

SECRETARY FOR JUSTICE V. CHAU KA CHIK TSO AND OTHERS

Judgment Information

Date	8 Dec, 2011
Action No.	FACV5/2011
Neutral Cit.	[2011] HKCFA 86
Parallel Cit.	(2011) 14 HKCFAR 889 [2013] 2 HKC 303

FACV No. 5 of 2011

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO. 5 OF 2011 (CIVIL)
(ON APPEAL FROM CACV NO. 26 OF 2010)

Between:

SECRETARY FOR JUSTICE
and
CHAU KA CHIK TSO
by its manager CHAU FUK SZE
(now replaced by CHOW LAP YAN and CHAU MOU LIN
TOMMY) duly registered under the [New Territories
Ordinance, Cap.97](#)
LAM CHI-FAI
LAM CHI-KIN ANDREW
LAM CHI-LEUNG
LAM CHI-KWONG
LAM SAI-KIT
LAM YUET-YAU
LAM TZE-CHUN
LAM CHUN-SING
LAM PING-CHUNG
LAM WING-LAU
LAM KWOK-KEE
LAM TZE-CHOI
LAM SHUI-LUN
LAM NGOK-CHING

Appellant
1st Respondent

2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent
8th Respondent
9th Respondent
10th Respondent
11st Respondent
12nd Respondent
13rd Respondent
14th Respondent
15th Respondent

Court: Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Mr Justice Litton NPJ and Lord Scott of Foscote NPJ

Dates of Hearing: 15 to 17 November 2011

Date of Judgment: 8 December 2011

JUDGMENT

Mr Justice Bokhary PJ :

1. I agree with the judgment of Lord Scott of Foscote NPJ.

Mr Justice Chan PJ :

2. I have had the advantage of reading the judgments in draft of Mr Justice Ribeiro PJ and Lord Scott of Foscote NPJ. I agree that this appeal must be dismissed.
3. It is common ground that the doctrine of encroachment applies to the facts of this case. There is also no dispute as to the effect of the doctrine when it is applied to the case of an encroachment by a tenant on land adjoining the demised land. But the legal basis of the doctrine is, in the words of Neuberger LJ in *Tower Hamlets LBC v Barrett* [2006] 1 P. & C.R. 9, para.82, "somewhat obscure and confused". I would however prefer the analysis given by Mr Justice Ribeiro which is based on the presumption and estoppel arising from the application of the doctrine. There are judicial statements which tend to support this as the basis of the doctrine (see the cases cited in paragraphs 33-39, 42-50 and 62). It also seems to me that if the presumption that the tenant intends to occupy the encroached area as part of the demised land would ultimately benefit the tenant as well as the landlord, they should both be precluded from denying that this state of affairs exists after a sufficiently long lapse of time.
4. However, I have some difficulty in fitting the provisions of the [Limitation Ordinance, Cap 347](#) (in particular ss 7 and 17) into the doctrine of encroachment in an encroachment case without doing violence to the language of these provisions. In my view, the limitation period is only relevant in determining the period after which the landlord cannot be heard to say that the tenant is not holding the demised land together with the encroached area upon the same terms until the end of the lease. But by virtue of the doctrine of encroachment, the landlord's right to possession of the encroached area is not barred forever and his title in this area is not extinguished (which would have been the consequence had ss 7 and 17 of the Ordinance applied). The landlord's right to possession to this area is, as it were, only "suspended": it is retained and can be exercised again at the end of the lease. Furthermore, far from having the landlord's title extinguished, during the remaining term of the lease, both the landlord and the tenant are bound by the covenants under the lease (which may benefit the landlord) in relation to the encroached area as they are in relation to the demised land.
5. Mr Edward Chan SC for the Government accepts that the Respondents have uninterrupted possession of the encroached areas in this case since at least 1924. But he submits that by reason of the [New Territories \(Renewable Government Leases\) Ordinance, Cap 152](#) ("Renewal Ordinance"), the period between 1924 and 1973 has to be discounted and that for the purpose of calculating the limitation period (in this case 60 years), time has to start afresh in 1973 in which case, the Government's right to recover possession of the encroached areas is not barred until the end of the new lease which was extended by the [New Territories Leases \(Extension\) Ordinance, Cap 150](#) to 2047.
6. The linchpin of his case is that the Respondents' possession of the encroached areas came to an end upon renewal in 1973 by the Renewal Ordinance which took effect as a termination of the old lease and the

granting of a new lease. He relies on the statement of Pennycuik VC in *Smirk v Lyndale Developments Ltd* [1975] [1 Ch 317](#), at 333. He argues that the Respondents cannot add the period of possession before 1973 to the period after 1973 (the “no adding up rule”) and that this effect, he submits, is the logical consequence of the rule that a tenant who encroaches on the adjoining land of his landlord has to give up the encroached area at the end of the lease (the “coterminous rule”).

7. With respect, I do not consider Pennycuik VC’s statement (the so-called “no adding up rule”) helpful. No authority was cited by the learned Vice Chancellor in support of this proposition. Nor has this statement regarding the “no adding up rule” been the subject matter of judicial discussion in subsequent cases. In the *Smirk* case, there was no right of renewal (unlike in the present case) and the question there was whether there was a new tenancy with a new landlord. On this issue, Pennycuik VC found that there were two tenancies and held that “there can be no ground for treating a period of two different tenancies as continuous for present purposes.” On appeal, the English Court of Appeal overturned this finding of fact which formed the basis of the learned VC’s proposition.

8. Mr Chan further contends, not without some force, that the Privy Council case of *Chung Ping Kwan & others v Lam Island Development Co. Ltd* [1997] [AC 38](#) does not apply to the present case. *Lam Island* was a case in which the trespasser’s adverse possession against the Crown lessee was held to have continued, notwithstanding the renewal of the Crown lease under the Renewal Ordinance for the reason that the Crown, as a result of the Crown lessee’s right of renewal contained in the original Crown lease, did not have any opportunity to exercise its right to possession upon renewal. In the present case, Mr Chan argues, the Government did have the right under the encroachment doctrine to re-possess the encroached areas at the end of the original lease on 30 June 1973, and hence the reasoning in *Lam Island* does not apply.

9. While I would agree that the situation in *Lam Island* is quite different from the present case, I do not think this argument can advance the Government’s case. The Respondents (or their predecessors in title) started to occupy the encroached areas in about 1924. Since then, they have been holding as lessees the same demised land together with the same encroached areas, albeit under two leases, one after the other. Under the doctrine of encroachment, they hold the demised land and the encroached areas subject to the same covenants until 2047 and I do not think the Government can now dispute this state of affairs or is entitled to evict the Respondents from the encroached areas before then.

Mr Justice Ribeiro PJ:

A. The issues

10. On 6 July 1916, the Crown sold by public auction a lot known as Lot 1212 in Demarcation District 115 in Yuen Long with boundaries enclosing 18 acres of land for agricultural use. The lease granted by the Crown was for a term of 75 years from 1 July 1898 with a right of renewal for a further term of 24 years less the last three days.

11. On 21 May 1924, the Lot was divided into five sections and each section sold by the then Crown lessee to persons including the respondents’ predecessors in title. The respondents are the current Government lessees of three of the five sections of the Lot.

12. It was found by the trial judge [\[1\]](#) that since some point in time between 1916 and 1924 (when aerial photographs of the area were taken) the respondents and their predecessors, as well as the Government lessees of the other sections of the Lot and their predecessors, have been occupying an adjoining portion of Government land extending beyond the northern boundary of the Lot with a total area of 6.67 acres. The land so occupied was used to enlarge the fishponds maintained on the leased land. The Judge found that the Government was unaware of their occupation of this additional land until some time in the 1980s when large scale maps of the area were prepared.

13. In December 2000, the respondents and the Government lessees of the other sections of the Lot brought proceedings against the Government seeking Orders establishing their right to the additional

land. They sought first to argue that the northern boundary had been incorrectly drawn and ought to have enclosed the additional 6.67 acres; alternatively, that they were entitled by virtue of the common law doctrine of encroachment to a leasehold interest in the additional land until 30 June 2047; in the further alternative, that their occupation of the additional land had resulted in their acquisition of a possessory title extinguishing the Government's title to that land; and finally, that they were entitled to the additional land on the basis of a proprietary estoppel.

