal and O Radley Gardner, *Adverse Possession* (Haywards Heath: Bloomsbury Professional, 2011) at [25:29]. If the landlord's permission expressly gives a mere licence however, it may exclude the operation of the rules on encroachments, *Ali v Tower Hamlets London Borough Council* [1996] EGCS 193.

holder then has 65 working days in which to respond to the notice from the Land Registry.

They have three options. Firstly, they can consent to the application. This will result in the adverse possessor being registered as proprietor. Secondly, the registered proprietor may serve an objection. This challenges the factual basis for the adverse possessor's application. This may be a prudent course of action where appropriate if, for example, there is a risk that the applicant might fall into one of the categories in schedule 6, paragraph 5. Thirdly, the registered proprietor may serve a counter-notice. The counter-notice will have the effect of causing the applicant's application to be dismissed unless it falls under one of the categories in paragraph 5. If the registered proprietor does not respond, the applicant will also succeed in being registered as new proprietor.

If the registered proprietor does serve a counter-notice, and none of the exceptions in paragraph 5 apply, they then have a two-year period in which to commence possession proceedings against the adverse possessor. If they fail to do this, the adverse possessor will be entitled to apply again to be registered. They will then automatically be registered. Thus, total inaction for 12 years may still result in a loss of title, but crucially, there will be a warning after 10 years or whenever the application is lodged, that such loss is imminent. A degree of further protection is thereby accorded to the registered title-holder.

Where this protection falls down is where the application falls into one of the categories in schedule 6, paragraph 5. If one of these applies, the adverse possessor will be registered as proprietor. These categories are: (1) if there is an equity arising by estoppel; (2) if the applicant is entitled to be registered for some other reason; and (3) if the boundary exception applies. The boundary exception states that if, for a least 10 years ending on the date of the application, the adverse possessor reasonably believed that they were in possession of land belonging to them, and such land was adjacent to property to which they did have title, then they will be entitled to be registered notwithstanding a counter-notice served by the current proprietor.

The central features of this regime therefore are the continuation of the previous "substantive" definition of adverse possession (factual possession and intention to possess which is adverse); notification and opportunity to object accorded to the current proprietor in all but the narrowest of circumstances; and a two-year grace period post notification in which the registered proprietor must act. As we shall see, the rules relating to encroachments do not sit comfortably within this framework.

In order to demonstrate this a closer look must be had at section 96 LRA 2002. This section states that:

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

...

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

This section, effectively, disapplies section 15 Limitation Act 1980, but because of the terms of section 8 Limitation Act 1980, arguably this section never applied to encroachments anyway. This means that section 96 has no affect on encroachments. Section 97 LRA 2002 directs that "adverse possession" be dealt with under Schedule 6. Again, since encroachment does not involve adverse possession, this does not apply here either, something which is confirmed perhaps by the total lack of mention of encroachments in the Law Commission report explaining the LRA 2002.²⁷ Thus, the encroaching tenant would simply apply to be registered leasehold proprietor under the normal rules, and would be registered accordingly if they could prove 12 years of possession (as the ten-year possession period under the 2002 Act would not apply either, contrary to the approach in *Skipwith v Singh*²⁸ and *Dickenson Homes v Longhurst*²⁹).

Unfortunately the analysis cannot be as simple as this. Although encroachments do not require adverse possession, they may involve possession which is adverse. That is, encroachments may involve factual possession, with an intention to possess, which is not with the consent of the paper title-holder. In such cases, although the doctrine of encroachments applies, subject to one qualification, it cannot be said that the tenant is not, as a matter of fact, in adverse possession. Thus both section 96 and 97 would apply and so the operation of the rules in schedule 6 would depend on the distinction between consent of the landlord or not since in the latter case there would be possession which was adverse (although whether this means that there was adverse possession for the purposes of section 96 and 97 depends somewhat on how the presumptions in play in encroachments cases are seen as impacting upon the operation of adverse possession *strictu sensu*, an issue which is discussed below). Having such a distinction is not wholly illogical, but it does not appear in the traditional rules relating to adverse possession.

The qualification mentioned however relates to the intention to possess. The intention to possess, famously, requires an intention to possess in one's own

²⁷ Law Commission, 'Report 271: Land Registration for the Twenty-First Century - A conveyancing revolution' (HMSO, London 2001).

²⁸ *Skipwith v Singh* HM Adjudicator to the Land Registry, REF/2009/0850.

