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Untangling Encroachments and Adverse possession

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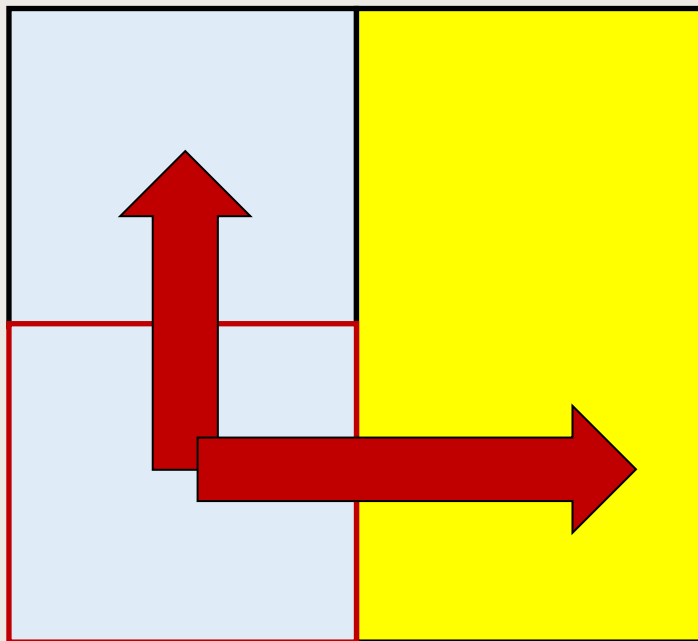
Introduction: what is the doctrine of encroachment?

- a) Tenant B takes possession of his landlord A's land not included in the demise by virtue of his possession of the demised premises; land presumed to be an addition to the demise, and must be given up on determination of the lease (unless B's conduct makes it clear that he occupied the land for his own benefit, and not as part of the demised premises);
- b) Tenant B takes possession of the land belonging to a third party C, then both B and A can contend that the land has been added to the demise under the lease, (so that on expiry it must be given up to A).

See the summary in Jourdan at 25-01.

Introduction: what is the doctrine of encroachment?

fig 1



A is freeholder of the blue land
B holds a lease from A of land edged red
C is freeholder of the yellow land

Introduction: what is the doctrine of encroachment?

Why does this matter?

1. Isn't this all about adverse possession?
2. Isn't it rather difficult to establish a right by adverse possession in relation to registered land post LRA 2002 (save where there is an honest error as to boundary)?
3. Aren't most estates going to be registered, and therefore subject to the LRA 2002? (21 year leases triggers registration under s. 123(1) LRA 1925; 7 year leases triggers registration under s. 4(c) LRA 2002)

Introduction: what is the doctrine of encroachment?

When might this matter?

1. Converted buildings (e.g. townhouse converted into flats?)
2. Lofts, roofs, gardens?

Georgiou v Wong

Introduction: what is the doctrine of encroachment?

An approach to the analysis:

1. B's demise will be defined by his lease; if he encroaches on A or C's land, isn't he a trespasser?
2. Does the doctrine operate to grant B rights against A or C, and if so when (or A against C)?
3. Or does the doctrine operate to limit the rights B might otherwise acquire, in particular against A, and if so when?
4. Two key perspectives:
 - a) Tenant
 - b) Landlord

Recap of key principles

Adverse possession:

- Limitation act 1980:
 - S. 15: no right of action after 12 years from accrual of right;
 - Sch 1 para 8: right of action where land in possession of someone in whose favour the period can run;
 - S. 17: extinction of title on expiration of limitation period
- Adverse possession:
 - Factual possession (single and exclusive possession);
 - Intention to possess for the time being to the exclusion of others, including owner with paper title;
 - Possession must be “adverse” (no right to possession precluding limitation from running).

Recap of key principles

Adverse possession and registered land:

- LRA 2002:
 - S. 96: no period of limitation under s. 15 LA 1980 in relation to registered estate; no extinction of title under s. 17;
 - Sch 6 makes provision for application for registration of the estate after 10 years adverse possession (same meaning as under LA 1980) against that estate;
 - If registered proprietor objects, either within sch 6 para 5 gateways (estoppel, other reason for registration, 10 years' honest mistake as to boundary), or remain for 2 years from rejection of application;
 - S. 98: defence if entitled to registration.