14. On 30 March 2001, the Government issued a counterclaim for a declaration that the additional land was Government land and for possession thereof in the event that the respondents should be found to be in adverse possession.

15. Before this Court, the respondents rely solely on the common law principle of encroachment as the basis for their title to the additional land, having abandoned the other grounds previously advanced. This Court is therefore asked to determine whether the respondents or the Government are presently entitled to the land in question, applying the common law doctrine of encroachment in the context of the [Limitation Ordinance](#). [2] It also requires consideration of the effect, if any, of the [New Territories \(Renewable Government Leases\) Ordinance](#) [3]. ("the Renewal Ordinance") on the operation of that doctrine.

B. The doctrine of encroachment

B.1 The effect of the doctrine

16. Before examining the authorities, it may be helpful to identify in outline the circumstances when the doctrine of encroachment applies and what results from its application.

17. The doctrine addresses the position of a tenant who encroaches upon adjoining or adjacent land beyond the boundaries of the land demised to him under his lease. Such encroachment may be (as in the present case) upon land which belongs to his landlord. Or it may be upon land belonging to a third party. As we shall see, the principle operates quite differently in each of those two cases.

18. Of course, if the tenant occupies the additional land with the express or implied agreement of the person entitled to it (whom I shall call the "owner" for convenience), or encroaches in circumstances estopping the owner from complaining about the encroacher's conduct, the doctrine has no application. Similarly, the principle does not require consideration where, before expiry of the limitation period, the owner objects to the encroachment as an act of trespass and promptly takes steps to recover possession of the encroached upon land.

19. The doctrine is only likely to be relevant where the tenant's encroachment provokes no pertinent reaction on the part of the owner and endures over a sufficient period for the tenant to mount a limitation defence should the owner seek to recover the land encroached upon.

20. Where the area of encroachment belongs to a third party, the doctrine takes effect where, on the facts, the tenant has by adverse possession barred the third party's right of action and extinguished his title to the land. Then under the doctrine, a presumption arises (unless previously rebutted) that the encroached upon land has been occupied as an addition to the landlord's land and the right to possession vests in the landlord at the end of the tenancy. The land encroached upon is not treated as land acquired by the tenant by adverse possession for his own benefit.

21. Where the encroachment area belongs to the tenant's landlord, the doctrine functions quite differently. The landlord's interest in the land is not extinguished by limitation but the doctrine operates to deem the tenant to have acquired a leasehold interest in the land encroached upon to be held on the same terms as his tenancy, and to be surrendered up to his landlord and the end of its term.

22. I would respectfully adopt the rationale of the doctrine advanced by Neuberger LJ (as Lord Neuberger of Abbotsbury then was) in a case involving an encroachment on a third party's land as follows:

"...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 eg 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 (ie the landlord), rather than in someone who (after the end of the tenancy concerned) has no interest in it (ie the tenant)." [4]

B.2 The legal basis of the doctrine of encroachment

B.2a Uneasiness as to the basis of the doctrine

23. The doctrine has been the subject of some judicial discomfort. Thus, in *AG v Tomline*, [5] Thesiger LJ noted:

"... there is a difference of opinion among Judges as to the exact grounds of the doctrine that encroachments made by tenants enure for the benefit of their landlords."

And in *Whitmore v Humphries*, [6] Willes J called it "a branch of the law which involves considerations of some nicety".

24. In *Smirk v Lyndale Developments Ltd*, [7] Pennycuik VC commented: "The law on this point ... has got into something of a tangle." And although the Court of Appeal in *Smirk* credited Pennycuik VC with "untangling" the law, [8] Neuberger LJ in *Tower Hamlets LBC v Barrett*, [9] still felt constrained to describe the doctrine as one "whose unsatisfactory nature is plain".

25. The unease engendered by the doctrine is especially felt in cases involving a tenant's encroachment upon his landlord's land. While the authorities indicate that the expiry of the limitation period for actions to recover land is in some way relevant to the operation of the doctrine, the precise relationship between the limitation period and the doctrine has not been explored in any detail.

26. In Hong Kong, that period is 60 years from the date on which the right of action accrued where the Government seeks to recover Government land [10] and 12 years in the case of land recovery actions brought by anyone else. [11] Section 17 of the [Limitation Ordinance](#), which derives from section 16 of the Limitation Act 1939, [12] lays down the consequence of expiry of the limitation period:

"Subject to [presently immaterial provisions], at the expiration of the period prescribed by this Ordinance for any person to bring an action to recover land ..., the title of that person to the land shall be extinguished."

27. In cases where the encroachment doctrine is not engaged, the extinguishment of the landlord's title follows as a matter of course from the fact that the limitation period has expired. As Lord Browne-Wilkinson stated in *J A Pye (Oxford) Ltd v Graham*:

"It is to be noted that the right of action to recover the land is barred whenever twelve years have elapsed from the time when any right of action accrued: it does not have to be a period immediately before action brought. In the case of unregistered land, on the expiration of the limitation period regulating the recovery of the land, the title of the paper owner is extinguished: Act of 1980 section 17." [13]

28. What effect then do these provisions have on the doctrine? If, as a few of the authorities appear to suggest, expiry of the limitation period for actions to recover land is a constituent component of the doctrine, how can the doctrine result in giving only partial effect to the [Limitation Ordinance](#)? In other words, if limitation is an ingredient of the doctrine, the premise must be that the tenant's occupation of the land encroached upon constitutes adverse possession sufficient to start time running and, upon expiry of 12 or 60 years as the case may be, is sufficient to bar the right of the landlord to recover that land. But if that is the true analysis, why is the landlord's interest not then extinguished pursuant to section 17? Why instead is the landlord's interest merely transformed under the doctrine into a reversionary interest allowing the landlord to recover possession of the land at the end of the encroaching tenant's lease? If, on the other hand, the limitation period is *not* a constituent component of the doctrine, then why, after the limitation period has expired, is the landlord unable to recover the encroached upon land until the encroaching tenant's lease determines?

29. Before attempting to address these difficulties, it should be noted that the doctrine as applied to encroachments by the tenant onto land belonging to a third party operates differently. In such cases, the doctrine proceeds on the basis that the [Limitation Ordinance](#) takes effect in full, not only barring the third party's right to recover the land, but also extinguishing his title to it. What the doctrine then does is to deprive the tenant of the benefit of such extinguishment by deeming possessory title to the encroachment area to vest in the landlord at the end of the tenancy.

30. I turn now to consider how the encroachment doctrine functions in cases involving a tenant's encroachment on his landlord's land in the light of the authorities. The conclusion which I shall come to is that the doctrine does not operate by relying on some form of partial application of the provisions of the [Limitation Ordinance](#). It operates to prevent that Ordinance from being relied on by the tenant at all. I will also conclude that the consequence of the tenant acquiring a leasehold interest in the land encroached upon coterminous with his tenancy flows from the presumption and estoppel forming part of the doctrine and not from limitation barring the landlord's right of action.

B.2b The central themes of the doctrine

31. Two principal themes, which are closely related, run through the cases establishing the doctrine. The first involves a rebuttable presumption that the encroaching tenant occupies the land in question as an addition to the holding demised under his lease; and the second involves an estoppel preventing the tenant from asserting rights inconsistent with the aforesaid presumption. As appears from the authorities, it is a distinct species of estoppel which arises in consequence of the relationship between the parties: since the tenant is able to make the encroachment only by virtue of having been given possession of the demised land by his landlord, the doctrine does not permit the tenant to assert that his occupation of the encroachment is other than as part of his demised holding and in particular estops him from claiming that he has barred his landlord's right of action and extinguished his landlord's title by adverse possession.

B.2c Presumption, estoppel and Statute of Limitations

32. The presumption and the estoppel are applicable both in cases involving encroachment upon the landlord's land and encroachment upon land belonging to a third party.

33. In *Andrew v Hailes*, [\[14\]](#) the tenant encroached upon a third party's land, building a bakehouse and offices on it and occupying it for over 20 years. When his landlord served on him notice to quit, he gave up the land demised under his tenancy but sought to keep the encroached upon land for himself. The Court held that he had to surrender up that land to his landlord, its decision being based on the presumption and the estoppel. Lord Campbell CJ stated: [\[15\]](#)

"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.” [16]

34. Coleridge J pointed out that the presumption depends on the inference to be drawn from the facts and stated its effect:

“... 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.” [17]

35. Erle J formulated the presumption as follows:

“... when the power to encroach is derived from the occupation of the premises held from a landlord, and the encroachment is occupied as if it was part of the holding, then, at the end of the tenancy, the presumption as between the landlord and tenant, is that it is part of the holding, and it belongs to the landlord.” [18]

36. Lord Campbell CJ’s formulation of the presumption was adopted by Parke B in *Kingsmill v Millard*, [19] in the following terms:

“It is laid down in all the cases – whether the inclosed land is part of the waste, or belongs to the landlord or third party – 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, 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.”