²⁹ *Dickenson v Longhurst Homes*, HM Adjudicator to the Land Registry REF/2007/1276.

name and for one's own benefit.³⁰ The intention in encroachment cases, as is made clear in *Lewis v Rees* by Parke B, is to hold "as part of the lease".

It is clearly settled that encroachments made by a tenant are for the benefit of his landlord, unless it appears 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.³¹

This is a subtly, but importantly different intention, from that which is present in a true adverse possession situation. There is no intention, in short, to hold in one's own name, but rather, by operation of the presumption, an intention to hold in one's own and one's landlord's name. This argument may provide a route by which we can again assert that *all* encroachments, whether by consent of the landlord or not, are not based on adverse possession at all.

This argument appears to receive some support from the Land Registry in their guidance on adverse possession by tenants.

As explained above, adverse possession requires "the intention, in one's own name and on one's own behalf, to exclude the world at large". There is a legal presumption that a tenant who encroaches onto other land does so for the benefit of their landlord. At least on one view, this presumption means that there is no adverse possession by a tenant and that any application under Schedule 6 to the Act should be by the tenant's landlord.

... Furthermore, there is another view, which is that the presumption is only concerned with who might have acquired title at common law to the estate concerned and does not alter the fact that the tenant is in adverse possession, and so is irrelevant where the application is one under Schedule 6.³²

Thus, following from this analysis, we can once again conclude that possession of a tenant against his landlord cannot give rise to an application under schedule 6, but may instead allow the tenant to apply to be registered as leasehold proprietor on the basis of encroachments as an independent doctrine. If this is the case, following the requisite period of possession, the tenant would apply for an alteration on the grounds that the register was out of date (LRA 2002, sch 4 paragraph 2(1)(b)).

Encroachments as limitation and schedule 6

How, if at all, is this analysis affected by the decision in *Secretary for Justice v Chau Ka Chik Tso*³³ (a similar approach is taken in *Skipwith v Singh*³⁴)? As

³⁰ *Powell v McFarlane* (1979) 38 P & CR 452, 471.

³¹ *Lewis v Rees* 6 C. & P. 610356

³² <http://www.landregistry.gov.uk/professional/guides/practice-guide-4#guide-mark-32> published July 2013, accessed 28th May 2014,

³³ *Secretary for Justice v Chau Ka Chik Tso* [2011] 2 HKC 441 (CFA (HK)).

³⁴ *Skipwith v Singh* HM Adjudicator to the Land Registry, REF/2009/0850

discussed above, this decision of the final court of Hong Kong suggests that, contrary to the argument presented here, encroachment is not an independent doctrine, but rather is based on a nuanced understanding of limitation of action. To recap, as Merry summarises: “What was extinguished... was the owner's right during the term of years to enjoy the property free from the term of years”.³⁵ And the reason for this extinction, was very clearly the tenant’s “adverse possession” of the land with the associated limitation on intention:

the effect of the encroacher's adverse possession is necessarily limited by the unrebutted presumption and the effect of a trespasser's possession depends upon his intentions, so if the trespasser's intention was to take possession in a limited way rather than as full owner, the consequences should be limited accordingly.³⁶

If this is correct, i.e. that encroachment is based on limitation then the above argument does not succeed at all and schedule 6 will apply to tenant versus landlord situations.

As a matter of authority in English law it is fairly clear that the approach in *Chau Ka Chik Tso* is wrong. No authority proceeds on the basis that encroachment against a landlord is based on limitation of title – not surprising given that the landlord’s title is not extinguished by the possession – and the authority of *Long v Tower Hamlets LBC* shows that landlord’s consent when not expressed to be as a mere licence is irrelevant to the operation of the doctrine. Instead, there is strong authority that the doctrine is based on something akin to estoppel as highlighted above. It is unlikely that an English court would therefore follow the decision of the Hong Kong court, notwithstanding the presence of Lord Scott. More importantly however, as Merry as convincingly argued, the approach based on limitation does not make sense as a matter of policy or logic. He demonstrates that to rely on limitation requires, “[a finding of] degrees within the owner's own title”³⁷ leading to a potentially very great degree of uncertainty.

Nevertheless, in case the prestige of the Hong Kong court did result in a reassessment by an English court, we must now assess how encroachments fit into schedule 6 where a tenant encroaches on land to which his landlord has title, but which is not included in the original demise if the doctrine is indeed based on limitation. Thus we turn back to the provisions of the Act.