Recap of key principles

Proprietary estoppel by acquiescence:

1. B adopts a particular course of action in relation to land;
2. B mistaken as to their current rights;
3. A knows of B's belief and A's inconsistent rights;
4. A fails to assert A's rights against B;
5. B would suffer detriment if A were free to enforce their rights.

Snell 12-034, Ramsden v Dyson (1866) Lr 1 HL 129 per Lord Carnworth VC at 140-141

Estoppel by representation see Thorner v Major [2009] 1 WLR 776 at [29]

3rd Party Land cases

Doe d Lewis v Rees (1834) 6 C&P 610

Kingsmill v Millard (1855) 11 Ex 13 per Parke B

"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. ... The encroachment must be considered as annexed to the holding, unless it clearly appears that the tenant made it for his own benefit."
(sic)

Tower Hamlets LBC v Barrett [2006] P&CR 9 (CA)

3rd Party Land cases

Note:

1. A basis for a claim against 3rd Party Land is required, e.g. adverse possession;
2. Case focus typically on whether 3rd Party bound, or whether tenant bound at end of lease.

Landlord's retained land cases

Smirk v Lyndale Developments Ltd [1975] Ch 317 at 323
per Pennycuik V-C:

"The law on this point, if I may respectfully say so, has got into something of a tangle."

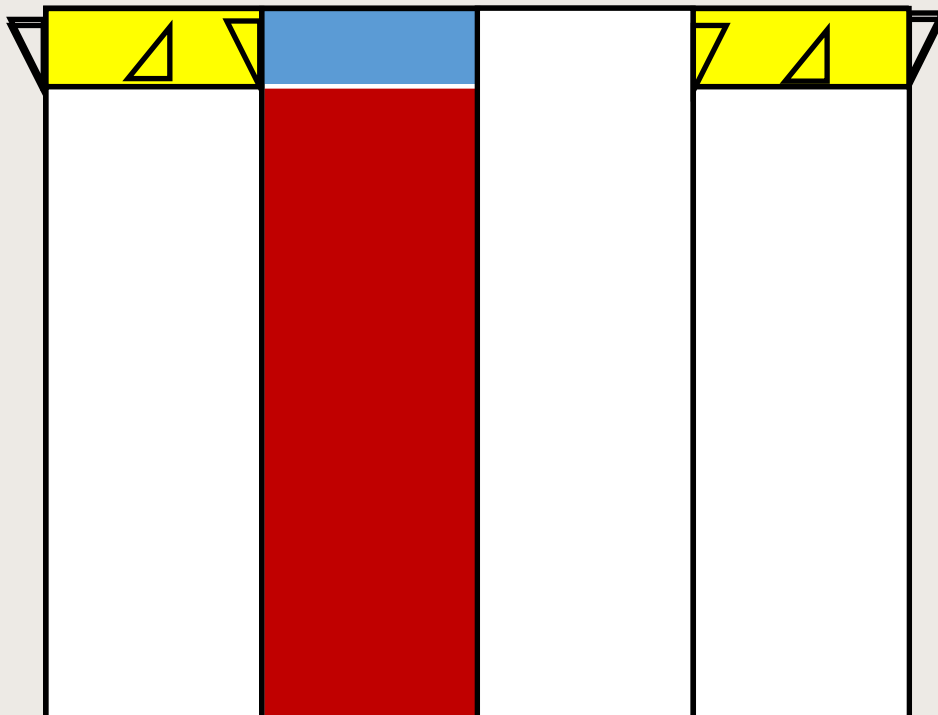
End of tenancy cases focus on tenant's position. Either:

- a) Doctrine of encroachment applies and tenant obliged to give possession to the landlord; or
- b) Doctrine does not apply/rebutted and tenant claims title against landlord.

Whether the landlord is bound likely to be immaterial.

