Neutral Citation Number: [2024] EWHC 534 (Ch)

Case No: PT-2022-000489

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (CHD)

Rolls Building
Fetter Lane
London
EC4A 1NL

Handed down by email
Date: 13 March 2024

Before :

MR NICHOLAS CADDICK K.C.
(sitting as a Deputy High Court Judge)

Between :

MARIA JESUS EL MASSOURI

Claimant

- and –

OMANI ESTATES LIMITED

Defendant

HUGH JACKSON (instructed by **Streathers Solicitors LLP**) for the Claimant
MAX THOROWGOOD (instructed by **Blacks Legal**) for the Defendant

Hearing dates: 6th to 8th February 2024

Nicholas Caddick K.C. (Deputy High Court Judge):

Introduction

1. This action concerns the property at 93 Finborough Road, London, SW10. The principal issue is who is entitled to possession of the third floor of that property.

2. The property at 93 Finborough Road is a mid-terrace property which, in 1984, was divided into four separate flats (lower ground floor, ground floor, first floor and second floor), each of which was held on a long lease. At that stage, the top flat was the second floor flat, which was demised to the Claimant and her late husband (Mr Salah El Massouri) by a 99 year lease dated 6 December 1984 ("the Claimant's Lease") for a premium of £32,000.

3. In early 1990, having lived together in the second floor flat for 6 years, Mr and Mrs El Massouri separated. They did not divorce and seem to have remained on good terms. Mrs El Massouri remained a co-owner of the lease of the second floor flat but (at least before her husband became ill) it was mainly her husband who dealt with matters relating to the property as he continued living there. Nevertheless, Mrs El Massouri did have some knowledge of events relating to the property, albeit not always of the detail.

4. On 9 July 1990, the freehold to the building was acquired by Mrs Rosemary Baffour-Awuah. At the time, Mrs Baffour-Awuah was known as Rosemary Hamilton and she had, in the 1980s, been in a relationship with the very well-known businessman, Nicholas van Hoogstraten, and had had two children by him, Maximilian Hamilton and Britannia Hamilton. In his evidence in this action, Maximilian Hamilton commented that his father liked to use the name Hamilton because it is the capital of Bermuda where, at one time, Mr van Hoogstraten had had interests. According to Mr Hamilton, his father would have had historical knowledge relating to the property at 93 Finborough Road from

the time when the freehold was in the name of Mrs Baffour-Awuah (then Rosemary Hamilton).

5. In 1993, Mr and Mrs El Massouri applied for planning permission to create additional accommodation in 93 Finborough Road by the construction of a new third floor mansard over the front section of the building and of a new storey to the rear section. Permission was granted but no works were carried out at that time. This may have been in part because (as Mrs El Massouri said) they were unable to fund the works at that time due to the property crash, and in part because of (as Mr El Massouri said in an earlier witness statement) "*the ongoing difficulties we were having*" (see below). There is no suggestion that it was because of concerns as to whether they were legally entitled to do the works. That does not seem to have entered their minds.

6. Mr El Massouri's evidence was that, "*[r]ight from the start*", there had been problems with the freeholder's failure to carry out proper repairs to the roof. As a result, by early 1996, Mr and Mrs El Massouri were suing Mrs Baffour-Awuah for failing to repair the roof. Meanwhile, Mrs Baffour-Awuah had brought proceedings against all four existing tenants seeking to forfeit their leases. In the course of these disputes, the tenants issued an application under the Landlord and Tenant Act 1987 seeking to buy the freehold and, as early as 21 March 1996, their solicitor reported to them that Mrs Baffour-Awuah had offered to sell them the freehold for £5,000. In the event, it took some time for the sale to be finalised. Finally, on 23 December 1998, Mrs Baffour-Awuah executed a transfer of the freehold to 9T9T9 Limited, a company controlled by the four tenants, for an agreed price of £2,000. However, it appears that she then sought to add further conditions to the transaction, and it was only in mid-1999, after the tenants had issued an application to the court, that the transfer was finally registered.

7. In the meantime, on 31 October 1996 (after receiving the tenants' application to acquire the freehold but before executing the transfer), Mrs Baffour-Awuah granted a 199 year lease to someone called Francis Frimpong for a premium of

£7,500. I will deal with this lease ("the Frimpong Lease") in more detail later. In brief, the demise was of space above the second floor flat and of air space to the rear of the building above the ground floor level and its terms were substantially more favourable to its lessee than those of the four existing leases. The Frimpong Lease was registered on 7 January 1997 but it was not suggested that Mrs Baffour-Awuah or Mr Frimpong did anything else to draw the existence of this lease to the attention of Mr and Mrs El Massouri or the other tenants.

8. On 15 November 1998, whilst Mrs Baffour-Awuah was still the freeholder, Mr and Mrs El Massouri re-applied for planning permission for their proposed works to construct a third floor mansard and a new storey to the rear section of the building. The application documents cannot now be found. However, the grant of permission dated 15 January 1999 shows that the application had been made by reference to plans dated November 1992 – clearly the same plans that had been used in the 1993 application, copies of which are available.

9. In, it seems, late 2001, Mr and Mrs El Massouri began the building works to create the proposed new third floor mansard and new storey to the rear section, both being accessed through their second floor premises. As appears from 9T9T9 Limited board minutes, this was done with the knowledge of that company (as freeholder) and of the tenants who controlled it. Significantly, there appears to have been no discussion at any point regarding matters of title to the new third floor being created. It was simply referred to in the board minutes as an "*extension of [Mr El Massouri's] flat*". Certainly, no objection was raised and the other tenants' main concern seems to have been as to how much of the cost of the works should be attributed to repairs to the roof to be shared between the four tenants.

10. The works, which were extensive, were completed in 2002 and Mr El Massouri continued to live in the extended premises, having a room on the third floor and using a roof terrace on the roof of the new storey added to the rear section of the building as part of the works.

11. In 2006, Mr and Mrs El Massouri applied for planning permission to put railings around that third floor roof terrace and, according to Mr El Massouri's witness statement, it was at this point that he was told by the Local Authority that "*the balcony lease 'was not in my name'*." Having made further enquiries, he was informed by the Land Registry on 31 October 2006 that Mrs Baffour-Awuah had granted a lease of the third floor to Mr Frimpong and that the lease had been registered. Mr El Massouri's statement says that this was the first time he had heard of the Frimpong Lease.

12. By this time, Mr El Massouri was seriously ill and in need of more suitable accommodation. As a result, he moved out of the property in late October 2006 and he and his wife set about trying to sell their lease. However, after the issue of the Frimpong Lease was raised by a potential purchaser, they decided to abandon their attempt to sell and instead used the rents from letting rooms on the second and third floor to help pay for Mr El Massouri's care, until his death in August 2013. In the course of her cross examination, Mrs El Massouri said that she thought that it was during the aborted attempt to sell the lease that she and her husband found out about the Frimpong Lease. In my judgment, it is more likely that it was discovered (as Mr El Massouri said) a little earlier, in the course of the 2006 planning application. Whichever date is correct, I have no hesitation in accepting Mrs El Massouri's evidence that the discovery was in 2006 and was a complete surprise to both her and her husband. It seems clear from the 9T9T9 Limited board minutes that it was also a surprise to the other tenants.

13. In 2008 and 2009 some attempts were made on behalf of Mr and Mrs El Massouri to trace Mr Frimpong. However, these were unsuccessful.

14. On 20 February 2017, Mr Frimpong transferred the Frimpong Lease to the Defendant, Omani Estates Limited ("Omani"), a company controlled by Maximilian Hamilton, Britannia (his sister) and Richmond Hamilton and Alexander Hamilton (their half-brothers). Maximilian Hamilton stated that this

transfer would have been discussed with his mother and, most likely, with his father because of his father's historical knowledge of the property. He also stated that he did not go to see the property, nor instruct a land agent, nor check whether it was insured. Omani's interest was registered at H.M. Land Registry and, on 27 March 2017, its agent, Robert Gates & Co, tried to send 9T9T9 Limited a copy of the transfer[1] but, beyond this, Omani did nothing with regard to the property until early 2020. It was then that it wrote opposing an application made by Mrs El Massouri to the Land Registry seeking to be registered as proprietor of the third floor on the ground of adverse possession. In view of that opposition, Mrs El Massouri's application was withdrawn on 25 May 2021.

15. At some point after that, Omani instructed London based agents, Brijesh Patel and Isha Kumar, to act on its behalf in relation to 93 Finborough Road. In the course of January 2022, Ms Kumar asserted claims on behalf of Omani not only to the roof space above the second floor but also to the bathroom on the half-landing between the first and second floor and to the stairs leading up from the first floor to that bathroom (areas which the Defendant now accepts were part of the demise under the Claimant's Lease). Ms Kumar also demanded the immediate removal of the door at the bottom of those stairs. That demand was rejected by Mrs El Massouri on the basis that it was the entrance to her flat (which is also now accepted by the Defendant).

16. After that, agents acting for Omani took a number of steps with regard to 93 Finborough Road:

    a. Between 5 and 7 February 2022, they entered the property and removed the door at the bottom of the stairs that led up from the first floor together with its closing mechanism (presumably leaving the Claimant's property unsecured).