Assuming that the tenant has been in adverse possession for 10 years, he will be entitled to apply to be registered as leasehold proprietor of the estate in

³⁵ M Merry, ‘Adverse possession and the principle of encroachment: *Secretary for Justice v Chau Ka Chik Tso*’ [2012] Conv 333 at 337.

³⁶ M Merry, ‘Adverse possession and the principle of encroachment: *Secretary for Justice v Chau Ka Chik Tso*’ [2012] Conv 333 at 337.

³⁷ M Merry, ‘Adverse possession and the principle of encroachment: *Secretary for Justice v Chau Ka Chik Tso*’ [2012] Conv 333 at 339.

question (assuming more than 7 years remain on the lease³⁸). That the tenant can be described as having been in adverse possession, and that the normal procedure in Schedule 6 applies, receives support from the decision of the adjudicator in *Skipwith v Singh*:

Accordingly, whether or not the application had been made by the Applicant under the pre-2002 regime, or under Schedule 6 to the 2002 Act, the Applicant would be able to establish either twelve, or ten, years' adverse possession, as the case may be. If the application had been treated as made entirely under the 2002 Act, the outcome would be exactly the same.³⁹

In such circumstances, it is likely that the landlord would serve a counter-notice, forcing the application to be dealt with under paragraph 5.⁴⁰ The application will therefore be rejected by the Land Registry unless the tenant can bring himself under the protection of one of the exceptions in schedule 6⁴¹ – (a) he is entitled to be registered for some other reason;⁴² (b) there is an equity arising by estoppel;⁴³ and (c) the boundary exception.⁴⁴ We can dismiss the first one. By definition (a) does not apply. We have however to be more tentative with (b). It does not apply if encroachment is based on limitation and not on estoppel, but what if it is based upon estoppel and the possession is adverse since there is no consent of the landlord, and the argument based on intention discussed above proves to be wrong? In such a case you could say that there is an equity arising by estoppel – it prevents the tenant from asserting freehold title – but also contrary to what might be expected, it allows the tenant to assert leasehold title, as the minority reasoning in *Secretary for Justice v Chau Ka Chik Tso* demonstrates.⁴⁵ In such a case the tenant could be registered notwithstanding the counter-notice.

More likely however will be success based on the boundary exception. This requires that:

- (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)

³⁸ LRA 2002, Section 27(2)(b).

³⁹ *Skipwith v Singh* HM Adjudicator to the Land Registry, REF/2009/0850 [14].

⁴⁰ LRA 2002, schedule 6, paragraph 3(1).

⁴¹ LRA 2002, schedule 6, paragraph 5.

⁴² LRA 2002, schedule 6, paragraph 5(3).

⁴³ LRA 2002, schedule 6, paragraph 5(2).

⁴⁴ LRA 2002, schedule 6, paragraph 5(4).

⁴⁵ *Secretary for Justice v Chau Ka Chik Tso* [2011] 2 HKC 441 (CFA (HK)). See M Merry 'Adverse possession and the principle of encroachment: *Secretary for Justice v Chau Ka Chik Tso*' [2012] Conv 333 at 338.

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.

There are two problems that a tenant will face here – meeting condition (a) and condition (c), and whether they meet this will depend on what “belonging to” is said to mean.⁴⁶ This inelegant phrase is probably supposed to mean “registered proprietor of” and of course the tenant will be registered proprietor of the leasehold estate (as by definition here it is longer than 7 years’ duration). In such a case also it would then be a question of fact⁴⁷ as to whether the belief extended to belief in being proprietor of the encroached-upon land.

In other words, the position is potentially complex, and there are no clear answers. However, to summarise, the options are:

- (1) Encroachment, although based on possession, is not based on adverse possession. Thus, section 8 excludes the operation of section 15, and so section 96 and 97 LRA 2002 do not apply, and as such encroachment operates entirely without schedule 6. A tenant would then rely on sch 4, para 2(1)(b) to bring the register up to date.
- (2) Encroachment is based on adverse possession albeit a modified version and the Limitation Act does apply. Then the tenant could apply under schedule 6, and the provisions of that will determine whether the application is successful or not. If the landlord were to serve a counter-notice, the tenant may be able to bring him or herself into the protection of the boundary exception, dependant upon the interpretation of “belonging to”.
- (3) Encroachment can be based on adverse possession where there is no consent of the landlord, in which case the tenant can apply under schedule 6. In this case, if the situation is based on a combination of estoppel and adverse possession, then he may be able to rely on the equity arising by estoppel for the purposes of paragraph 5.