37. His Lordship went on to hold that the presumption gives rise to an estoppel:

“... 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]

38. *Whitmore v Humphries*, [21], was a case involving an encroachment on the landlord’s land. The tenant was held by Willes J to have encroached on manorial waste belonging to his landlord by enclosing an adjoining piece of common pursuant to an agreement that such encroachment should be held “on the same terms as are usually applicable to encroachments by virtue of the law”. [22] Willes J stated the general rule as to the presumption as follows:

“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.” [23]

39. Willes J went to hold that an estoppel arose which excluded application of the Statute of Limitations:

“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.” [24]

B.2d A possible way out of the conundrum

40. In my view, Willes J's decision suggests a way out of the doctrinal difficulties mentioned above. 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.

B.2e Subsequent authorities

42. *Attorney-General v Tomline* [\[25\]](#) was a case involving a copyhold tenement, but Fry J considered the principles governing encroachments on leasehold land belonging to the landlord to be applicable. [\[26\]](#) His Lordship adopted Willes J's approach to the effect of the estoppel on the Statute of Limitations:

".. 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* [citing the passage from Willes J's judgment set out above]. ... I say that, there being an 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." [\[27\]](#)

43. Elaborating on this theme, his Lordship stated:

"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 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.' 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." [\[28\]](#)

44. The Court of Appeal overturned Fry J's decision holding that, even assuming the doctrine applicable to copyholds, it did not apply in the case at hand since factually the presumption had been rebutted so that there was nothing to exclude operation of the Statute of Limitations. [\[29\]](#) The Court did not, however, cast doubt on Fry J's approach to the consequences of the estoppel in cases where the presumption was

unrebutted and the doctrine of encroachment was applicable. Cotton LJ acknowledged the principle as explained by Willes J in *Whitmore v Humphries* and added:

"... looking at the circumstances under 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 when given up to the landlord, a principle which could hardly apply to encroachments by a copyholder." [30]

45. Similarly, Charles J in *Tabor v Godfrey*, [31] held that the Statute of Limitations was excluded by operation of the doctrine:

"... 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. 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 that he entered under another."

46. His Lordship held on the other hand, that the landlord could not eject the tenant from the land encroached upon during the term of his lease since, the presumption and estoppel applying equally to the landlord, he was bound to treat the tenant as lawfully holding the encroachment as part of his demise :

"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 tenant who has occupied an encroachment has occupied it for the benefit of his landlord. ... The principle is that he comes in and has it as part of his take, and although the lease excludes it, yet 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. There will therefore be judgment for the defendant as to trespasses on the strip of land, as I am of opinion that the defendant is entitled to occupy it." [32]

47. *Perrott (J F) & Co Ltd v Cohen* [33] was a case where the tenant had built lavatories on the encroached upon land belonging to his landlord. After expiry of the lease, the landlord made a claim for dilapidations under the covenants for repair in the lease on the basis that the lavatories on the encroachment had become part of the demised holding, held upon the same terms. That claim was upheld by the Court of Appeal. As Somervell LJ noted, the only possible conclusion on the facts was that the lavatories had been occupied throughout by the defendant as if they were part of the property demised. [34] That raised an estoppel against the tenant asserting that he had held it on any other basis, his Lordship stating:

"That being so, it is right to treat the lavatories as part of the demised premises; and the tenant - who of course at one time wanted the lavatories so treated - cannot now adopt the other position and say: 'Although I have occupied them, although I have treated them as part of the demised premises as against my landlords when their solicitor suggested they were not part of the demised premises, I shall now change my position and claim that they were not included in the demise.'" [35]

48. Cohen LJ, took *Tabor v Godfrey* [36] and *Hastings (Lord) v Saddler*, [37] to be laying down a principle to the following effect:

"...where a tenant has occupied land of the landlord's not included in the demised premises, according to the terms of the demise, but adjoining them, and, after the tenancy has determined, the landlord seeks to eject his former tenant therefrom, but the tenant relies on the Statute of Limitations, the proper question for the judge to put to the jury, or to decide himself if there is no jury, is: 'Do you think

the land was occupied by the tenant as a mere extension of the locus of his tenancy? If you do, you should find a verdict for the landlord. If you think the tenant took possession not as a tenant, but with the object or desire simply of benefiting himself and so as to acquire the ownership of the land occupied under the Statute of Limitations, you should find for the tenant’.” [38]

49. His Lordship was accordingly of the view that the Statute of Limitations could not be relied on as a defence by the tenant where the presumption that his occupation was “as a mere extension of the locus of his tenancy” was unrebutted; but that the opposite was true where the tenant’s occupation was not subject to the presumption and the estoppel.

50. Denning LJ stated that the doctrine gave rise to a principle akin to an estoppel, which precluded the tenant from asserting that his occupation was adverse to the landlord so as to acquire a title under the Limitation Act:

“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.” [39]

51. This is significant since an estoppel (or something akin to an estoppel) which prevents the tenant from contending that his possession is adverse to the landlord, prevents him from saying that time has started running for limitation purposes at all. Thus, [section 13](#)(1) of the [Limitation Ordinance](#) states:

“No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as adverse possession) and where under the foregoing provisions of this Ordinance any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.”

52. I shall return to the judgment of Pennycuik VC in *Smirk v Lyndale Developments Ltd* [40] when dealing with the Government’s arguments regarding the effect of the Renewal Ordinance. For present purposes, what is important is Pennycuik VC’s finding (reversed on appeal) that the tenant’s holding had been subject to two different tenancies and consequently his Lordship’s statement as follows:

“It seems to me, however, that the break in the tenancy necessarily negates [the claim that the tenant held the encroached upon land as an extension of the locus of his tenancy]. 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.” [41]

53. Pennycuik VC was evidently taking the view that such right as the tenant might wish to claim had to “accrue” for some requisite period – presumably for a time in excess of the relevant limitation period – and that since (as he found) such accrual had been interrupted by the termination and immediate renewal of the initial tenancy, the tenant’s claim was dismissed.

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 Pennycuik VC's reasoning contained in the cited passage.

56. His Lordship's decision was reversed in the Court of Appeal where their Lordships held that as a matter of fact, the tenancy had not been interrupted. But, again with respect, I am unable fully to accept Lawton LJ's formulation of the principle. His Lordship stated :

"...at the very end of the case, when counsel were actually addressing him, Pennycuik V-C called their attention to the position in law which would arise if there had been a change of tenancy at about the time when the defendants distributed new rent books. The point which he raised with counsel was a pertinent one for this reason: on the law as untangled, if the plaintiff had established a possessory title to the land at the back of no 191 Victoria Road, the effect of such a title would have been that the landlords could not have evicted him from that land, but the plaintiff's title would not have extended beyond the period of his own tenancy. In other words, he could not sell that land or otherwise dispose of it; he held it because it was part of his tenancy and when his tenancy came to an end he would have to give it up." [42]

57. If, as his Lordship postulates, the tenant "established a possessory title" to the property, it is hard to see how it can be said at the same time that "the effect of such a title would have been that the landlords could not have evicted him from that land, but the plaintiff's title would not have extended beyond the period of his own tenancy". Surely the tenant's acquisition of a possessory title would entail extinguishing the landlord's title.

58. The last English authority that may be mentioned is *Tower Hamlets LBC v Barrett* . [43]. It was a case in which (among other issues) the doctrine had to be considered in circumstances involving encroachment by the then tenants onto the land of a third party for the purpose of determining whether the doctrine resulted in attributing to the tenants themselves their then landlord's acknowledgement of the third party's title for limitation purposes.

59. Being a third party case, the limitation period was plainly a necessary ingredient of the doctrine. It was only if the third party's title was extinguished by the tenant's adverse possession that possessory title in the land encroached upon would vest in the landlord, to be enjoyed in the meantime by the tenant as part of his demised holding and with possession to be surrendered up to his landlord at the end of the tenancy. Neuberger LJ dealt accordingly with adverse possession and the limitation period:

"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." [44]

60. I take Neuberger LJ to have had it in mind that the tenant might acquire the possessory title in his own right if the presumption had previously been rebutted but that such title would vest in the landlord otherwise.