[1] The letter was addressed to 9T9T9 Limited at the First Floor flat at 93 Finborough Road. It is not clear whether that was that company's registered office as, on Land Registry documents, its address was given as the Second Floor flat. In any event, the letter was returned undelivered in April 2017 and there seems to have been no follow up.

b. Between 11 and 14 February 2022, they erected a partition across the half-landing between the ground to first floors, thereby obstructing access to storage cupboards there which were used by tenants in the building.

c. On 12 February 2022, Ms Kumar wrote to the residents of rooms on the third floor asserting that Omani (and not Mrs El Massouri) was the owner of the properties that they were occupying and stating that those properties "*will now be repossessed*". The letter advised the tenants to remove all their belongings and to vacate the premises.

d. On 4 March 2022, an agent of Omani went up the stairs into the second floor flat. CCTV footage shows that, on this person's way back down the stairs, he knocked down and removed the CCTV camera that Mrs El Massouri's partner, Stefan Sell, had installed on the half-landing between the first and second floors.

e. The same happened on 28 or 29 March 2002 when a person wearing a hood and carrying a stave of wood again mounted the stairs, removed and took away a replacement CCTV camera that had been put up on behalf of Mrs El Massouri.

f. At some point, probably between March and early June 2022, Omani caused exterior scaffolding to be erected at the rear of the property. This went from the top of the ground floor terrace up to the third floor – providing access to the third floor roof terrace. Omani says that this scaffolding has been erected in air space that was part of the Frimpong Lease demise. Mr Rellis (a chartered surveyor called by the Claimant as an expert witness) referred to this as a "*rudimentary scaffold"* which, he said, is not secure and does not comply with safety regulations. He also commented that it is "*a serious breach of privacy*" as it passes the windows of the bathrooms on the upper floors of the building.

g. On 6 June 2022, two hooded people (one of them carrying a wooden stave) mounted the stairs to the second floor and knocked down yet another replacement CCTV camera that had been put up there and took it and some other items away with them.

h. On 9 June 2022, Omani's agents entered the property and blocked access from the second floor to the third floor by means of a horizontal partition screwed to the walls of the stairwell between those floors. They also removed a handrail and balusters and screwed shut the doors to the rooms on the third floor. It is not clear how they accessed the premises but when they left, having installed the partition, they presumably did so via the scaffolding. Mr Sell and a friend, Ashraf Ibrahim (who helps look after Mrs El Massouri's interests at 93 Finborough Road) removed the partitioning and the screws so that Mrs El Massouri's tenants were able to access their rooms on the third floor.

17. As a result of these actions, on 10 June 2022, Mrs El Massouri applied for and obtained an *ex parte* injunction which seems to have put an end to any further incidents. The present action was commenced on 13 June 2022 and, on 30 June 2022, an order was made continuing the injunction until trial.

The issues

18. As indicated above, the principal issue in the action is who is entitled to possession of the third floor of 93 Finborough Road. The Claimant seeks declarations that she and her late husband have been in adverse possession of the third floor at all times since 2002 and that the Defendant is estopped from claiming an order for possession or damages for trespass. If she fails in that, her alternative claim is that the property demised under the Frimpong Lease was never capable of being possessed by a lessee under the Frimpong Lease. Accordingly, she asserts that the Defendant is not entitled to an order for possession but only to damages in lieu of an injunction. In response, the Defendant claims possession of the third floor on the basis of the Frimpong Lease and claims damages for trespass.

19. The other substantive issue in the action is whether the Defendant is liable to the Claimant in trespass as a result of various actions taken by its agents in areas which are now accepted to be within the Claimant's demised premises.

20. The parties have produced an agreed List of Issues which helpfully identifies the legal and factual issues relevant to this claim. What I have said above and what I say below, are my findings of fact in relation to those issues, based on the witness and documentary evidence that was before me at trial.

The Witnesses

21. At trial, I heard evidence from the following witnesses.

22. Tony Rellis was the Claimant's expert. He gave useful evidence regarding the layout of the property, the nature of the roof prior to 2002 and the inaccessibility of the new third floor other than through the second floor. His evidence as regards the issue of negotiation damages was less useful as his expertise was as a building surveyor rather than as a valuer. However, he was clearly doing his best to assist the court.

23. The Claimant, Mrs El Massouri. She had been less involved in matters concerning the property than her husband when he was alive. More recently, she has clearly been deeply affected and frightened by the actions of the Defendant's agents to which I have referred and has understandably relied on Mr Sell to protect her interests. Despite this, and despite the fact that she was dealing with events many of which took place some years ago, I have no doubt that she was an honest witness who was doing her best to assist the court.

24. Stefan Sell is the Claimant's partner. His evidence was primarily concerned with recent events at the property. He was an impressive and honest witness whose evidence I have no hesitation in accepting.

25. Maximilian Hamilton is a director of the Defendant company and the son of Mrs Baffour-Awuah and Mr van Hoogstraten. Under cross examination, he was not argumentative and he answered the questions he was asked in a straightforward manner. These included questions relating to the extensive business interests of the Hamilton family and the people involved in that business including Mr Englehart (of Engleharts Solicitors), employees of Robert Gates & Co (property agents), Mr Browne (an architect), Mr Frimpong, Mr van Hoogstraten and Mr van Hoogstraten's various children (all of whom featured in some way in the events relating to 93 Finborough Road). His evidence in these regards was generally helpful. There were, however, a number of important issues in relation to which Mr Hamilton was unable to assist the court. As he had only been 11 years old in 1996, he could say little about the circumstances surrounding the grant of the Frimpong Lease. In relation to more recent matters, he could not explain the lack of disclosed documents relating to the grant and subsequent transfer of the Frimpong Lease – even though they were transactions in which Mr Englehart had been involved. He suggested that the Defendant had obtained a valuation of the Frimpong Lease prior to its transfer to Omani but he was unable to provide any details of this or anything in writing to show that there had been such a valuation. There was a similar failure to produce the ledger to which he referred (for the first time) in cross examination and which, supposedly, evidenced Mr Frimpong's financial dealings with the Hamilton family. Further, in many instances, particularly when asked about the Defendant's dealings with its agents and the instructions given to those agents, Mr Hamilton's evidence was that he was unable to assist as these were things that had been dealt with apparently orally by one of his siblings or half siblings (none of whom gave evidence). As Mr Jackson pointed out, this rather contradicted Mr Hamilton's written evidence, which dealt with some of these matters on the basis that he had personal knowledge of them.

26. Francis Frimpong was a very different type of witness. It seems that he was in some way offended that the Claimant had doubted his existence. But such a doubt was hardly surprising given the circumstances of the grant of the Frimpong Lease and given that, in the 21 years that he held that lease, nothing

had been done (other than registration) to bring either his or that lease's existence to the attention of the Claimant or of anyone else at the property. Under cross examination, Mr Frimpong was truculent, evasive and argumentative and I formed the clear view that his evidence and his entire role in events was driven by the interests and needs of the Hamilton family. One example of this was the way in which his witness statement was drafted. He initially asserted categorically that its contents were not the result of any discussions with anyone, and that he had had no discussions with Mrs Baffour-Awuah. When it was pointed out that the statement referred to the supposed trespass into the loft space and the existence of two studio flats on the third floor about which he would have known nothing, he changed his evidence and accepted that he had been told this. Overall, Mr Frimpong was a thoroughly unreliable witness whose evidence on any matter must be treated with extreme caution.

27. Mrs Baffour-Awuah's evidence was also unsatisfactory and not just because she was, in her own words, "*very young*" at the time of the events in relation to which she gave evidence. Her evidence regarding the Frimpong Lease was particularly unsatisfactory. She was confused as to the terms of that lease and why they differed from the terms of the other leases and her explanation of how she came to grant the lease to Mr Frimpong was thoroughly unconvincing. Her evidence regarding her inspection of the roof and supposed loft space was also confused. Overall, I formed the clear view that in relation to 93 Finborough Road her role was really as part of the wider Hamilton property business, at the head of which was Mr van Hoogstraten, with whom she had been in a relationship in the 1980s. Certainly, in her dealings with regard to 93 Finborough Road, she relied heavily on agents connected with the Hamilton business – people such as Mr Duncan, Mr Englehart, Mr Browne and, of course, Mr Frimpong.

28. The Claimant relied on the witness statement of Ashraf Ibrahim, whose witness statement (in translation) was read and, as he not required to be called, can be accepted. The Claimant also relied on a witness statement of the late Mr El

Massouri dated 7 July 2008 which was admitted under a hearsay notice. In assessing his evidence, I bear in mind that he was an interested party and was not the subject of cross examination.

29. Finally, I should note that, although Ms Kumar, the Defendant's agent, had provided a witness statement in relation to the interim injunction application, she did not give oral evidence at the trial. As there was no hearsay notice with regard to her statement, I assume that it is not admissible. However, in case I am wrong, I have read her statement. For the most part, the factual matters to which she refers (i.e. the actions of Omani's agents in the property, as opposed to her beliefs) were no longer in issue by the time of the trial.

The layout of 93 Finborough Road before the construction of the mansard

30. Turning to the List of Issues, paragraphs 4 to 7 of that list relate to the layout of the property prior to the construction of the mansard roof in around 2002. In this regard, I had the benefit of some reasonably detailed plans produced in support of applications for planning permission. These included the plans from 1984 when the property was converted into flats (one of which, helpfully, has floor plans for the 4 floors as at 1984)[2] and the plans dated November 1992 relating to Mr and Mrs El Massouri's application for planning permission in relation to the proposed new third floor.[3] I was also greatly assisted by what I saw when I visited 93 Finborough Road with counsel at the end of the first day of the trial.

31. The property is a typical terraced building. Its front section (nearest the road) runs the full width of the plot but its rear section (the rear third, nearest the garden) is narrower. This leaves an open space to the side of the rear section which allows rooms in the front section to have windows facing the rear. On the lower ground floor and the ground floor, there was no difference in floor level between the front and rear sections. However, on the first and second floors, the ceiling heights in the rear section were lower than those in the front section. Accordingly, on those floors, the rear section of the building contained (as Mr

[2] Pages C87 to 91 in the Trial Bundle
[3] Pages C129 to 132 in the Trial Bundle

Rellis put it) "*half landings which are intermediate levels split between the floor level below and above*".