It is suggested that only the first of these makes sense. Encroachment, notwithstanding the discussion in *Chau Ka Chik Tso*⁴⁸ and the indications in *Dickinson v Longhurst Homes*⁴⁹ and *Skipwith v Singh*,⁵⁰ is not based on limitation and adverse possession. It is an independent doctrine based something akin to estoppel arising from the presumed intentions that come

⁴⁶ Jourdan and Radley Gardner acknowledge that it is unclear from the text whether “belonging to” includes a tenant. S Journal and O Radley Gardner, *Adverse Possession* (Haywards Heath: Bloomsbury Professional, 2011) at [22:82].

⁴⁷ See *IAM Group v Chowdrey* [2012] EWCA Civ 505.

⁴⁸ *Secretary for Justice v Chau Ka Chik Tso* [2011] 2 HKC 441 (CFA (HK)).

⁴⁹ *Dickenson v Longhurst Homes*, HM Adjudicator to the Land Registry REF/2007/1276.

⁵⁰ *Skipwith v Singh* HM Adjudicator to the Land Registry, REF/2009/0850.

from a landlord and tenant relationship, and therefore operates outside the principles established by schedule 6.

Tenant versus third party

The position of a tenant who encroaches from the leasehold demise onto land owned by a third party has always been more controversial than the position between landlord and tenant, and as a result is harder to justify. The general rule is relatively clear. Where the tenant adversely possess against the third party, that third party's title is extinguished. Any acknowledgement of title by the landlord is irrelevant, since the question relates here to limitation of the paper title-holder's title, and the consequences of this extinguishment.⁵¹ As Fox explains, "the third party's right to recover possession of the encroachment is barred by 12 years' continuous dispossession, rather than by 12 years' continuous possession by either the landlord or the tenant".⁵² Thus, without question, this type of encroachment is a matter of adverse possession. The tenant will then become leaseholder of that land, and his landlord will become freehold owner. The encroached land will then become subject to the terms of the lease.⁵³ When the lease comes to an end, the landlord reversioner will be entitled to go into possession of the encroached land as freeholder.

According to Merry:

The rationale for the principle is that the tenant will normally have been able to occupy the additional land only because he is the tenant of the landlord's land... It is also usually more practical to do so since the additional land will normally be small and adjoining the leased land and will have been enjoyed with it for a long time, often exceeding the normal limitation period of 12 years.⁵⁴

Notwithstanding the apparent logic in this approach however, as Laddie J explains in *Batt v Adams*, it is still somewhat difficult to justify the position:

To an outsider, although the presumption may appear sensible and fair to the extent that it covers a tenant's encroachment on his own landlord's land, it may appear feudal when it applies to land belonging to third parties. Why should a tenant who trespasses on a third party's land, perhaps distant from the land the subject of his tenancy, acquire title which passes to his landlord? What happens if he is a tenant of two or more different landlords and the land which the tenant adversely possesses is distant to all of them (or abuts them all)? Which landlord acquires title by virtue of the presumption or do they all do so,

⁵¹ *Tower Hamlets LBC v Barrett* [2005] EWCA Civ 923, [2006] 1 P & CR 9, [99].

⁵² D M Fox, 'Adverse possession and "palm tree" justice' (2007) 66 CLJ 17-18.

⁵³ *Tower Hamlets LBC v Barrett* [2005] EWCA Civ 923, [2006] 1 P & CR 9 [85] and C Harpum et al, Megarry & Wade, *The Law of Real Property* (6th edn, 2000) at para.21-027.

⁵⁴ M Merry, 'Adverse possession and the principle of encroachment: *Secretary for Justice v Chau Ka Chik Tso*' [2012] Conv 333 at 335. See also *Andrews v Hailes* (1853) 2 Ellis and Blackburn 349, 118 ER 797, *Attorney General v Tomline* (1877-80) 5 Ch D 766, 15 Ch D 150 and *Tabor v Godfrey* (1895) 64 L J (QB) 245.

and if so in what proportions?... Furthermore, it might be said that the presumption works a hardship on the tenant. For years he exposes himself to the risk of being sued for trespass. His landlord is not liable. Yet at the end of the day it is the landlord who benefits from the acquired title to the stranger's land. He obtains all the benefit and takes none of the risk. He acquires title only because the squatter happens to be his tenant on another piece of land.⁵⁵

The basis of this rule is therefore, once again, unclear and once again, the precise mechanism matters here because of the statutory language of schedule 6. It is clear that there is adverse possession in these situations, but it is far from clear that the landlord is able to use this adverse possession as a basis for an application under schedule 6. *Dickenson v Longhurst Homes*⁵⁶ suggests that the correct approach will be for the landlord to make the application under schedule 6,⁵⁷ but it is far from clear that this is right according to the terms of the statute. Schedule 6, paragraph 1(1) states 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”. In the case of a landlord, he will not have been in adverse possession for ten years. The language does not happily accommodate the application of the landlord, but nor is it particularly suited to the application of the tenant who as a result of the rule of encroachments is entitled to apply only for leasehold title and he has not been adversely possessing as against a leasehold estate. The only application that makes sense on the statutory wording is for the tenant to apply to be registered as freehold proprietor of the disputed land.