61. Neuberger LJ did mention *obiter* tenants who encroach on land belonging to their landlord. After citing the then current edition of *Megarry and Wade* , [45], *Tabor v Godfrey* , *Smirk v Lyndale Developments* and *Woodfall on Landlord and Tenant* , [46], his Lordship noted:

“... a tenant can insist, against the will of his landlord, on remaining on land of his landlord, on which he has encroached for more than 12 years, for the remainder of his tenancy.” [\[47\]](#)

As it was unnecessary to do so, his Lordship did not delve any deeper into the question and the doctrinal basis of his statement is unclear.

62. In *Amatek Ltd v Googoorewon Pty Ltd*, [\[48\]](#) the High Court of Australia described the doctrine as “founded on a kind of estoppel”. Referring to “a line of cases in which *Kingsmill v Millard* is the leading authority”, their Honours stated:

“The basic principle on which these cases proceed is that, as between a landlord and a tenant who has encroached during his term on land not held under the tenancy, the area encroached upon is presumed to be part of the holding to be rendered up at the end of the term. [The presumption and its limitations are discussed by Pennycuik V-C in *Smirk v Lyndale Developments* [\[1975\] Ch 317](#), at 323-332, whose judgment on this aspect of the case was approved by the Court of Appeal: see at 337, 340, 341. See *Woodfall's Law of Landlord and Tenant*, 28th ed, vol 1, paras 19.007, 19.008] These cases 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, and [which] he occupied ... as part of these premises’ [per Lord Campbell CJ in *Andrews v Hailes* (1853) 2 El & Bl 349, at 354; [118 ER 797](#), at 799; see also *Tabor v Godfrey* (1895) 64 LJQB (NS) 245, at 247].” [\[49\]](#)

63. Notwithstanding the citation of *Smirk* in the quoted passage, it appears to me that the present legal analysis is consistent with the High Court's approach. It is not suggested by their Honours that the landlord's right to recover the land encroached upon is barred by any statute. It is the estoppel which “precludes the tenant from denying the landlord's title” to the area of encroachment, resulting in the tenant acquiring his interest in that land, to be rendered up at the end of the term.

B.2f Conclusion as to the doctrine

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.

65. In the present case, it is common ground that the presumption that the respondents held the additional land as part of the demised holding has not been rebutted. It is also common ground that they have occupied such land continuously since at least 1924. It follows that the 60 year limitation period applicable to Government claims to recover land expired in 1984, when, subject to the effect (if any) of the Renewal Ordinance, the doctrine took effect, estopping the respondents from asserting, contrary to the presumption, that they have, by adverse possession, acquired a possessory title and extinguished the Government's title. Since the presumption applies equally to the Government (subject to the Renewal Ordinance) it became bound to accept that the respondents had acquired a leasehold interest in the additional land on the terms of their Government leases, expiring at the end of their term.

B.2g Statutory construction and estoppel

66. I have had the benefit of reading in draft, the judgment of Lord Scott of Foscote NPJ who has adopted a different approach in arriving at our common destination. Under that approach, the landlord's right of action is barred under [section 7](#) of the [Limitation Ordinance](#) after expiry of the limitation period, but the consequence is that the tenant acquires a leasehold interest in the land encroached upon coterminous with his tenancy over the demised land. The doctrinal difficulties I have adverted to are avoided by construing section 17 so that it only extinguishes the landlord's title to the extent of the encroaching tenant's presumed intention, limiting such extinguishment to the term of the tenancy. It is an approach with the great attraction of simplicity and it is accordingly with regret that I do not feel able, for the reasons which follow, to adopt it.

67. In the first place, I do not consider it a construction capable of being accommodated within the language of the Ordinance. If section 7 is engaged, it prohibits the bringing of any action to recover the encroached upon land after the limitation period. The right of action so barred is barred permanently, which is why limitation statutes are said to be "statutes of repose". [\[50\]](#) That is not what happens under the doctrine as accepted by the approach under discussion, since the landlord's right of action against the encroacher revives when the tenancy of the adjacent demised land terminates. Neither does the approach give effect to section 17 which provides that at the expiration of the prescribed period, the title of the person whose right of action is barred "shall be extinguished". Under the doctrine as accepted by the approach, the landlord's title is not extinguished. Instead, he retains a reversionary interest in the land encroached upon which falls into possession at the end of the tenancy.

68. Secondly, the law of limitation operates through barring, after the prescribed period, the right of action which had accrued to the person entitled until then to recover the land. In principle, the bar must affect the entire interest that person had which had been protected by that right of action. Thus, for instance, in *Chung Ping Kwan v Lam Island Development Co Ltd*, [\[51\]](#) the lessee's right of action was held to have been barred not only in respect of the existing estate of the owner but also a new estate derived from the right of renewal contained in the old lease. It is difficult to see how the right to recover the land can be barred but affect only part of the owner's interest in the land.

69. Section 17 brings certainty to the position as to title. Where the person against whom adverse possession has run can no longer recover the land, his title is extinguished. And the person in whose favour adverse possession has run acquires a possessory title to the extent of the entire title of the person dispossessed. Thus, as pointed out by Lord Browne-Wilkinson in the passage from *J A Pye (Oxford) Ltd v Graham* cited in Section B2.a above, [\[52\]](#) extinguishment of the landlord's title follows as a matter of course from the moment that the limitation period expired. However, the construction of section 17 adopted modifies that section's effect depending on the encroacher's (or trespasser's) actual or presumed intention. While it is well established that a trespasser's intention to possess is an essential requirement of adverse possession, [\[53\]](#) I am unaware of any suggestion in the authorities that where the encroacher has succeeded in barring the right of action through adverse possession, the nature of his actual or presumed intention may have the consequence of limiting section 17's effect on the paper owner's title. This is likely, in my view, to introduce uncertainty regarding title to the land after expiry of the limitation period.

70. It is also my view that the approach fails to give sufficient weight to the authorities which developed the doctrine of encroachment. It ignores, for instance, all the references to estoppel in the judgments cited above since on the adopted approach, estoppel apparently has no role to play. On the proposed construction of the statute, there is no need to estop the tenant at all. 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 arise out of the presumption based on the relationship between the parties. It is, in my view, a species of estoppel by convention [\[54\]](#) – a presumed convention based on the presumption applicable to both parties that the encroaching tenant's occupation of the encroached upon land is as an addition to his demise.

C. The effect of the Renewal Ordinance

71. As indicated in Section A of this judgment, the original Government lease granting the relevant sections of the Lot to the respondents and their predecessors in title was for a term of 75 years from 1 July 1898 with a right of renewal for a further term of 24 years less the last three days. The 75 year portion of the term was therefore due to expire on 30 June 1973. This was the position affecting numerous leases since the Crown's practice, prior to 1959, had been to grant leases specifying an initial term of 75 years with the aforesaid right to renew.

72. On 9 May 1969, about four years before the initial term was due to expire, the Renewal Ordinance was passed.

(a) Section 3 deals with the Ordinance's application:

"This Ordinance applies to every Government lease existing immediately before the expiration of the 30th day of June 1973 under which land in the New Territories is demised for a term of seventy-five years from the 1st day of July 1898 and which contains a right of renewal for a further term of twenty-four years less three days, other than [certain immaterial exceptions]."

(b) Section 4(2) deems the right to renew contained in the respondents' leases to have been duly exercised:

"In the case of an existing Government lease of a lot which has been divided into sections before the 1st day of July 1973, the right of renewal contained in the lease shall be deemed to have been exercised by the persons entitled to that right and on that date there shall be deemed to be granted to such persons separate new Government leases of the land respectively held by them immediately before that date under the existing Government lease."

(c) Section 4(3) then sets out the terms of the renewed lease.