32. The layout of the various floors was as follows.

a. Lower ground floor - the lower ground floor had its own access via steps down from the pavement. Beyond the rooms in the front section, there was a kitchen in the rear section. Beyond the kitchen was a small utility room of a single storey construction (the 1984 plans show that this had previously been a WC). A conservatory was added to the side of the rear section, apparently after the grant of planning permission on 11 May 1988.

b. Ground floor - the main front door to 93 Finborough Road led into a hallway on the ground floor. Within the ground floor flat, beyond the front section, there was (again) a kitchen in the rear section. This was situated above the lower ground floor kitchen (but did not extend over the lower ground floor utility room).

c. First floor - at the end of the ground floor hallway was a flight of stairs leading to a half-way landing in the rear section of the building – i.e. a landing between the ground and first floors of the front section of the building. At this level, as shown in the 1984 plan, the rear section is smaller than on the ground and lower ground floors. As a result, the space there (marked "kitchen" on the plan, although that is not apparent on site) was and is smaller than those below. Beyond that space, there were what the plan describes as "Existing Balcony Doors" leading to a small terrace over part of the roof of the ground floor kitchen. These doors and terrace can be seen in several photographs, although access to them has since been obstructed by the partition which the Defendant has erected across the landing. It was over this terrace that agents of the Defendant erected scaffolding in 2022, as mentioned above. Continuing five steps up from this half-landing was the rest of the first floor flat and

a staircase leading up to the second floor. At the foot of these stairs was the door which Ms Kumar demanded be removed but which, it is now agreed, was (and always had been) the entrance to the Claimant's flat and part of the demise to the Claimant.

d. Second floor – the stairs from the first floor led to another half-way landing in the rear section – i.e. a landing between the first and second floors. It was here that the CCTV cameras referred to above were positioned. As shown in the 1984 plan, the rear section at this level contained (and still contains) a bathroom. The roof over that bathroom was sloping, as shown by a dotted line on the 1992 plans. The space between the bathroom ceiling and that sloping roof was accessed by a small door in the wall above the landing (which can be seen in a photograph in the Trial Bundle[4]). I accept Mrs El Massouri's evidence that this space was like "a little attic", containing a water tank, and that, closest to the door, it was high enough for a person to stand up but not further in due to the sloping roof. Continuing eight steps up from this half-landing was the rest of the second floor flat. As I have mentioned, until 2002, the second floor was the top floor of the property.

e. The new third floor – whilst dealing with the layout, it is convenient to refer to the changes made by the Claimant and her late husband in 2002 to implement their 1992 plans. These changes resulted in the creation of a new third floor over the front section of the building, under a new mansard, and the addition of a new storey to the rear section, creating a new half-way landing between the existing second and new third floors containing a bathroom for the third floor with, as mentioned above, a roof terrace on top.

33. According to the List of Issues, there are issues as to whether, prior to 2002, there was a loft above the second floor flat and, if not, as to the construction of the building there (paragraph 5 of the List of Issues); whether there was a loft

[4] Page C277

hatch and to what area the door shown in the photo at page C277 of the Trial Bundle gave access (paragraph 6); and what was then the position of the ceiling of the second floor flat and the joists and beams to which it was attached (paragraph 7).

34. As to paragraphs 5 and 6 of the List of Issues, as set out above, prior to 2002 there was a "little attic" over the rear section of the building with a sloping roof over it. In relation to the main (front) section of the building, the 1992 plans[5] show a flat roof with little or no space for any loft between that roof and the ceiling of the second floor flat. Mrs El Massouri also gave evidence that the roof was flat (as, for that matter, did Mr Frimpong). However, Mr Rellis' evidence was that, prior to 2002, the roof "*was likely to be a barrel roof type construction that was often common in this area of SW10*" and he produced pictures of such roofs on nearby buildings. On balance, I think that Mr Rellis is probably correct. However, Mrs El Massouri's (and Mr Frimpong's) belief that the roof was flat is understandable given that the barrel roof was, to use Mr Rellis' words, only "s*lightly domed*" with a high point of "*200 or 300 mil maximum*". I assume that this was at its centre and that the roof tapered down to its edges. On this basis, Mr Rellis concluded that, prior to 2002, there was no significant roof space between the ceiling of the second floor flat and the then roof.

35. Mr Frimpong's evidence was that there was a roof hatch in the ceiling of the second floor. However, he said that did not feel the need to go through it because he had seen the floor plan and *"we know what those buildings look like up there".* His evidence does not, therefore, establish the existence of any loft in the space between the ceiling and the roof.

36. In her written evidence, Mrs Baffour-Awuah claimed that, whilst she was the freeholder (so, before 1999), she had inspected the roof space access hatch at the top of the staircase. Then, in her oral evidence, she stated that "*I cannot remember the details, but I know that I did go up to see the space on the roof, yes*". However, her evidence was confused, "*Maybe – I don't know if – I can't*

[5] Pages C129 and C130 of the Trial Bundle

remember now if there was a cupboard room with, maybe, like, a water tank. I don't know. I know I gained access that I could see that there was room." This was clearly a reference to the little attic over the second floor bathroom in the rear section of the building.

37. In her oral evidence Mrs Baffour-Awuah backtracked on her earlier written evidence regarding a "roof space access hatch" at the top of the staircase, saying that "*it may not have been a hatch*". However, she was adamant that there was some means by which she was able to see that there was roof space over the front section of the building. She concluded "*I could see that there was room*" and that "*I went into the property and I gained access somehow through an entrance or stairway that I was able to see the roof and see that there was space up there.*" Insofar as this is evidence that there was anything more than an insignificant space between the ceiling of the second floor and the roof, then I reject it. In my judgment, there was no loft in the space below the roof and I think that what Mrs Baffour-Awuah was actually claiming to have seen was the space (i.e. in the open air) above the then roof – space in which a third floor flat could be constructed under a new raised roof.

38. Given my conclusions below regarding the nature of the demise under the Frimpong Lease, the issues whether there was a hatch in the ceiling of the second floor and whether there was then a loft are of little or no real importance. However, for what it is worth, it seems to me that Mrs Baffour-Awuah (and Mr Frimpong) were probably right in saying that there was some sort of hatch in the ceiling of the second floor flat, albeit one that provided access to the roof and not to the insignificant space between that roof and the ceiling of the second floor flat. If there was no hatch, it is hard to see how anyone could check, for example, the state of the roof. However, on Mrs Baffour-Awuah's own evidence, it is unlikely that she would have gone up any ladder and through the hatch because she was (she said) likely to have been wearing high heels. It seems to me to me more probable that her belief that there was space above the roof was based on what she could see from the street (where the lack of a mansard on 93 Finborough Road, in contrast to its neighbouring properties,

would have been obvious). It is also possible that she was relying on the Claimant's 1992 plans of the building.

39. As to paragraph 7 of the List of Issues, the position of the ceiling of the second floor flat and the joists/beams to which it was attached was not something that was addressed in evidence. Doing the best I can, it is probable that the works did not alter the height of the second floor rooms. Accordingly, I find that the ceiling and its supporting joists/beams before 2002 were in their current places.

The Claimant's Lease

40. Paragraphs 8 and 9 of the List of Issues relate to the Claimant's Lease.

41. It is common ground that the premises demised by the Claimant's Lease included the second floor. It is also now common ground that the demise also included the half-landing between the first and second floor (with the bathroom situated on that level) and the staircase running up from the first floor. However, this was only conceded a matter of days before the trial. Until then, the Defendant had vigorously asserted (and, as set out above, acted on the basis) that that half-landing (and bathroom) and the stairs leading up to it were not part of the demise under the Claimant's Lease. It appears that its justification[6] was that that half-landing area was the rear section that was marked "kitchen" on the plan of the first floor attached to the Claimant's Lease,[7] an area which was not part of the premises demised under that lease. In fact, the rear section shown on that plan was the rear section between ground and first floor (i.e. on the floor below). Overall, it was clear that the half-landing between the first and second floor (and the bathroom on that landing) was part of the demise under the Claimant's Lease. Given that, on the Defendant's own case, its officers had never visited the property, it is highly regrettable that it and its agents did not ascertain the true position before acting in a way which was clearly likely to intimidate not only Mrs El Massouri but also the various residents of 93 Finborough Road.

[6] See, for example, para.6 of the first witness statement of Maximilian Hamilton
[7] See p.C20 of the Trial Bundle

42. In its Defence, Omani asserted that the Frimpong Lease had the benefit of a right of way over the Stairs (i.e. over the stairs from the first floor which had been included in the demise under the Claimant's Lease) because of the reservations in paragraphs (ii) and (iii) of Part 3 of the First Schedule to the Claimant's Lease. Those reservations were of:

> *"(ii) Power for the Lessor and the Lessor's surveyor and agents with or without workmen and others at all reasonable times upon giving 14 days written notice (except in the case of emergency) to enter the Demised Premises for the purpose of carrying out the Lessor's obligations under the Second Schedule hereto and to repair the remainder of the Property and any adjoining or neighbouring property of the Lessor."*

and

> *"(iii) All other rights and easements in or over the Demised Premises or any part thereof and all rights and privileges in the nature of easements or quasi-easements which are or have heretofore been used or enjoyed for the benefit of the remainder of the Property or any adjoining or neighbouring property of the Lessor or the occupiers thereof"*

43. Only reservation (iii) was included in the list of issues (at paragraph 9). However, at trial, it did not seem to be argued for the Defendant that either reservation entitled Mrs Baffour-Awuah to give the lessee of the Frimpong Lease a general right to use the Stairs to access the third floor. Instead, the Defendant's case appeared to be simply that reservation (ii) had permitted it to access the second floor flat on 9 June 2022 in order to erect the partition between the second and third floors. In other words, it was a defence to part of the trespass claim. I will return to this later in this judgment.

44. In my judgment, the Defendant was right not to argue that these reservations permitted Mrs Baffour-Awuah to give the lessee of the Frimpong Lease a general right of way over the Stairs. Reservation (ii) is simply a reservation of a right of access for the purpose of fulfilling obligations that the freeholder owed under the Claimant's Lease and for carrying out repairs. As regards reservation (iii), there is no evidence that, prior to the grant of the Claimant's Lease, the

freeholder had ever exercised any general right, easement or privilege over the Stairs in order to access the then roof or the insignificant space under it and certainly no evidence of the exercise of any right (etc) which would allow the freeholder to grant the lessee of the Frimpong Lease a general right of way over the Stairs (and parts of the Second Floor) so as to access (for any purposes) accommodation on a new third floor. To the extent that any right (etc.) might have been exercised, it could only ever have been for the purposes of maintenance and repair of the then existing building. In this regard, reservation (iii) adds nothing to reservation (ii).

The Frimpong Lease

45. Paragraphs 10 to 14 of the List of Issues relate to the Frimpong Lease. Before dealing with them, it is worth commenting on the Frimpong Lease more generally because the facts relating to it were, as Mr Jackson submitted, somewhat extraordinary.