Landlord's retained land cases

Tabor v Godfrey (1895) 64 LJQB 245



Property in red
Passage in yellow
Encroachment in
blue

Landlord's retained land cases

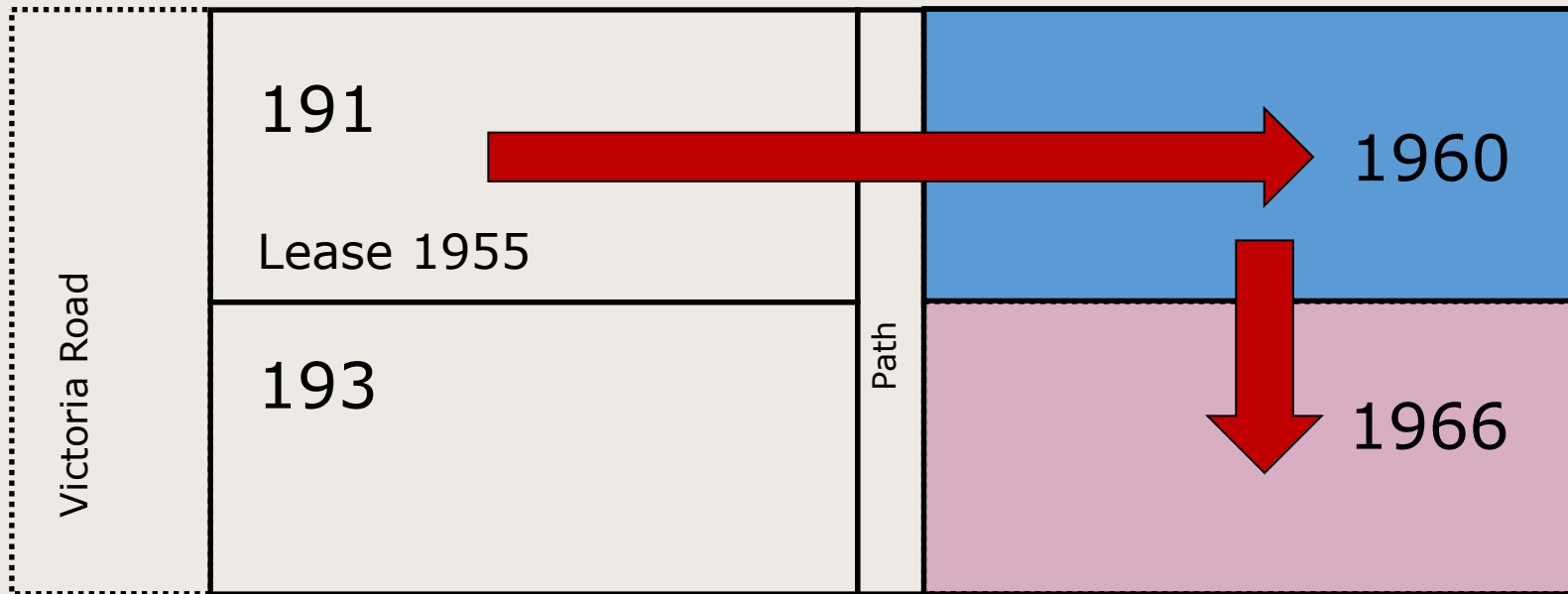
Perrott (FJ) & Co Ltd v Cohen [1951] 1 KB 705 CA

Ali v London Borough of Tower Hamlets (unrep 27
November 1996)

Smirk v Lyndale Developments Ltd [1975] Ch 317

Landlord's retained land cases

Smirk v Lyndale Developments Ltd [1975] Ch 317



Possible explanation

1. The doctrine does not of itself give the tenant any right against his landlord;
2. Any right against or binding the landlord must have some other source e.g. adverse possession, estoppel or possibly by agreement;
3. The doctrine estops the tenant from asserting against his landlord at any time that he or she holds the land other than as an accretion to his tenancy, whether *but for the doctrine* the tenant might have some greater right, *or at all*.

Secretary for Justice v Chau Ka Chik Tso & Ors [2013] 2 HKC 303

Lord Scott (majority view):

"[109] . . . the oddity, or one of the oddities, of the encroachment presumption is that it is unilateral. It binds the encroaching lessee, unless rebutted, but it does not bind the lessor until, either by his conduct or by the nature of his acquiescence he accepts the presumption, or, by the expiry of the relevant limitation period, he becomes unable to recover possession of the encroached-upon land and must, perforce, accept the presumption.

"[110] . . . the landlord can, so long as he is not bound by the presumption, treat the encroacher, his tenant of the demised land, as a trespasser . . . and obtain against him all or any of the remedies that the law allows against a trespasser. . . .