73. As Lord Nicholls of Birkenhead pointed out in *Chung Ping Kwan v Lam Island Development Co Ltd*, [55] one of the main purposes of the Renewal Ordinance was to avoid the administrative inconvenience of multiple renewal notices and multiple grants of new leases. Accordingly, as his Lordship there stated:

"...the Ordinance should be approached on the footing that, save as otherwise provided, the Ordinance was intended to achieve the same result as would have occurred if a new lease had been granted pursuant to the right of renewal. The deemed new lease is to be regarded as having the like consequences in law as would have followed from an actual exercise of the renewal option and an actual grant of a new lease." [56]

74. That the deemed renewal under the Renewal Ordinance results in a new Government lease being granted was also recognized by Lord Hoffmann NPJ in *Chan Tin Shi v Li Tin Sung* [57]:

"Section 4(1) of that Ordinance said that the options to renew in the existing leases should be deemed to have been exercised and that 'a new Government lease' should be deemed to have been granted. That undoubtedly created a new leasehold interest. Because the lease created by the option was a new estate, the Privy Council in *Chung Ping Kwan & Others v Lam Island Development Co Ltd* [1997] AC 38 had to consider whether adverse possession under the [Limitation Ordinance](#) barred not only the existing estate of the owner but also a new estate derived from a right which existed in the old lease."

75. It is this aspect of the Renewal Ordinance that Mr Edward Chan SC, appearing for the Government, emphasises. He relies on the passage in the judgment of Pennycuik VC in the *Smirk* decision discussed in Section B2.e above, for his contention that the break in the respondents' tenancies in 1973 prevented their acquisition of a leasehold interest in the encroachment area. I set out the passage again for convenience:

“It seems to me, however, that the break in the tenancy necessarily negates [the claim that the tenant held the encroached upon land as an extension of the locus of his tenancy]. 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.” [\[58\]](#)

76. This passage certainly suggests that Pennycuik VC thought that the tenant acquires no rights against his landlord where his holding is separable into two tenancies, with the initial tenancy being determined prior to expiry of the limitation period, followed by the grant of a fresh tenancy which has only run for a shorter time than the limitation period, even though the holding as tenant covers overall a continuous period exceeding the limitation period.

77. As previously indicated, I am unable to agree with that passage. It should be noted that, as Lawton LJ explained in the Court of Appeal, the possible relevance of a break in the tenancy was raised by Pennycuik VC only at the very end of the case, when counsel were making their final submissions. [\[59\]](#) No authority is cited for the proposition that such a break “necessarily negates” the claim to a leasehold interest pursuant to the encroachment doctrine. Nor is there any explanation as to why in principle a surrender and re-grant of the tenancy, where occupation of the land encroached upon is seamless, should have such effect. The legal point was not explored in the Court of Appeal since their Lordships overturned Pennycuik VC’s finding that there had been a break in the tenancy as a matter of fact.

78. 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 Pennycuik 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 on 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.

82. The respondents are therefore entitled to a leasehold interest in the additional land. That interest is to be enjoyed until the end of their respective tenancies as Government lessees of the Lot. By operation of the [New Territories Leases \(Extension\) Ordinance](#), [\[60\]](#), as explained in *Chan Tin Shi v Li Tin Sung*, [\[61\]](#), those tenancies terminate at the expiry of 30 June 2047.

D. Conclusion

83. I would accordingly dismiss the appeal.

Mr Justice Litton NPJ :

84. Lot 1212, sold by the government at public auction in July 1916, lies in a coastal plain near Yuen Long. It was, at that time, marsh land, lying between two small rivers, the Shan Pui River and the Kam Tin River, subject to tidal influence.

85. Over the years, by dint of hard manual labour, plants and vegetation were removed from the land, embankments ("bunds") were built up and the land was converted into large fish ponds.

86. An aerial photograph taken in November 1924 shows the bunds in place, enclosing large ponds.

87. It is common ground that the bunds at the northern end of Lot 1212, and to a small extent at the north-west corner, were constructed beyond the lot boundary, encroaching on about 6.67 acres of government land.

88. Lot 1212 granted by the government under the crown lease was for about 18 acres; the fish ponds as finally constructed covered about 24.67 acres. The grantees who were using those ponds for fish farming had, without a doubt, exclusive possession over the whole.

89. Upon the facts as stated above, it is clear that the grantees were, in terms of [s.13\(1\)](#) of the [Limitation Ordinance](#), [Cap.347 \[62\]](#), in "adverse possession" of the encroached portions of the land, and time began to run in their favour from 1924, if not earlier. The government's right of action to take back the land then accrued and was, if nothing else intervened, barred by limitation in 1984, under [s.7\(1\)](#) of the [Limitation Ordinance \[63\]](#).

90. The broad question arising on this appeal is this: What consequence in law flows from the fact that the encroachment was not by strangers to the government but by lessees on their lessor's adjoining land, having been put into the position to encroach, in the way they did, by the grant of Lot 1212 (a grant of a term expiring on 30 June 1973, subject to a right to a further term of 24 years less 3 days)?

91. In this regard, I have had the advantage of reading in draft Lord Scott NPJ's judgment and I wholly agree with it. It seems to me that, on the facts of this case, the termination of the first term on 30 June 1973 is irrelevant to the result. The government's right of action continued to run so long as the grantees and their successors in title were in adverse possession : which they undoubtedly were, beyond 30 June 1973. Time ran out against the government, under [s.7\(1\)](#), in 1984.

92. As to the effect in law of the government's action for possession being barred after 1984, I have no difficulty in construing [s.17 \[64\]](#) in the way proposed by Lord Scott NPJ : That is to say, that the extinguishment of the lessor's title is only to the extent as the law presumes : Namely, that the lessee simply intended all along to have the encroached land annexed to his demise and to be subject to the

same terms and conditions of the demise. To this extent the lessor's right of possession of the encroached land is "extinguished" in terms of s.17. A word, like the word "extinguished" in s.17, takes its meaning from the context in which it is used. [65]. The common law doctrine of encroachment has evolved over the years from medieval concepts of land holding in England. It sits uncomfortably in the context of the Hong Kong [Limitation Ordinance](#). When, as between lessor and lessee, all that could be attributed by law to the lessee is an intention to exclude the lessor from the encroached land *for the duration of the lease*, it would be extraordinary to give to the word "extinguished" in s.17 a greater meaning.

93. On the facts of this case, the presumption imposed by law, arising from the relationship of the parties, would seem consistent with the reality on the ground. In the various fishponds, the same piece of water covered both the demised land and the encroached land. The fish swimming in the ponds knew no imaginary boundary; nor, in reality, did the grantees or their agents tending to the daily business of fish-farming. To them a fishpond was a fishpond, irrespective of who owned the bottom of the pond.

94. I too would dismiss this appeal.

Lord Scott of Foscote NPJ :

95. This is an appeal from the judgment of the Court of Appeal handed down on 14 February 2011. The main judgment was given by Rogers VP. Le Pichon JA and Kwan JA agreed with that judgment and Kwan JA added some helpful observations of her own.

96. This litigation commenced with an action brought by some 15 plaintiffs against the Hong Kong Government, represented by the Secretary for Justice. Each of the plaintiffs was the lessee of a plot of land in the New Territories. The original lease, of a Lot of some 18 acres, had been granted in 1916 but, subsequently although pre-1924, the Lot had been divided into five sections and the sections had devolved separately from one another. Each of the plaintiffs is a lessee of one or other of the sections. The term granted by the original lease was a term of 75 years from 1 July 1898 but the lease conferred a right for the term to be renewed for a further term of 24 years less 3 days.

97. The [New Territories \(Renewable Government Leases\) Ordinance, Cap. 152](#), made on 19 May 1969 applied to this lease (see s.3). Section 4(2) of the Ordinance said that:

"In the case of an existing Government lease of a lot which has been divided into sections before the 1st day of July 1973, the right of renewal contained in the lease shall be deemed to have been exercised by the persons entitled to that right and on that date there shall be deemed to be granted to such persons separate new Government leases of the land respectively held by them immediately before that date under the existing Government lease." (see also ss 4(3) and (4))

So, as at 1 July 1973 each of the lessees of the respective sections of the demised Lot was deemed to have been granted a new lease of his or her section for a further 24 years less 3 days. There is, or was, a dispute between the parties as to what land was comprised in that "new lease" but that the leasehold interest of each lessee in the land comprised in his or her section was continued under this Ordinance is not in dispute.