46. As set out above, the Frimpong Lease was entered into at a time when Mrs Baffour-Awuah was involved in litigation relating to her failure to repair the property and when she was facing a claim by the existing four tenants to compel her to transfer the freehold to them. It also followed relatively shortly after Mr and Mrs El Massouri had been granted planning permission for works to construct accommodation under a third floor mansard. Given this and given the clear links between Mr Frimpong and the Hamilton family, I have no doubt that the Frimpong Lease was entered into in order to create an interest which could be later used by the Hamiltons to their advantage – either against the tenants or specifically against Mr and Mrs El Massouri. I am not suggesting that Mr Frimpong held the lease on trust for anyone in the Hamilton family. However, I am satisfied that he and the Hamiltons were not acting independently but rather together in their mutual interests. These conclusions are supported by the following facts:

a. When, in 1996, Mrs Baffour-Awuah decided to grant the Frimpong Lease, there is no suggestion that she looked for a buyer on the open market. Instead, she chose Mr Frimpong.

b. Mr Frimpong then had and still has close connections with the Hamilton family. On Mrs Baffour-Awuah's own evidence, she had known him for some years before 1996. His evidence also shows that he has lived in or used properties associated with the Hamilton family. He currently lives in a property in Hove (69 The Drive) that Maximilian Hamilton described as "a family property" and his stated address at the time of the Frimpong Lease (504 Edgware Road) was a property associated with the Hamiltons, as evidenced by its being the address given for Mr Frimpong in the Frimpong Lease and also (as Mr Hamilton confirmed) by its being the address of a Mr A.J. Browne (an architect closely associated with the Hamiltons at the relevant time and found in other litigation[8] to be Mr van Hoogstraten's "*right hand man*"). Mr Hamilton also stated that Mr Frimpong regularly borrows money from Hamilton entities and that, as at 2017 when he transferred the Frimpong Lease to Omani, the total of his borrowings was in the region of £150,000. Mr Frimpong has also been involved with the Hamilton family in relation to other property matters. In cross examination, he was referred to a Court of Appeal judgment, reported at [2002] EWCA Civ 417 and dealing with a case in which he and Mr van Hoogstraten (and others) were accused of having conspired to defeat a tenant's claim to acquire the freehold of the property at 2 – 6 Palmeira Square, Hove. Mr Frimpong admitted that he had bought a lease of a flat in that property from Mr van Hoogstraten but said that he had no memory of anything else regarding that property or that litigation.[9]

[8] See *Raja v Van Hoogstraten* [2005] EWHC 2890 per Lightman J at [69]
[9] The judgment states (at para.21) that he had been debarred from defending the proceedings after failing to provide any disclosure.

c. If Mr Frimpong was acting independently, one might reasonably have expected him or Mrs Baffour-Awuah to have done more than merely registering the new lease and to have informed the other tenants or the new freehold company of its existence. In fact, neither of them did this. This may, of course, have been because Mrs Baffour-Awuah had failed to give the other tenants notice of her intention to grant the lease, thereby depriving them of the right of first refusal with regard to it – a failure which, if done without reasonable excuse, would have been a criminal offence under s.10A Landlord and Tenant Act 1987 (which came into force a few weeks before the grant). It may also have been because, in breach of clause 3(b)(i) and (ii) of the Claimant's Lease, the terms of the Frimpong Lease were far more favourable to the lessee than those of the Claimant's Lease by, for example, omitting any obligation on the lessee to contribute towards structural repairs[10]. The favourable terms of the Frimpong Lease suggest that the Hamiltons hoped to be able to benefit from the Frimpong Lease at minimal cost to themselves. Significantly, on Mr Frimpong's own evidence, he did not discuss what he might have to pay towards repairs before entering into the Frimpong Lease. It was clearly of no interest to him.

d. Mr Frimpong showed a similar lack of interest after the grant of the Frimpong lease. As I understand his evidence, he visited 93 Finborough Road once in 1996 but did not visit again in the rest of the 21 years that he held the Lease. In all that time, he did nothing to alert the other tenants or the freehold company either to his existence or to that of the Frimpong Lease. He did not insure his interest in the property nor make any payments by way of ground rent or for insurance or maintenance. On his own evidence, it did not cross his mind to pay any ground rent.

[10] It also provided for a substantially lower ground rent, £1 p.a as opposed to the Claimant's £75, rising to £150 p.a. and was for a period of 199 years, thereby creating a substantial reversionary interest upon the termination of the Claimant's 99 year lease.

e. When, in 2017, Mr Frimpong came to dispose of the Frimpong Lease, he did so to Omani (a company controlled by the Hamilton children). It was not suggested that he sought to market this potentially valuable asset more widely.

f. Significantly in relation to both the grant of the Frimpong Lease in 1996 and its transfer to Omani in 2017, Mr Englehart of Engleharts Solicitors (a trusted solicitor for the Hamilton family), acted for all parties (Mrs Baffour-Awuah and Mr Frimpong in 1996 and Mr Frimpong and Omani in 2017) - showing there were no possible conflicting interests between them. The manuscript markings on documents (for example the "93" on Mrs Baffour-Awuah's land certificate and the "F.F." and "Third Floor 93" on Mr Frimpong's) are also suggestive of a filing system whereby those parties' interests were dealt with together.

g. There was a remarkable absence of documentation from Mr Englehart's files in relation to either transaction. This was despite chasers from the Claimant's solicitors and despite the fact that Engleharts Solicitors were custodians of documents for the purposes of disclosure. On 25 July 2023, the Defendant's solicitors wrote in relation to various issues relating to Mr Frimpong and saying that enquiries were being made of Engleharts and that Mr Englehart would be in a position to address them. However, they never responded to the Claimant's solicitor's letter of 23 August 2023 pressing for disclosure from Engleharts. I am bound to wonder whether, if disclosure had been given or if evidence had been obtained from Mr Englehart, it might have contained material adverse to the Defendant's case.

h. There appears to have been none of the sort of exchanges that one would expect to see on the grant of a lease such as the Frimpong Lease and on its subsequent transfer. For example, there is no evidence of any client care letters, of any advice on matters of title or obligations under the lease, of any searches being carried out (other than the Land Registry

search costing £3 referred to in Engleharts' invoice to Omani dated 14 March 2017[11]), or of any other pre-contract dealings (such as draft contracts).

i. Finally, although the transactions were purportedly for consideration, this does not suggest that they were arm's length transactions. In the first place, there is no evidence of any valuation being carried out (for either party) when the lease was granted in 1996 for a premium of £7,500. In relation to the transfer to Omani, supposedly for the sum of £96,000, Maximilian Hamilton said that he thought an estate agent's valuation had been obtained. However, he admitted that he had no first hand knowledge of this and he was unable to provide any details or supporting evidence. Further, it emerged in the course of the cross examination of Mr Hamilton that, far from the sum of £96,000 being an actual payment made by Omani to Mr Frimpong (as had been suggested in Omani's pleadings and witness statements), that sum had been "paid" by way of a set off against part of the sum that Mr Frimpong is said to have owed various other Hamilton companies (not Omani), as recorded in some sort of rolling debt ledger. However, the ledger was not disclosed and no details were given of the various transactions supposedly recorded in it. In the absence of such information and of a valuation, it is impossible to attribute much significance to the figure of £96,000. Instead, these dealings serve to emphasise the close nature of the relationship between Mr Frimpong and the Hamilton family.

47. Paragraph 10 of the List of Issues raises a number of issues as to the extent of the property demised under the Frimpong Lease. Under clause 1 and Part 1 of the First Schedule of that lease, the demised premises were defined as:

> *"ALL THAT area forming part of the Property edged red on the Plans annexed hereto and situate above the second floor flat together with all areas to the rear addition of the building above the ground floor and including the ceilings and floors of the proposed flat and the joists and beams on which the floors are*

[11] See page C328 Trial Bundle. Interestingly, no invoice to Mr Frimpong has been disclosed.

> *laid and the joists or beams to which the ceilings are attached and the windows and the internal walls of the said flat including the internal and external walls thereof Excepting from the demise the roof and foundations of the Building and all garden walls"*

48. On first reading, I formed the view that the reference to the roof in that demise was a reference to the then existing roof and, therefore, that the demise was of the insignificant space between the ceiling of the second floor and the then roof in the front section of the building and of the little attic to which I have referred in the rear section. However, on reflection, I have come to the firm conclusion that this cannot be what the parties to the Frimpong Lease intended. Rather, as Mr Thorowgood submitted, what those parties had in mind was a demise of the space for a new third floor flat. This is apparent from the fact that the demise was said to include "*the ceilings ... of the proposed flat*", and from the fact that the plans to the lease showed that it was of a "third" floor extending over all of the front and rear sections of the building, and from the fact that the demise included the airspace over the ground floor rear terrace (presumably with a view to being able to construct a means of access to an otherwise inaccessible third floor, see further below). The reference to the roof in the demise must, therefore, have been a reference to the roof over the proposed flat. It could not have been a reference to the then existing roof as that would leave insufficient space to create a new flat within the demised premises.

49. A difficulty with the above conclusion is that a demise defined by reference to the ceilings of a "proposed flat" (and which excludes some future hypothetical roof over that flat) appears, on its face, to be uncertain. Without knowing the dimensions of the "proposed flat", the extent of the demise cannot be ascertained. To get around this, Mr Thorowgood argued that it should be inferred that the demise was of the space that would exist if the roof was raised to the same level as those of the adjoining properties (Nos. 91 and 95 Finborough Road, which already had third floor mansards). I am not convinced that the fact that the neighbouring properties had a certain roof height would of itself justify such an inference. However, in this case, the parties' intention is made clear by their use of the words "**the** proposed flat" (emphasis added). It

seems to me that these words show that they had a specific proposed flat in mind, a proposed flat whose dimensions would be sufficiently certain for the purposes of a demise. There is no suggestion that Mr Frimpong had put together any proposals for such a flat and Mrs Baffour-Awuah confirmed that "maybe" Mr Duncan had drawn something on paper but nothing officially. In the circumstances, I am satisfied that "the proposed flat" to which they were referring, must have been the flat proposed by Mr and Mrs El Massouri - the proposed flat for which planning permission had been granted only three years before the Frimpong Lease pursuant to a planning application of which, as set out below, I am satisfied Mrs Baffour-Awuah was aware. As appears from the 1992 plans, the roof of the proposed flat was, indeed, level with those of the neighbouring properties. In fact, in closing, Mr Thorowgood invited me to define the scope of the demise under the Frimpong Lease by reference to those plans.