"[111] . . . so long as the landlord . . . remains entitled to treat the encroacher, his tenant of the demised land, as a trespasser vis-à-vis the encroached-upon land, it cannot be denied that the trespasser's possession of the encroached-upon land is 'adverse' to the landlord for limitation purposes.

Secretary for Justice v Chau Ka Chik Tso & Ors [2013] 2 HKC 303

Lord Scott (majority view):

But, on the expiry of the limitation period:

- the encroacher would not be a trespasser and could resist an order for possession;
- The statutory effect of the adverse possession would be limited by the presumption; the land would be regarded as an accretion to the lease;
- The landlord's title would not be extinguished;
- A new limitation period would run from the landlord's reversion falling into possession.

Secretary for Justice v Chau Ka Chik Tso & Ors [2013] 2 HKC 303

Ribero PJ (minority view):

"[40] . . . But for the 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 the 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. . . ."

Secretary for Justice v Chau Ka Chik Tso & Ors [2013] 2 HKC 303

Ribero PJ (minority view):

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

Secretary for Justice v Chau Ka Chik Tso & Ors [2013] 2 HKC 303

Ribero PJ (minority view) put another way as to why the landlord is bound:

"[64] . . . [U]pon the 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 the determination of the lease."

Secretary for Justice v Chau Ka Chik Tso & Ors [2013] 2 HKC 303

Majority view:

- Tenant's possession is adverse and limitation period runs;
- Statutory effect is limited by the presumption to accretion to the tenancy.

Minority view:

- Expiry of the limitation period "but for" the presumption triggers application of the doctrine;
- Thereupon tenant estopped from claiming possession "adverse" so as to rely on statute at all;
- The price to the landlord is that he is bound by the presumption too.

How does this fit with the LRA 2002?

- LRA 2002 s. 96: no limitation period under the LA 1980 runs in respect of a registered estate;
 - Majority reasoning: after 12 years the tenant has no rights under the LA 1980 at all; nothing to modify;
 - Minority reasoning: but for the presumption, the tenant would not be entitled to registration as proprietor of the estate after 12 years; no right to registration to estop the tenant from relying upon.

How does this fit with the LRA 2002?

- LRA 2002 sch 6: adverse possession for 10 years merely gives the tenant the right to apply under sch 6:
 - Majority reasoning: tenant could engage sch 6; if successful, tenant's right under LRA 2002 limited to accretion to leasehold estate;
 - Minority reasoning:
 - The doctrine estops him from claiming he is in adverse possession;
 - The tenant has to show that but for the doctrine, he would be entitled to be registered;
 - But to trigger any entitlement to be registered, he must first apply under sch 6, which he can only do if in adverse possession.
 - Might be able to argue that if he could engage sch 6, he would be registered on the basis he satisfies one of the gateways in para 5 (probably only reasonable mistake as to boundary)
 - Compare the s. 98 defence.

How does this fit with the LRA 2002?

- Alternative view; nothing to do with limitation and an independent doctrine. But:
 - No authority for the proposition that mere lapse of time apart from limitation gives any right (compare Ramsden v Dyson);
 - Other authorities binding landlord explicable as estoppel or contract;
 - How long is the period of possession required? Where does it come from?
 - Why is the possession not adverse to the landlord (from the landlord's perspective) and therefore why do the statutory modifications to the scope of adverse possession apply?

The land registry view?

Skipwith v Singh REF/2009/0850

- Classic analysis as adverse possession;
- A claim needs first to be made out under LA 1980 or using the sch 6 procedure under the LRA 2002;
- Either way, registration as accretion to lease only.

Conclusion

- The law on encroachment is a mess;
- It has been developed alongside the old law of adverse possession inherently linked to statutes of limitation;
- The LRA 2002 does not specifically deal with encroachment;
- Legislative policy, in relation to registered land, is against squatters acquiring rights save in limited circumstances;
- Equity does not grant squatters rights save in limited circumstances;
- There is no clear authority for the operation of the doctrine as an independent, self contained source of tenants' rights against their landlords; are the courts going to go that far?
- Honest mistake as to boundary cases may well be run as estoppel as in Tabor v Godfrey; is there any remaining scope for the doctrine at all?

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