98. 30 June 1997 was the date on which the United Kingdom's rights in relation to the New Territories would expire. So it is not surprising to find that an agreement was reached between the United Kingdom Government and the Government of the People's Republic of China as to what would happen to land titles relating to land in the New Territories after that date. The agreement, embodied in the Sino-British Joint Declaration signed in Beijing on 19 December 1984, was given effect by the [New Territories Leases \(Extension\) Ordinance, Cap. 150](#). The Ordinance was expressed by s.2 to apply to "every New Territories lease ... that, but for this Ordinance, would expire before 30 June 1997" (with certain exceptions not here relevant) and provided, in s.6, that the term of every lease to which the Ordinance applied was "extended, from the date on which it would, apart from this Ordinance, expire, until the expiry of 30 June 2047, without payment of any additional premium". It is not in dispute that the term of the lease of each of the plaintiffs entitling him or her to possession of his or her section has been extended under this Ordinance.

99. To the north or north-west of the Lot comprised in the original lease lies an area of land that prior to 1924 appears to have been used by the lessees of the respective sections as fishponds for fish farming. It is not in dispute that the then lessees constructed embankments ("bunds") to enclose an additional area of some 6.67 acres within the demised Lot and that bunds were also constructed to divide the 6.67 acres into five parts so that, in effect, one such part became incorporated into each of the five sections and the lessee or lessees for the time being of that section enjoyed exclusive possession of that part.

100. It is important to note, first, that the enclosed area (i.e. the 6.67 acres) was never the subject of any lease or right of possession granted by the Government, secondly, that since at latest 1924 the lessee or lessees for the time being of each section has, or have, been in exclusive occupation of the part of the 6.67 acres enclosed within the section in question with no interruption to that occupation in fact or, until the Government's counterclaim for possession served on 30 March 2001, in law, and, thirdly, that the Government was unaware of this unauthorized occupation of its land until some time in the 1980s.

101. The plaintiffs' action against the Government was brought in order to establish, on various alternative bases, that they were entitled to remain in occupation of the part of the 6.67-acre area adjoining their respective sections. One basis of claim was that the 6.67 acres had been included in the original demise of the Lot. This claim failed on the facts at the trial of the action and has not been revived. Another basis was that the Government's title to the 6.67 acres had been extinguished by adverse possession of over 60 years and that the plaintiffs had become the owners of their respective parts of the 6.67 acres. This, too, failed at first instance and is no longer contended. A third basis of claim was that, by virtue of the plaintiffs' occupation of the 6.67 acres for over 60 years, the part adjoining each of the sections had become annexed to that section during the continuance of the demise of that section. This basis of claim was rejected by the trial judge but was accepted by the Court of Appeal and is the only basis of claim that has been relied on in this Court.

102. The claim relied on in this Court, as briefly described in the previous paragraph, requires a careful look, first, at the relevant provisions of the [Limitation Ordinance, Cap. 347](#), and, secondly, at the judge-made principles of the concept of encroachment by a lessee on to adjoining land of the lessee's landlord. Let me start with the [Limitation Ordinance](#).

The Limitation Ordinance

103. The current Ordinance, "to consolidate and amend the law relating to the limitation of actions and arbitrations", was made on 11 June 1965. It is relevant to notice that the primary purpose of this, and predecessor [Limitation Ordinances](#), was to deal with "the limitation of actions ...", not with the acquisition of rights. As Lord Hoffmann observed towards the end of the judgment of the Privy Council that he delivered in *Sze To Chun Keung v. Kung Kwok Wai David* [\[1997\] 1 WLR 1232](#) at 1236:

"... the [Limitation Ordinance](#) is not concerned with whether the defendant has acquired a title but with whether the plaintiffs' right of action has been barred."

104. Section 7(1) provides that:

"(1) No action shall be brought by the Crown to recover any land after the expiration of 60 years from the date on which the right of action accrued to the Crown ..."

It is common ground that the right of the Crown to recover possession of the enclosed 6.67 acres must have accrued when the bunds, enclosing the area and excluding all others, were constructed by the plaintiffs' predecessors in title, that is to say, at latest 1924. It is common ground, also, that during the next 60 years the plaintiffs remained in exclusive occupation of their respective parts of the 6.67 acres and that nothing was done by the Government to challenge that occupation until, at earliest, December 2001. So why do the Government contend that they were entitled in December 2001 to recover possession of the enclosed areas, thereby putting an end to some 77 years of undisturbed possession?

105. The submissions of Mr Edward Chan SC, leading counsel for the Government before this Court, seem to me to propose two possible answers to that question. First, it is submitted that, during that long period of exclusive occupation, the plaintiffs were not, for limitation of action purposes, in “adverse possession” of their respective enclosed areas. Second, it is submitted that case law on the concept of “encroachment” requires the conclusion that on the expiry of the term granted by the original lease, that is to say, 30 June 1973 in the present case, the requisite 60-year period had not yet expired, had to commence afresh on the commencement of the deemed new grant and had not expired by December 2001. I must examine these submissions in turn.

Adverse possession

106. The concept of adverse possession is central to the operation of statutes of limitation in the common law. But in considering that concept it is important, it seems to me, to keep in mind the purpose of statutes of limitation. In *Adnam v. Earl of Sandwich* (1877) [2 QBD 485](#) Field J explained, at 489, that:

“The legitimate object of all Statutes of Limitation is no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principle that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for so long a time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties ...”

In *Trustees of Dundee Harbour v. Dougal* (1852) 1 Macq. HL 321 Lord St Leonards had commented that “In all well regulated countries the quieting of possession is held an important point of policy”. The policy recommended by these dicta is advanced if the required “possession” is an actual, factual possession, regardless of the paper title owner’s intentions regarding the land (see *JA Pye (Oxford) Ltd v. Graham* [2003] [1 AC 419](#) per Lord Browne-Wilkinson at 433 to 438), and by regarding the requirement that the possession be “adverse” as placing the necessary restriction on the circumstances in which actual, factual possession can lead to the barring of the true owner’s right of action.

107. In my opinion, the factual quality of the plaintiffs’ occupation of their respective parts of the 6.67 acres post 1924 has represented for limitation of action purposes “adverse possession”, subject only to Mr Chan’s submission that because this occupation has represented an encroachment by lessees on adjoining land of their lessor and because it is to be presumed that they made their encroachment for the purpose of adding their respective parts of the 6.67 acres to their respective demised land, their possession cannot be regarded as adverse to their lessor.

Encroachment

108. The principle of “encroachment” is that if a tenant goes into, and remains in, occupation of land belonging to his landlord, it is to be presumed, particularly if the encroached-upon land is adjoining the demised land, that the tenant’s encroachment is intended by him to annex the encroached-upon land to his demised land so as to enable him to occupy and use the encroached-upon land as if it were part and parcel of the demised land (see *Kingsmill v. Millard* (1855) 11 Exch 313 at 318). The presumption, although imposed by judge-made law, is a rebuttable one and can be rebutted by evidence that the tenant intended to occupy the encroached-upon land not simply as tenant but as owner.

109. It is not in dispute that this presumption does apply to the encroachment by the plaintiffs, or by their respective predecessors-in-title, on to the parts of the 6.67 acres adjoining their respective sections. Nor is it in dispute that the presumption has not been rebutted. The plaintiffs, it follows, are bound to accept that they, and their predecessors, have occupied their respective parts of the 6.67 acres as annexes to their demised land and on the same terms as those on which they hold their demised land under their leases. But 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. This feature of the presumption, namely, that it does not, and cannot, initially at least, bind the landlord, the owner of the encroached-upon land, is important. It follows that 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 on the encroached-upon land and obtain against him all or any of the remedies that the law allows against a trespasser. These remedies include an order ejecting the encroacher from the encroached-upon land, an injunction against re-entry, payment of mesne profits and damages for trespass.

111. It seems to me to follow, also, that so long as the landlord, the owner of the encroached-upon land, remains entitled to treat the encroacher, his tenant of the demised land, as a trespasser vis-a-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. And it follows from this that if the owner of the encroached-upon land does nothing, whether through inertia or through ignorance of the encroachment is immaterial, time for limitation purposes may run and if the limitation period expires the landlord will lose the right to treat the encroacher as a trespasser and will no longer be able to seek an order ejecting the trespasser from the encroached-upon land. On the expiry of the limitation period the encroacher will no longer be a trespasser and will be able, for the time being at least, to resist an order for possession sought by the landlord.