50. On this basis, it seems to me that the demise under the Frimpong Lease included all of the space up to (and including) the ceilings of the proposed flat depicted in the plans used by Mr and Mrs El Massouri for their 1992 application for planning permission.

51. The issue raised in paragraph 11 of the List of Issues is whether the Frimpong Lease has the benefit of a right of way over the Stairs (i.e. the stairs from the first floor to the second floor) in order to access the new third floor. In my judgment, it does not. Those Stairs had been demised to Mr and Mrs El Massouri under the Claimant's Lease. Given that (as set out above in relation to paragraph 9 of the List of Issues) the freeholder had not reserved a right of way over the Stairs for the benefit of a new flat on the third floor, the freeholder could not have granted such a right of way to the lessee of the Frimpong Lease.

52. As set out above, the Frimpong Lease demise also included "*all areas to the rear addition of the building above the ground floor*" shown edged red on the plans annexed. In my judgment, those plans show that this was a reference to the air space above the terrace on the roof of the ground floor kitchen. This

demise was, in effect, of the air space directly upwards from that terrace and into the sky above. As I have said, I assume that the reason for including this was to provide a possible means of access to the proposed new third floor flat.

53. Paragraph 12 of the List of Issues asks whether the lessee of the Frimpong Lease has the right to construct a means of access in that air space. Mr Jackson argued that it does not because the right of "*adjacent and lateral support*" granted under that lease was limited to existing support (i.e. that "*now enjoyed by the Demised Premises*") and would not, therefore, allow for the support of an entirely new structure in this air space. There would also, he pointed out, be issues regarding the attachment of such a structure to the existing fabric of the building (which would require the permission of the freeholder) and most probably issues in obtaining planning permission, given that such a structure would pass immediately outside the windows of the bathrooms in the rear section of the property. Further, Mr Rellis' evidence was that it would not be possible to create a Building Safety compliant access route from the rear of the property to the third floor. Given these points (and I note that Mr Thorowgood did not seek to address them), I am satisfied that the lease of this air space does not provide the lessee under the Frimpong Lease with a genuine means of access to the third floor. I would note that there would probably be further issues – for example, whether the lessee under the Frimpong Lease would have the right to pass over other parts of the property in order to access that air space or, if a structure could in theory be built in the air space, whether it would be possible to get from that structure into the proposed third floor flat (the 1992 plans on which the demise under Frimpong Lease was based would suggest otherwise). However, as these further issues involve the rights of persons who are not party to this action (the current freeholder and the lessees of the lower ground, the ground and the first floors), I make no findings on them.

54. Paragraph 13 of the List of Issues asks when Mrs El Massouri and/or her late husband first became aware of the Frimpong Lease. As I have already noted, it does not appear that Mr Frimpong or Mrs Baffour-Awuah informed anyone of the existence of the lease. Further, although the lease was registered with the

Land Registry before the tenants acquired the freehold in 1999, I am satisfied that that registration was not noticed by Mr or Mrs El Massouri or by Mr Hargreaves (the solicitor acting for the tenants in the transfer) - probably because the transfer (drafted by Mr Englehart) did not specifically refer to the individual leases to which the freehold was subject but said, simply, "*The Property is sold subject to the Leases referred to in the Property Register*". It clearly did not occur to the tenants (or to Mr Hargreaves) that Mrs Baffour-Awuah would have granted a new lease in relation to the property in the period between her offer to sell the freehold to the tenants and the transfer which completed that sale. In the circumstances, as set out in paragraphs 11 and 12 above, I find that Mrs El Massouri and her late husband first learned of the existence of the Frimpong Lease in 2006 in the course of their 2006 planning application and I accept Mrs El Massouri's evidence that it came as a complete surprise to them both. I was also shown minutes of the board meeting for 9T9T9 Limited in July 2007 which suggest that it was also a surprise to the other tenants and to 9T9T9 Limited.

Knowledge of planning applications and of works to create the third floor flat

55. Paragraphs 15 to 20 of the List of Issues relate to whether Mrs Baffour-Awuah and Mr Frimpong knew of the various planning applications in relation to the third floor flat and of the work done in creating that flat.

56. As to paragraph 15, I am satisfied that, on 25 January 1993, as confirmed by the Claimant's certificate provided under s.27 Town & Country Planning Act 1971, notice of Mr and Mrs El Massouri's 1993 planning application to "*BUILD NEW 3RD FLOOR MANSARD & BACK ADDITION EXTENSION"* was served on Mrs Baffour-Awuah at 19 Church Road, East Sussex BN3 2FA. That was the address provided for her at H.M. Land Registry in her capacity as the freehold owner. Further, it was and is an address associated with the Hamiltons. Mrs Baffour-Awuah confirmed in cross examination that she used to work there and that it is a business address that she still uses and through which she still receives letters. On this basis, I do not accept her evidence that she did not receive notice of the planning application. Nor do I accept her evidence that she would have

objected to the application if she had received the notice. I find that it is likely that she did receive that notice and that she was well aware that Mr and Mrs El Massouri had plans for the creation of a new third floor flat. The reference to "the proposed flat" in the Frimpong Lease that she granted supports this finding.

57. The issue at paragraph 16 of the List of Issues is whether Engleharts (the solicitors acting for both Mrs Baffour-Awuah and Mr Frimpong) carried out a Local Authority search when they were retained to act in relation to the grant of the Frimpong Lease in 1996. The point being that such a search would have disclosed the 1993 Application and the grant of planning permission. It is possible that there was a search and that an adverse inference to this effect can be drawn from the fact that the Defendant has failed to obtain evidence from Mr Englehart. However, on balance, given the circumstances in which the Frimpong Lease was granted and the relationship between Mr Frimpong and the Hamilton family, it seems unlikely that they would have bothered with such a search. Mrs Baffour-Awuah was well aware of the position with regard to planning without needing to do a search. As mentioned above, the absence of such a search is consistent with my finding that Mr Frimpong was not acting independently of the Hamiltons in relation to 93 Finborough Road.

58. Paragraph 17 of the List of Issues asks whether the November 1998 planning application was advertised and, if so, whether and when it came to Mr Frimpong's attention. In closing, Mr Jackson accepted that notice of this application would not have been given directly to Mr Frimpong because Mr and Mrs El Massouri did not then know about his lease. He argued, however, that Mrs Baffour-Awuah was still the registered freeholder at that time and that, in order to grant permission on 15 January 1999, the local authority must have been satisfied that she had been given the requisite notice. He argued that the application would then have been discussed with Mr Frimpong. I accept that notice was sent to Mrs Baffour-Awuah at the 19 Church Road address. I also accept that it would have come to her attention and/or to the attention of the Hamilton family (probably including Mr van Hoogstraten, given his knowledge of matters relating to the property) and that it would have been discussed with

Mr Frimpong or that, if it was not discussed, that was because Mr Frimpong, in relation to 93 Finborough Road, was unlikely to act independently of the Hamilton family.

59. As to paragraph 18 of the List of Issues, Mr Jackson suggested that Mr Frimpong would have received the notice of the 2006 application that was sent to him on 10 June 2006 at 504 Edgware Road, London, W2 1EJ, that being the address given for him at H.M. Land Registry. I find that the notice was properly sent to that address. However, I do not think that I can find that it would actually have come to Mr Frimpong's attention given that he was living elsewhere by then and that it is unclear whether letters from 504 Edgware Road would have been passed on to him or to the Hamiltons. If (which is also unclear) the property was still occupied by Mr Browne in 2006, then the notice may not have been passed on because, according to Maximilian Hamilton, Mr Browne had fallen out with the Hamiltons in the aftermath of the murder in 1999 of Mr Mohammed Raja.

60. The issue at paragraph 19 of the List of Issues is when Mr Frimpong became aware of the construction of the third floor extension. Although the 2006 notice sent to 504 Edgware Road had referred to works at "*3rd floor level*" and "*at raised second floor level at the rear of the building*", for the reasons set out above, I am not satisfied that this would have come to Mr Frimpong's attention. Nor is there any evidence that Mr Frimpong had visited the property after around 1996. He may, of course, have learned of the works from someone else involved with the Hamiltons but there is no suggestion that anyone in the Hamilton family had seen the extension. Mr Jackson argued that it was likely that the works would have come to the Hamiltons' attention in 2002 via Mr Keith Duncan, an estate agent who, Mrs Baffour-Awuah stated, was based about a ten minute drive away from the property and "*used to look after the property for me*" and advise her regarding her disputes with the tenants. Mr Jackson argued that because notices relating to the works would have been placed on lampposts and because the works were of a very substantial nature (involving 3 large metal "I" shaped roof beams and, at one point, the closing of the

Finborough Road, a busy arterial road in the area), Mr Duncan would have been aware of them. I am not satisfied that I can make that finding simply because Mr Duncan's office was relatively close to Finborough Road. In my judgment, it was probably not until 2020 when the Hamiltons received notice of Mrs El Massouri's application to the Land Registry 2020 that they found out that the extension had been built. Mr Frimpong probably became aware of it sometime thereafter, possibly as late as 2023, when he was approached by Mrs Baffour-Awuah and asked to give a witness statement for the present action.

61. Turning to the issue in paragraph 20 of the List of Issues. As set out above (see paragraph 57), I have found that it was unlikely that Engleharts solicitors would have carried out a Local Authority search in 1996. Although some years had passed, I find that it is also unlikely that they would have carried out such a search in 2017 when they were retained to act for both Omani and Mr Frimpong in relation to the transfer of the Frimpong Lease to Omani. This conclusion is supported by the contents of their March 2017 invoice in respect of their services in relation to that transfer,[12] which referred to a Land Registry Search but not to a Local Authority search.

Adverse possession

62. Paragraphs 21 to 23 of the List of Issues relate to adverse possession. Before dealing with those issues, I should say something about the law of adverse possession as it now applies with regard to land which (as in this case) is registered.