The lack of clarity that results from this ambiguity is highlighted by Jourdan and Radley-Gardner.

Take this case: a tenant, T, encroaches on neighbouring registered land, reasonably believing the encroached land to belong to his landlord, L. T holds possession for ten years. T then applies to be registered as proprietor of the encroached land, and the application succeeds. T is now the registered proprietor of the encroached land. It is not clear if T will have to treat the land as subject to the tenancy, and so have to return possession of it to L on the expiry of the tenancy. It may be that, if T communicates to L his application to be registered, that will be sufficient to negative the presumption that otherwise arises that the encroached land is added to the demised premises.⁵⁸

Indeed, this lack of clarity suggests that encroachments against third party do not fit into the 2002 Act framework at all, and since the Act disapplies the

⁵⁵ *Batt v Adams* (2001) 82 P & CR 32, [38].

⁵⁶ *Dickenson v Longhurst Homes*, HM Adjudicator to the Land Registry REF/2007/1276.

⁵⁷ *Dickenson v Longhurst Homes*, HM Adjudicator to the Land Registry REF/2007/1276 at [34].

⁵⁸ S Journal and O Radley Gardner, *Adverse Possession* (Haywards Heath: Bloomsbury Professional, 2011) at [22:37].

limitation period, it is not possible to succeed on the basis of limitation outside the provisions of the Act. As a result, it is arguable that the 2002 provisions put a stop to encroachments against third parties by tenants, and instead. Such a conclusion means that a court would either conclude that the tenant is not able to apply for title at all (given the presumption that he has possessed on behalf of his landlord), or that he can only apply to be freehold proprietor. Policy considerations suggest the former is more likely given the desire to prevent very small areas of land belonging to the tenant as freeholder once the rest of his lease comes to an end.

This is where the discussion in *Tower Hamlets v Barrett*⁵⁹ becomes highly relevant however. The conceptual timing and reality of the situation prior to the extinction of the lease tells us what process must be followed by tenant and landlord in relation to their applications. It is clear from that case that although the tenant is the one in adverse possession, that does not entitle them to freehold title to the land, and the third party will be affected by that, not just the landlord and tenant. The estoppel-type right which arises out of the possession and the landlord and tenant relationship has impacts beyond the parties to that relationship. On this reasoning, the tenant is unable to apply to become registered proprietor of the freehold since he will be estopped (or something like being estopped) from making this application. However, if we see the LRA 2002 schedule 6 as an autonomous system, dependent upon the definition of adverse possession, but not dependent upon its rules relating to extinction, then neither the landlord or tenant are apply to apply. The landlord cannot apply as he does not meet the definition of the Act. The tenant cannot apply as he is prevented from doing so because of the landlord and tenant relationship that arises and which can be relied upon and impacts upon third parties.

Conclusion

Thus, it appears that the LRA 2002 does not account for encroachments at all against third parties. It is the tenant who is entitled to apply and no one else according to the statutory language. He is entitled to apply only for registration of the estate against which he has been in adverse possession. In this case he will have been in adverse possession against the freehold estate but the rules of encroachments will prevent him from so doing. The landlord cannot apply either. Furthermore, it appears that the relationship between tenant and landlord is regulated entirely without the scope of schedule 6 so that the procedures there do not apply when considering encroachment by a tenant against his landlord. Instead, the tenant must apply to have the register brought up to date.

Unfortunately, we cannot know for sure what the position is with encroachments and schedule 6 without a firm commitment from a higher

⁵⁹ *Tower Hamlets LBC v Barrett* [2005] EWCA Civ 923, [2006] 1 P & CR 9 [86].

court as to the basis of encroachments. What we can know however is that the wording of schedule 6 does not encompass encroachments at all comfortably. Thus, if we take the wording of schedule 6 seriously, it may very well be that the doctrine of encroachments is not dealt with under the 2002 Act at all.