112. But the effect of the encroaching trespasser's adverse possession is, as it seems to me, necessarily limited by the unrebutted presumption. The encroacher's presumed intention is to occupy the land in question as an annex to his or her demised land. The encroacher will, therefore, on the termination of the demise of the demised land, be under an obligation to deliver up to the landlord not only the demised land but also the encroached-upon land held as an annex to the demised land. To that extent, therefore, the encroacher's possession of the encroached-upon land has not been "adverse" to the landlord. It seems to me, as a matter of principle, that the effect of a trespasser's possession must depend upon the trespasser's intentions. If the trespasser's intentions are to take possession of the land in a capacity not that of full ownership but limited in some way, then it seems to me that the consequences of that possession, if it has continued for the requisite limitation period, should, in principle, be limited accordingly. It should be no part of the function of statutes of limitation to give long enjoyed possession of land a consequence never intended by the possessor. I know of no authority to the contrary.

113. I conclude, therefore, that if a lessee enters into and remains in possession of land belonging to his lessor and adjoining the demised land and does so with the intention, presumed and unrebutted or simply proved, of thereby enlarging the demised land and treating the encroached-upon land as annexed to the demised land, his (the lessee's) possession is adverse possession, for he is in complete and exclusive possession and is, unless the lessor has consented to the encroachment, undoubtedly a trespasser. But it is a limited adverse possession, for it does not deny, and indeed accepts, the right of the lessor, the owner, to recover possession on the termination of the demise. It is adverse only for the limited purpose of acquiring a title during the continued currency of the demise. In such a case, there is, in my opinion, no reason why, if the possession continues uninterrupted for the requisite limitation period, the encroacher should not obtain, in effect, a leasehold title to the encroached-upon land for a period commensurate with the term for which he holds the demised land, and every reason why, on the expiry of that term, the lessor should be entitled to recover possession not only of the demised land but also of the encroached-upon land. [Section 9\(1\)](#) of the [Limitation Ordinance](#) would, in my opinion, apply.

114. A similar situation might well arise in relation to settled land. Suppose a case in which a stately home and the park around it are settled upon trust for A for life with remainder to B. And suppose that A encroaches upon land belonging to B adjoining the park and remains in that occupation of B's land for the requisite limitation period with no acknowledgment of B's title and no interruption of the occupation. Suppose also that there is no means of access to the encroached-upon land other than from the park or

from B's surrounding land. I would easily assume in such a case that it had been A's intention to occupy the encroached-upon land as an annex to the settled land and that it had not been A's intention to occupy the land adversely to B's right to recover the land after A's death. It would be absurd to suppose that A intended to acquire by his wrongful occupation of B's land any greater interest than a life interest. Why should the statutes of limitation do more than give effect to A's intention?

Estoppel

115. An understanding of the judge-made principles regarding the encroachment presumption is, in my opinion, not assisted by treating the presumption as creating an estoppel by representation. In *Perrott (J.F.) & Co. Ltd v. Cohen* [1951] 1 KB 705, Denning LJ said, at 710, that the "principle underlying the cases on encroachment is not perhaps strictly an estoppel, but it is akin to it". He then gave this explanation:

"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 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."

Neither of the other two members of the Court, Somervell and Cohen LJ, made any reference to estoppel but regarded the case as one where both landlord and tenant had "... treated these lavatories as part of the land demised" (p.708), an entirely unexceptionable way in which a landlord can become bound by a presumption that initially would bind only the tenant.

116. Denning LJ's explanation, cited above, seems to me, if I may respectfully say so, to be a classic description of a representation by conduct acted on by the representee and that has accordingly become binding on the representor. But it does not explain the presumption. It is well settled that adverse possession for the requisite period can lead to the true owner's right to recover possession becoming barred by the statutes of limitation whether or not he, the true owner, knows that the trespasser has taken possession of some of his land. The key to acquisition of a possessory title is the adverse possession. The true owner's knowledge of it is irrelevant. It is otherwise with an estoppel by representation. Unless the representee has knowledge of the representation and acts on it in some way, the representor is not estopped from changing his mind and withdrawing the representation. The tenant who encroaches upon his landlord's adjoining land is presumed to be doing so in order to annex the encroached-upon land to the land of which he is tenant. Unless and until he can rebut that presumption, the presumption is binding on him. But the landlord, the owner of the encroached-upon land, may know nothing about it. He may be ignorant that his tenant has taken possession of some of his adjoining land and may have done nothing, either positively or by knowing acquiescence, to act on that assumption. True it may be that the tenant is barred from denying that he has taken possession of the encroached-upon land as owner, rather than as tenant. The unrebutted presumption has that effect. But unless the landlord knows of the encroachment and has consented to or acquiesced in the tenant's occupation of that additional land, the ingredients for an estoppel are not, in my opinion, present. It would, in my opinion, unacceptably distort the law relating to estoppel by representation to treat the effect of the presumption as creating, without more, such an estoppel.

117. For example, consider the present case, and the facts as they might have been. The encroachments commenced at latest in 1924 but it may have been earlier. The Government appears not to have known about the encroachments until some date in the 1980s. Whether, prior to that date, the 60-year limitation period prescribed by s.7(1) of the [Limitation Ordinance](#) had expired is uncertain. It may well have expired. Suppose it had done so, and that, post its expiry but before the Government had any knowledge of the encroachments, the plaintiffs had made it unequivocally clear to the Government that they were repudiating the Government's title to the encroached-upon land. What, in those supposed circumstances would have been the plaintiffs' and the Government's respective rights over the encroached-upon land?

118. The encroachment presumption, previously un rebutted, would hold the plaintiffs bound to accept that their possession of the encroached-upon land had been as lessees and not as outright owners. The Government would be entitled to rely on that presumption even though unaware of it or of the encroachments. The un rebutted presumption would provide the Government, the lessors, with sufficient and proper protection. But their reliance on an estoppel, or, at least, on an estoppel based on an express or implied representation, would be, in my opinion, a broken reed. The plaintiffs, the lessees, could respond that since the Government had been unaware of the encroachments and could not claim to have acted to their detriment on any representation capable of being drawn from the plaintiffs having taken and retained possession of land adjoining their demised land, no estoppel could be raised against them.

119. The plaintiffs could, of course, be described as being estopped from denying the Government's title to the encroached-upon land. "Estopped" is a word capable of meaning, simply, "barred" (see *The New Shorter Oxford English Dictionary* Vol. 1 1993 Edition) and the reason why the plaintiffs could be described as being "estopped" or "barred" would not be because of reliance by the Government on an estoppel but because of reliance by the Government on the un rebutted encroachment presumption.

120. In my opinion, therefore, in cases where the presumption applies and has not been rebutted, confusion is apt to be caused by treating the effect of the presumption as if it were brought about by an estoppel. In some cases the facts might well justify reliance on an estoppel. But not in all. Reliance on the un rebutted presumption after the expiry of the requisite limitation period would, in my opinion, always provide sufficient and proper protection for a lessor's proprietary interests. Reliance on an estoppel would not always do so.

Consequences

121. The consequences, in cases where the encroachment presumption that binds the encroacher cannot be, or has not been, rebutted, will depend upon what, if any, action is taken by the owner of the encroached-upon land in response to the encroachment.

(1) If the owner of the encroached-upon land has adopted the presumption, or has through conduct or knowing acquiescence become barred from denying it, both parties, tenant and landlord, will be bound to treat the encroached-upon land as annexed to the demised land and held by the tenant on the terms of the demise.

(2) If the owner of the encroached-upon land has done nothing and the relevant limitation period barring an action to recover possession of the encroached-upon land has expired, the owner will be unable to recover possession of that land until the termination of the demise. But the tenant, still bound by the un rebutted presumption, will be bound on the termination of the demise to deliver up possession both of the demised land and of the encroached-upon land to his landlord, the owner of both.

(3) But if the owner of the encroached-upon land, having done nothing to adopt the presumption, remains not bound by it, then, if the relevant limitation period has not yet expired, the owner can, by action, pursue the remedies available against trespassers and, accordingly, recover possession of the land.

These are, in my opinion, the principles that must be applied to determine this appeal.

122. So –

(1) The Government, lessor of the demised land and owner of the 6.67 acres of encroached-upon land, has done nothing to adopt the presumption and is not bound by it.

(2) The encroachers, the respective lessees of the sections, bound by the un rebutted presumption, have been, vis-a-vis the owner of the encroached-upon land, their lessor, trespassers. Their possession has,

therefore, been possession adverse to their lessor. The 60-year limitation period having expired in or shortly after 1984, the lessor has become, for the time being, barred by s.7 of the Ordinance from bringing an action to recover possession.