The Land Registration Act 2002

63. The Land Registration Act 2002 ("the 2002 Act") brought about significant changes by limiting the ability of a person to obtain title to registered land on the basis of a claim to adverse possession. The starting point for this is s.96 of the 2002 Act which, in the case of registered land, disapplies the various

[12] See page C328 of the Trial Bundle

limitation periods that applied under the Limitation Act 1980 with regard to claims to recover possession of that land.

64. The 2002 Act provides for two types of cases. First, cases where a person claiming to have been in adverse possession of registered land for ten years applies to the Registrar of the Land Registry seeking to be registered as proprietor of that land (see s.97 and Schedule 6 of the 2002 Act). Second, cases where a person defends an action for possession of registered land on the basis of a claim to be in adverse possession of that land (see s.98 of the 2002 Act). The two are mutually exclusive because, by reason of paragraph 1(3)(a) of Schedule 6, where a person is a defendant in proceedings which involve asserting a right of possession of registered land, that person cannot make an application under s.97 and Schedule 6. Such a person must, therefore, defend the proceedings on the basis set out in s.98.

65. In closing, Mr Thorowgood submitted that the present case is a s.98 case due to Omani's counterclaim. Mr Jackson argued the contrary, asserting that Omani's real claim is for an injunction or damages in lieu of an injunction rather than for possession (a point to which I will return). In my judgment, Mr Thorowgood is correct. In this action, Omani is asserting a right of possession. It is irrelevant whether, in the event, that claim fails or is treated as a claim for an injunction.

66. Under s.98(1) of the 2002 Act, a person has a defence to an action for possession if:

> *"(a) on the day immediately preceding that on which the action was brought he was entitled to make an application under paragraph 1 of Schedule 6 to be registered as the proprietor of an estate in the land, and*
>
> *(b) had he made such an application on that day, the condition in paragraph 5(4) of that Schedule would have been satisfied."*

67. Section 98(2) to (5) then sets out further defences or bars to the enforcement of judgments for possession that are not relevant for present purposes. However, s.98(6) provides that the defences under s.98 are:

> *"…additional to any other defences a person may have."*

Accordingly, a person facing a claim for possession of registered land may rely on another defence such as that of proprietary estoppel.

The section 98(1) Defence

68. To succeed in a s.98(1) defence, Mrs El Massouri must establish (a) that immediately before Omani made its counterclaim for possession, she would have been entitled under paragraph 1 of Schedule 6 of the 2002 Act to make an application to be registered as the proprietor of the land demised under the Frimpong Lease and (b) that the condition in paragraph 5(4) of Schedule 6 would have been satisfied if such an application had been made. I will deal with these in turn.

(a) Would Mrs El Massouri have been entitled to make an application

69. As to (a), under paragraph 1 of Schedule 6, a person who has been in adverse possession of registered land for the period of ten years ending with the date of the application, is entitled to make the application for registration. As the law as to what constitutes adverse possession has not been altered for the purposes of the 2002 Act, this means that Mrs El Massouri must be able to show that, for the requisite ten years, she and/or her late husband had been in factual possession of the relevant estate and that they had had the necessary *animus possidendi*.

70. It is common ground that Mrs El Massouri and her husband had been in factual possession of the third floor flat for the requisite ten year period (see paragraph 22 of the List of Issues). There is, however, an issue as to whether they had the necessary *animus possidendi* (see paragraph 23 of the List of Issues). In my judgment it is clear that they did. The necessary *animus* involves an "*intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow*" (see *Powell v McFarlane (1979) 38 P.C.R. 452* per Slade J at 471). I have no

doubt that this was Mr and Mrs El Massouri's intention in constructing, in occupying and in receiving rents in respect of the third floor premises (premises that were accessible only through their existing second floor premises). This was the position both before and after they found out about the Frimpong Lease. They were, in effect, treating the third floor as an accretion to their own existing lease. Whatever the position as regards 9T9T9 Limited as freeholder may or not have been, it seems to me that they had the necessary *animus possidendi* as against anyone else – such as the lessee under the Frimpong Lease.

(b) Would the paragraph 5(4) condition have been satisfied

71. As to (b) - i.e. whether Mrs El Massouri can show that the condition in paragraph 5(4) of Schedule 6 would have been satisfied. That paragraph provides that:

> *"(4) The third condition is that—*
>
> *(a) the land to which the application relates is adjacent to land belonging to the applicant,*
>
> *(b) the exact line of the boundary between the two has not been determined under rules under section 60,*
>
> *(c) for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him, and*
>
> *(d) the estate to which the application relates was registered more than one year prior to the date of the application."*

72. Both parties asserted that paragraph 5(4) was concerned with boundary disputes which, both seemed to agree, was not the present case. I will assume that that was correct. Nevertheless, both parties went on to deal with the question whether Mrs Massouri would have been able to satisfy the requirement in paragraph 5(4)(c). Mr Thorowgood's position was that Mr and Mrs El Massouri did not satisfy this requirement as they had found out about the Frimpong Lease in 2006, less than 10 years from when they first went into adverse possession. So far as I could tell, Mr Jackson did not dispute this and, on this basis, Mrs

Massouri would not have a defence to Omani's claim under s.98(1) of the 2002 Act.

The section 98(6) Defence

73. Accordingly, Mrs El Massouri's defence to Omani's claim depends on whether she can establish another defence within the meaning of s.98(6). Both parties agreed that proprietary estoppel would be such a defence. In this sense, in answer to the issue raised at paragraph 23 of the List of Issues, the adverse possession claim adds nothing to the proprietary estoppel issue considered below.

Proprietary estoppel

74. Paragraphs 24 to 26 of the List of Issues deal with proprietary estoppel.

75. It is worth starting with the note of caution sounded by Lord Walker in *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55 at [46]:

> *"46. Equitable estoppel is a flexible doctrine which the Court can use, in appropriate circumstances, to prevent injustice caused by the vagaries and inconstancy of human nature. But it is not a sort of joker or wild card to be used whenever the Court disapproves of the conduct of a litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way. Certainty is important in property transactions. As Deane J said in the High Court of Australia in Muschinski v Dodds (1985) 160 CLR 583 , 615–616,*
>
> > *"Under the law of [Australia]—as, I venture to think, under the present law of England—proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, subjective views about which party 'ought to win' and 'the formless void of individual moral opinion'" [references omitted]."*

76. Given the flexibility to which Lord Walker referred, "*the criteria for relief can be stated only in general terms*" – see *Megarry & Wade's Law of Real Property 9th ed.* at 15-001, which goes on to summarise the circumstances in which proprietary estoppel can arise, namely where:

> *"(a) the owner of land (O) induces, encourages or allows the claimant (C) to believe that C has or will enjoy some right or benefit over O's property, provided that inducement etc is not specifically limited to a mere personal use of the land;*
>
> *(b) in reliance upon this belief, C acts to his or her detriment to the reasonably determined knowledge of O; and*
>
> *(c) O then seeks to take unconscionable advantage of C by denying C the right of benefit which C expected to receive."*

77. As recognised in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] Q.B. 133, per Oliver J at p.148E, the element of acquiescence or encouragement envisaged in sub-paragraph (a) above:

> *"….may take the form of standing by in silence whilst one party unwittingly infringes another's legal rights. It may take the form of passive or active encouragement of expenditure or alteration of legal position upon the footing of some unilateral or shared legal or factual supposition. Or it may, for example, take the form of stimulating, or not objecting to, some change of legal position on the faith of a unilateral or a shared assumption as to the future conduct of one or other party. I am not at all convinced that it is desirable or possible to lay down hard and fast rules which seek to dictate, in every combination of circumstances, the considerations which will persuade the court that a departure by the acquiescing party from the previously supposed state of law or fact is so unconscionable that a court of equity will interfere."*

78. Further assistance is provided in *Megarry & Wade* at para.15-010 which (omitting footnote references) states that:

> *"Passive encouragement occurs when O, an owner of land, stands by and allows C to act to his or her detriment knowing that C mistakenly believes that C has or will obtain an interest in or right over O's land. In such a situation, 'the circumstances of looking on is in many cases as strong as using terms of encouragement'. Thus, an equity arose in C's favour where he constructed an engine shed on O's land and O both acquiesced in its construction and accepted rent for it. In another case, in which a lease had been forfeited, the lessors knowingly allowed the underlessees to believe that their sub-leases were still subsisting. The underlessees having acted to their detriment in this belief, the lessors were estopped from denying the validity of the underlease. Likewise, where O stands by as C converts a loft space believing, inaccurately, that it forms part of the demised premises. Formerly the courts adopted defined criteria for*

> *establishing acquiescence, and sometimes still do, but the approach is now generally more flexible. The weight of authority is that it is no longer necessary to force C's conduct 'into a Procrustean bed constructed from some unalterable criteria', but to consider whether in the circumstances it would be inequitable for O to insist upon his or her strict legal rights. The one element that is clearly essential is that O's conduct should have encouraged C to act as he or she did. Mere inaction by O in the face of an infringement of O's rights cannot therefore amount to acquiescence because it does not induce C to act. In cases of passive encouragement, it is unlikely that O's conduct will be regarded as unconscionable unless O was aware of, or should have been aware of:*
>
> *(i) O's own proprietary rights;*
> *(ii) C's expenditure or other detrimental acts; and*
> *(iii) C's mistaken belief that he had or would acquire an interest in or over O's land."*

79. In a footnote to sub-paragraph (ii) in the above passage, *Megarry & Wade* make clear that, in taking a case beyond mere inaction and into passive encouragement, it is not necessary to prove knowledge of actual expenditure or of actual acts. It will suffice that O is aware of C's intention to act to his or her detriment.

80. Ultimately, the fundamental principle which underlies proprietary estoppel is that equity is concerned to prevent unconscionable behaviour – see *Megarry & Wade* at para.15-001 and *Yeoman's Row* per Lord Walker at [92]. As Oliver J said in *Taylors Fashions at p.151-152*, the doctrine of proprietary estoppel -

> *"… requires a very much broader approach which is directed at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to enquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour"*

81. In my judgment, the facts of the present case give rise to a proprietary estoppel and I find that the Defendant is estopped from denying that the third floor forms a part of, or is an accretion to, the demise by the Claimant's Lease. In my judgment, it would be unconscionable for the Defendant to assert the contrary.

82. The starting point is that, despite knowing that planning permission for the creation of the third floor had been granted in 1993 and renewed in 1999, it was not until March 2020 that the Defendant finally asserted a right to possession of the third floor based on a lease granted in 1996. This was more than 27 years after Mrs Baffour-Awuah had been given notice of the first planning application, 24 years after the grant of the Frimpong Lease and more than 18 years after the third floor had been constructed and started being used as a residence for Mr El Massouri and for people letting rooms from him and Mrs El Massouri. In view of the close relationship between Mrs Baffour-Awuah, Mr Frimpong and Omani, I find that this lack of action is relevant to the question whether it is unconscionable for Omani now to assert its rights against the Claimant, even though it only acquired the Frimpong Lease in 2017.

83. A period of inactivity, even one as long as that in the present case, does not of itself give rise to an estoppel or support a finding of unconscionability. Something more is required. As set out below, I am satisfied that there are a number of factors that take this case well beyond one of mere inaction and that establish that it would be unconscionable for the Defendant now to assert its rights against the Claimant.

84. As set out above, I find that Mrs Baffour-Awuah was aware of the 1993 application for planning permission and of the proposed plans to create a new third floor. Planning permission had been granted and, relatively shortly after that, the tenants had sought to exercise their right to acquire the freehold from Mrs Baffour-Awuah. Her reaction to those events is significant. Far from raising any objection or pointing out to Mr and Mrs El Massouri that their proposals were contrary to her rights as the freeholder (rights that she knew she was likely soon to lose), she instead granted the Frimpong Lease purporting to create rights over the proposed third floor in favour of Mr Frimpong, a person associated with the Hamiltons. Beyond the registration of that lease (which was, of course, essential for its enforceability), she clearly did her best to keep its existence a secret, despite its clear significance both in relation to Mr and Mrs El Massouri's

proposed works and to the tenants' proposed acquisition of the freehold. In my judgment, her actions suggest that she knew that both those proposals were likely to be actioned and her grant of the Frimpong Lease was calculated to be turned to her (or the Hamilton family's) advantage in such event.

85. Then, in 1998 when (as I have found above) Mrs Baffour-Awuah was served with notice of the 1998 application for planning permission and whilst she was still the freeholder, she still did not inform Mr and Mrs El Massouri or the other tenants of the existence of the Frimpong Lease. She remained silent. If she had any doubt about the seriousness of Mr and Mrs El Massouri's intention to carry out the works, the fact that they had reapplied for permission should have removed that doubt.

86. Given that Mrs Baffour-Awuah and Mr Frimpong hardly visited the property (certainly after 1996), they probably did not see the works being carried out or the completed works. However, on the issue of unconscionability, it is of some (probably relatively limited) significance that they had a local agent, Mr Duncan of Ruck & Ruck, who had advised Mrs Baffour-Awuah and (according to Mr Frimpong) Mr Frimpong in relation to the property. Being aware of Mr and Mrs El Massouri's proposals, it would have been a simple matter for Mrs Baffour-Awuah and, subsequently, Mr Frimpong to have instructed Mr Duncan to inform Mr and Mrs El Massouri that the proposed works required their consent.

87. The lengthy period of inaction of Mrs Baffour-Awuah, Mr Frimpong and the Defendant went beyond a failure to assert their rights in the face of Mr and Mrs El Massouri's proposals. During that time, they also avoided their obligations in relation to the property. In Mrs Baffour-Awuah's case, she was, according to the Claimant (whose evidence I accept), ordered to pay £11,000 by way of damages for her failure to carry out repairs – an order that she has not complied with – and it was whilst she was being sued for this failure to repair that she granted the Frimpong Lease without complying with the notice provisions of Part 1 of the Landlord and Tenant Act 1987 and in breach of her obligations under the Claimant's Lease. In the case of Mr Frimpong, as 9T9T9 Limited was

unaware of his lease, it never sought payment of any sums due under that lease and Mr Frimpong certainly did not volunteer any payments.

88. Overall, the rights on which the Defendant relies were rights derived under a transaction that was clearly a device designed to be used against the tenants and, in particular, against Mr and Mrs El Massouri and to give the Hamiltons a claim in relation to the proposed third floor. The Hamiltons (Mrs Baffour-Awuah and Mr van Hoogstraten) knew that the opportunity to create a third floor in the property was potentially valuable to Mr and Mrs El Massouri, and were also well aware that it was an opportunity that Mr and Mrs El Massouri were planning to exploit and that, given the access issues, were uniquely positioned to exploit. Yet the Hamiltons did nothing to point out that to do so would be contrary to Mrs Baffour-Awuah's rights as freeholder. Then, when it became apparent that Mrs Baffour-Awuah was likely to lose that freehold, she granted the Frimpong Lease creating new rights over the relevant land and she and Mr Frimpong then stood by in the knowledge that Mr and Mrs El Massouri were likely to carry out the extensive works needed to create the new third floor. They did nothing to inform Mr and Mrs El Massouri and the other tenants of the existence of the Frimpong Lease (beyond arranging for its registration).

89. It is possible that the matters set out above would not give rise to an estoppel if Mr and Mrs El Massouri had not believed that they were entitled to carry out the works needed to create the new third floor. However, in my judgment, the evidence suggests that, until 2006, Mr and Mrs El Massouri did believe that they had that entitlement. By failing to raise any objection, Mrs Baffour-Awuah and Mr Frimpong allowed that belief to continue.

90. I recognise that, to a lawyer reading the Claimant's Lease, it is hard to see on what basis Mr and Mrs El Massouri had formed that belief given that they knew that the roof was part of the freeholder's responsibilities and given that their lease contained the usual covenants against alterations other than with the freeholder's consent. It may be that they were influenced by the fact that their premises was the sole means of access to a new third floor. However, the fact is

that they did not, at any stage, seek any permission (other than from the local authority) to do the works. They did not seek permission from Mrs Baffour-Awuah as freeholder before the transfer. Nor did they seek permission from 9T9T9 Limited as freeholder after the transfer. They did not, of course, know about the Frimpong Lease at that point. It could be argued that they did not seek permission from Mrs Baffour-Awuah because they were in dispute with her and may have thought that she was unlikely to give it. However, this cannot be said of the position with regard to 9T9T9 Limited, which acquired the freehold well before the works were commenced. As appears from the facts summarised in paragraph 9 above, the concern of the other tenants and of 9T9T9 Limited appears to have been limited to their obligation to contribute to the cost of a new roof to replace the old defective roof. As regards the new third floor, as I have mentioned, this was referred to in the minutes of a 9T9T9 Limited board meeting as an "*extension of [Mr El Massouri's] flat*". There appears to have been no discussion regarding matters of title or as to Mr El Massouri's entitlement to carry out the proposed works.

91. Also significant is the fact that Mr and Mrs El Massouri went to the expense of having plans drawn up in 1992 and of seeking planning permission in 1993. This was more than two years before their solicitor suggested that the tenants could purchase the freehold and it was at a time when they were in dispute with the then freeholder. It seems unlikely that they would have gone to that trouble and expense if they thought that they needed the permission of a freeholder who was unlikely to give it. Alternatively, if they thought they needed permission, why would they not have made any attempt to obtain that permission, given that they were going to the expense of drawing up plans and that the freeholder would become aware of those plans as part of the planning application process. Much the same can be said as regards their renewed application in 1998.

92. Mr Thorowgood pointed out that in 1993 (and, on my findings, again in 1998) the certificate of service of Mr and Mrs El Massouri's planning application referred to Mrs Baffour-Awuah in the section of the form listing "*owners of any part of the land to which this application relates*". However, this is perfectly

consistent with her being served as the freehold owner of Mr and Mrs El Massouri's flat. It does not show that they knew that they needed her permission.

93. Ultimately, in my judgment, the facts point to a belief in Mr and Mrs El Massouri that they had the right to carry out the works to construct the new third floor and, as set out above, Mrs Baffour-Awuah and Mr Frimpong stood by and allowed them to carry out the extensive (and, no doubt, expensive[13]) works needed to construct the new third floor on the basis of that belief. In my judgment, the estoppel to which this gives rise is binding on the Defendant and it would be unconscionable for the Defendant to be entitled now to enforce its rights under the Frimpong Lease against the Claimant.

Trespass

94. Paragraphs 27 to 32 of the List of Issues relate to trespass.

95. As to paragraph 27, I have no hesitation in accepting the Claimant's evidence that the door to the Claimant's flat was removed and was taken away by agents acting on behalf of the Defendant. To the extent that Ms Kumar's statement suggests that the door had been left on site, then I reject that evidence. I see no reason to doubt Mr Sell's evidence in this respect.

96. As to paragraphs 28 and 29 of the List of Issues, as it is now common ground that the Stairs and the half-landing between the first and second floors were part of the demise under the Claimant's Lease, there can be no doubt that the removal of the door at the bottom of those Stairs and the actions of the Defendant's agents on 4 March, 28 or 29 March and 6 June 2022 (as described above) were acts of trespass for which the Defendant is responsible. As Maximilian Hamilton was unable to assist in relation to the precise nature of the instructions given to the Defendant's agents, it is unclear whether those agents had acted outside their instructions but, in any event, I do not see that it makes any

[13] Mr Rellis puts the building costs at £90,000.

difference. In my judgment, the Defendant is liable for the acts of people who were only on the premises as its agents, seeking to assert its purported rights.

97. Much the same applies in relation to paragraph 31 of the List of Issues. It seems to have been accepted that, in order to install a horizontal partition between the second and third floors, the Defendant's agents must have accessed some part at least of the second floor. I also reject the argument that such works fell within reservation (ii) in the Claimant's Lease. The installation of the partition was not done in order to comply with the freeholder's obligations under the Claimant's Lease, nor did it constitute repairs.

98. In relation to paragraph 30 of the List of Issues, given that the freeholder and the lessees of the lower floors of the building are not parties to this action, I am not convinced that I could or should rule on whether the erection of the scaffolding to the rear of the property was a trespass. I would say, however, that I was not taken to any evidence to show that the Defendant was entitled to erect such scaffolding.