(3) But the lessees remain bound by the presumption. The most they can acquire through the expiration of the 60-year limitation period is the right to defeat a possession action and, accordingly, to remain in possession until the termination of their leases. Their possession has been adverse so far as the Government's right to recover possession during the currency of the leases is concerned but has not, on account of the presumption, been adverse to the Government's right to recover possession thereafter. To put the point another way, the lessees cannot, in my opinion, obtain a greater title by their adverse possession than that which corresponds to the possessory intentions imputed to them by the presumption.

123. It has been suggested that [s.17](#) of the [Limitation Ordinance](#) is not consistent with the conclusions I have expressed. I do not agree. Section 17 provides that:

"... at the expiration of the period prescribed by this Ordinance for any person to bring an action to recover land ... the title of that person to the land shall be extinguished."

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.

The adding-up rule

124. Mr Chan submitted that the limitation period of 60 years that commenced in 1924 had been interrupted by the cesser on 30 June 1973 of the term of the original lease, that the period had, perforce, to commence running afresh on 1 July 1973 when the further term of 24 years less 3 days commenced and that the period had not expired by December 2001 when the counterclaim for possession was served.

125. I am unable for a number of reasons to accept this submission. First, 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.

126. Moreover, *Smirk v. Lyndale Developments Ltd* [1975] 1 Ch. 317 is, in my opinion, the only authority of any weight that supports the notion that a period of adverse possession accrued under one lease cannot be added to a period of adverse possession accrued under its successor lease. This authority was naturally relied on by Mr Chan. It is, however, distinguishable. In *Smirk* there was no right of renewal included in the terms of the original tenancy. There was, therefore, at least an opportunity for the original lessor to determine the tenancy. In the present case, however, the original demise did contain a right of renewal and at no point of time did the lessor, the Government, have the ability to bring to an end the interest of any of

the lessees in their respective sections. Even if the no adding-up rule for which *Smirk* stands as authority is good law, and I do not want to express an opinion on that, the rule seems to me inapplicable to a case where the original lease did confer a right of renewal and the right was duly exercised. In such a case the possession by a trespasser of encroached-upon land adjoining the land comprised in the original lease, who continues in that possession when the term granted by the original lease is renewed pursuant to a right of renewal contained in the original lease, does not, in my opinion, commence a new period of adverse possession when the new lease is granted. The reasons why not are explained by Lord Nicholls of Birkenhead in giving the judgment of the Privy Council in the *Chung Ping Kwan & Others v. Lam Island Development Ltd* [\[1997\] AC 38](#).

Conclusion

127. For the reasons I have given, I would dismiss this appeal. I am relieved to have been able to come to this conclusion for two overriding reasons. First, if 77 years of undisturbed possession had not sufficed to entitle the plaintiffs to retain that possession against the Government, the [Limitation Ordinance](#) would have failed to achieve the policy of limitation statutes to which I referred in para.106 above. Second, if the plaintiffs' possession of the encroached-upon 6.67 acres had enabled them to defeat the Government's title thereto that is expectant on the termination of the leases, the result of the case would have contradicted the long line of common law authority establishing that a tenant who goes into possession of adjoining land belonging to his landlord is presumed to do so for the purpose of enlarging his demised land and not for the purpose of acquiring an outright title against his landlord.

Mr Justice Bokhary PJ :

128. The appeal is unanimously dismissed with an order *nisi* as to costs in favour of the respondents, such order to become absolute 21 days from today unless written submissions seeking some other order as to costs are delivered to the Registrar within that period in which case any submissions in reply are to be delivered to the Registrar in writing within 21 days thereafter. Counsel on both sides are thanked for their assistance.

(Kemal Bokhary)
Permanent Judge

(Patrick Chan)
Permanent Judge

(R A V Ribeiro)
Permanent Judge

(Henry Litton)
Non-Permanent Judge

(Lord Scott of Foscote)
Non-Permanent Judge

Mr Edward Chan SC, Mr Mok Yeuk Chi and Mr Anthony Chan (instructed by the Department of Justice) for the Appellant

Mr John McDonnell QC, Mr Benjamin Chain (instructed by Messrs Y.S. Lau & Partners) for the 1st, 11th to 15th Respondents

[\[1\]](#).Deputy High Court Judge L Chan, HCA 10670/2000 (30 December 2009).

[\[2\]](#) [Cap 347](#).

[\[3\]](#) [Cap 152](#).

[\[4\]](#).*Tower Hamlets LBC v Barrett* [\[2006\] 1 P & CR 9](#) at §109.

[5].(1880) [15 Ch D 150](#) at 161.

[6].(1871-1872) 7 LRCP 1 at 4.

[7].[1975] [1 Ch 317](#) at 323.

[8].Per Lawton LJ, *Ibid* at 337-338.

[9].[\[2006\] 1 P & CR 9](#) at §112.

[10] [Limitation Ordinance, Cap 347](#), section 7(1).

[11].*Ibid* , section 7(2).

[12].Subsequently section 17 of the Limitation Act 1980.

[13].[2003] [1 AC 419](#) at §26. Our section 17 is the equivalent of section 17 of the Limitation Act 1980.

[14].(1853) 2 E & B 349.

[15].At 356.

[16].At 353.

[17].At 354.

[18].At 355. Crompton J's judgment was to like effect.

[19].(1855) 11 Ex 313 at 318.

[20].At 319.

[21].(1871-1872) 7 LRCP 1.

[22].At 8.

[23].At 4.

[24].At 8.

[25].(1877) [5 Ch D 750](#).

[26].At 766.

[27].At 763-764.

[28].At 766.

[29].(1879) [15 Ch D 150](#) at 156, 160.

[30].At 160-161.

[31].(1895) [64 LJQB 245](#) at 247.

[32].*Ibid* .

[33].[\[1951\] 1 KB 705](#).

[34].At 708.

[35] *Ibid.*

[36] (1895) 64 LJQB 245.

[37] (1898) 79 LT 355.

[38] At 709.

[39] At 710.

[40] [1975] 1 Ch 317.

[41] At 333.

[42] [1975] 1 Ch 317 at 337-338.

[43] [2006] 1 P & CR 9.

[44] At §90.

[45] Megarry & Wade, *The Law of Real Property* (6th ed, 2000) §21-027.

[46] Looseleaf edition, Vol 1, §19.007.

[47] [2006] 1 P & CR 9 at §86.

[48] (1993) 176 CLR 471, in the joint judgment of Mason CJ, Brennan, Dawson, Gaudron and McHugh JJ.

[49] At 475-476.

[50] See per Li CJ in *Wong Tak Yue v Kung Kwok Wai (No 2)* (1997-98) 1 HKCFAR 55 at 67.

[51] [1997] AC 38.

[52] [2003] 1 AC 419.

[53] *Wong Tak Yue v Kung Kwok Wai (No 2)* (1997-98) 1 HKCFAR 55 at 68-69; and *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 at §42-§43.

[54] Which is discussed in *Unruh v Seeberger* in (2007) 10 HKCFAR 31 at §129 et seq.

[55] [1997] AC 38.

[56] At 50.

[57] (2006) 9 HKCFAR 29 at §29.

[58] *Smirk v Lyndale Developments* [1975] 1 Ch 317 at 333.

[59] [1975] 1 Ch 317 at 338.

[60] Cap150. Section 2 provides: "This Ordinance applies to every New Territories lease that exists at the commencement of this section and that, but for this Ordinance, would expire before 30 June 1997 [excepting immaterial leases]." And section 6 states: "The term of a lease to which this Ordinance applies is extended, from the date on which it would, apart from this Ordinance, expire, until the expiry of 30 June 2047, without payment of any additional premium."

[61] (2006) 9 HKCFAR 29.

[62].S.13(1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as adverse possession) and where under the foregoing provisions of this Ordinance any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.

[63].S.7(1) No action shall be brought by the Crown to recover any land after the expiration of 60 years from the date on which the right of action accrued to the Crown or, if it first accrued to some person through whom the Crown claims, to that person.

[64].S.17at the expiration of the period prescribed by this Ordinance for any person to bring an action to recover land.... the title of that person to the land shall be extinguished.

[65].“It is important not to be bewitched by words” : per Megarry J in *Mann v D’Arcy* [1968] 1 WLR 893 at 899 B And, quoting Holmes J : “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”