99. As regards paragraph 32 of the List of Issues, on the basis of my findings above, the new third floor under the mansard roof was constructed on premises that are part of the Frimpong Lease demise but the Claimant has a defence to a claim in trespass on the basis of my findings on the issue of proprietary estoppel.

Loss and interest

100. As regards issue 33, I find that the sums set out in the schedule of losses provided by the Claimant[14] - totalling £2,105.00 - properly represent the losses caused by the Defendant's agents and for which the Defendant is liable.

101. As I have rejected the Defendant's claim in trespass for the actions of the Claimant and her late husband in constructing and then using the third floor

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premises, there is no sum for which the Claimant is liable. In the event that I am wrong, I deal with the issue of damages below.

Remedies

The declarations sought

102. As set out in paragraph 35 of the List of Issues, it is now common ground that the Claimant is entitled to a declaration that the Stairs (i.e. the stairs leading up from the first floor) were included in the premises demised by the Claimant's Lease.

103. With regard to paragraph 36 of the List of Issues, for the reasons set out above, I find that:

a. The Claimant is entitled to a declaration that the land comprising title number BGL19306 (the Frimpong Lease) does not have a right of way over the Stairs and has no right of access to the mansard or to the additional storey of the rear section of the Property, save for the purposes of repair of the premises demised under the Frimpong Lease;

b. The Claimant is entitled to a declaration that the third floor mansard and the additional (top) storey to the rear section of the property which are comprised in title number BGL19306, have been in the adverse possession of the Claimant and/or her late husband since about 2002; and

c. The Claimant is entitled to a declaration that the Defendant is prevented by estoppel from claiming possession of those parts of the land comprised in title number BGL19306 which have been the adverse possession of the Claimant and/or her late husband since about 2002.

104. In my judgment, in view of the history of this matter and the effect it has clearly had on the Claimant's peace of mind, the Claimant is entitled to a permanent

injunction along the lines set out in paragraph 37 of the List of Issues. I will ask the parties to try to agree appropriate wording whereby the Defendant is restrained, whether by itself, its servants or agents, from entering or attempting to enter any part of the premises lawfully occupied by the Claimant save for the purposes of exercising rights (such as the right of repair) falling within reservations made in the Claimant's Lease, the benefit of which has passed to the lessee of the Frimpong Lease.

105. As regards paragraph 38 of the List of Issues, I would be prepared to make declarations as to the extent of the premises demised by the Frimpong Lease and the Claimant's Lease – such declarations to be in accordance with my findings above. As above, access over the Stairs would be limited to access in order to exercise rights (such as the right of repair) falling within the reservations made by the Claimant's Lease, the benefit of which has passed to the lessee of the Frimpong Lease.

Is the Defendant entitled to an order for possession, an injunction or damages in lieu of an injunction?

106. Given my findings in relation to proprietary estoppel, the Defendant is not entitled to any remedy as regards any part of the land demised under the Frimpong Lease which is currently occupied by the Claimant. Nevertheless, I will deal with the issues raised in paragraphs 39, 40 and 41 of the List of Issues, in case it is later found that my ruling in relation to proprietary estoppel is wrong.

107. If the Defendant is not estopped from asserting its title to the third floor, the issues are whether it is entitled to an order for possession of such land (paragraph 39), or to an injunction (paragraph 40) or to damages in lieu of an injunction (paragraph 41).

108. The Defendant's argument is that, as it is the registered proprietor of a legal estate in land currently being occupied by the Claimant, it is entitled to an order

for possession of that land as of right and with immediate effect. Its point is that, as the registered proprietor, it has a better claim to possession than the Claimant who entered that property as a trespasser, albeit more than 22 years ago. In support, it refers to cases such as *McPhail v Persons Unknown* [1973] Ch 447 (at pp.457B-458B and pp.461-462) and *Axnoller Events Ltd v Brake* [2022] EWHC 459 (Ch). The Claimant disputes this claim saying that the Defendant is not entitled to an order for possession because the Defendant is unable to define the relevant land (which, for the reasons set out in paragraphs 47 to 50 above, I do not accept) but also because the Defendant has never been and is unable now to go into possession of the land in question.

109. The nature of a claim for possession was considered by the Supreme Court in *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780 and, more recently, by the Court of Appeal in *Brake v Chedington Court Estate Ltd* [2024] EWCA Civ 1302. In essence, it is a claim by a person who has been ousted from possession of land for an order to be put back in possession of that land. Such a claim is the successor to what used to be called an action for ejectment (because the person seeking the possession order is claiming to have been wrongfully ejected from the land). The issue then is which of those persons has a better title to possession. See *Brake* per Lewison LJ at [32], [33], [48] and [49] and *Meier* per Baroness Hale at [33]. See also *Meier* at [6] where Lord Rodger stated that:

> *"… To use the old terminology, the defendant has ejected the claimant from the land; the claimant says that he has a better right to possess it, and he wants to recover possession. That is reflected in the form of the order which the court grants: 'that the claimant do forthwith recover' the land - or, more fully, 'that the said AB do recover against the said CD possession' of the land."*

110. The issue, then, is whether Omani (or its predecessor in title as lessee under the Frimpong Lease) has been ejected or ousted from possession by the Claimant and her late husband and whether Omani should be put back in (or, to use Lord Rodger's word, "recover") possession.

111. It is, therefore, necessary to consider the concept of "possession". In *Powell v McFarlane* (1979) P.&C.R. 452 at pp.470-472, Slade J gave the following guidance:

> *"It will be convenient to begin by restating a few basic principles relating to the concept of possession under English law:*
>
> *(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.*
>
> *(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("animus possidendi").*
>
> *(3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. In the case of open land, absolute physical control is normally impracticable, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion. "What is a sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to the resources or status of the claimants": West Bank Estates Ltd. v. Arthur, per Lord Wilberforce. ... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.*
>
> *(4) The animus possidendi , which is also necessary to constitute possession, was defined by Lindley M.R., in Littledale v. Liverpool College (a case involving an alleged adverse possession) as "the intention of excluding the owner as well as other people." ... What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name*

> *and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."*

112. Factual possession and the *animus possidendi* are, therefore, always required. It is just that in the case of an owner with paper title, those requirements are deemed to be satisfied unless the evidence shows otherwise. For persons without paper title, they must be proved.

113. The summary of the law from *Powell v McFarlane* set out above was approved by the House of Lords in *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 per Lord Browne-Wilkinson at [40] to [42] and, at [40], Lord Browne-Wilkinson confirmed that:

> *"…there are two elements necessary for legal possession:*
>
> *1. a sufficient degree of physical custody and control ("factual possession");*
>
> *2. an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess")."*

114. Then, in *Meier* at [34]-[35], Baroness Hale made the following remarks about possession actions:

> *"34 … it is clear that in reality what was being protected by the action was the right to physical occupation of the land, not the right to possession of a legal estate in land. The head lessee who was merely collecting the rents would not be able to bring an action which would result in his gaining physical occupation of the land unless he was entitled to it.*
>
> *35. It seems clear that the modern possession action is there to protect the right to physical occupation of the land against those who are wrongfully interfering with it. The right protected, to the physical occupation of the land, and the remedy available, the removal of those who are wrongfully there, should match one another. The action for possession of land has evolved out of ejectment which itself evolved out of the action for trespass."*

115. In my judgment, the evidence shows that Omani and Mr Frimpong, its predecessor, as the persons with paper title to the land on the third floor of the building, have never been and could never have been in possession of that land

in the sense set out above. They have not, therefore, been ejected from it. Nor is Omani in a position to go into (let alone "recover") possession of that land in the future. As set out in paragraph 51 above, the lessee under the Frimpong Lease has no right of access over the second floor premises to the third floor and, for the reasons set out in paragraph 53 above, it does not have a potential means to access that land using the air space over the terrace on the roof of the ground floor kitchen either. If the lessee of the Frimpong Lease had and has no legal means by which to access the land in question, I cannot see that that lessee has ever had or now has any right or ability physically to occupy that land. It is also questionable whether Omani and its predecessor in title can ever have had the requisite *animus possidendi* given that, except for Omani's actions after 20 February 2017 (see paragraph 14 above), they did not take any steps to assert their title to this land until 2020. Prior to that, as set out above, they did not assert any of the rights conferred by the Frimpong Lease and they did not recognise or meet any of the obligations imposed by it.

116. Against this, Mr Thorowgood pointed out that, due to the reservation made in the Claimant's Lease (i.e. reservation (ii), see paragraphs 42 to 44 above), Omani has a right of access across the second floor flat in order to carry out repairs to the premises demised under the Frimpong Lease. He also argued that Omani might be able to access those demised premises via an adjoining property (presumably meaning either 91 or 95 Finborough Road). I do not accept that either of these arguments establishes that Omani had a right to physical occupation of the demised premises. The ability to access land simply for the purpose of repairing that land is, at best, a very limited right and the fact that a person may be on land merely to carry out repairs will not, in general, constitute possession of that land. As to the possibility that Omani might be able to access the land from adjoining land, it seems to me that Omani's entitlement to possession of the relevant land must arise from its rights under the Frimpong Lease and not from some other unconnected and, at present, hypothetical right that it might or might never acquire over some other property.

117. It follows that, even if the Defendant is not estopped from asserting its rights, it would not be entitled to an order for possession against the Claimant.

118. Assuming, again, that my finding of estoppel was wrong, the next issue (see paragraph 40 of the List of Issues) is whether Omani would be entitled to injunctive relief requiring the Claimant to vacate the mansard and/or to permit Omani to enter upon the premises demised to the Claimant for the purposes of undertaking such works as might be necessary to separate the mansard from the premises demised by the Claimant's lease.

119. As reflected in Mr Thorowgood's submissions, the facts that are relevant to this issue are similar to those that I have considered in relation to the issue whether the Defendant is entitled to an order for possession. Accordingly, in my judgment, if the Claimant's proprietary estoppel claim were to fail, a court would refuse to grant the injunction sought by Omani. As Omani has no ability to access the third floor, such an injunction would either stultify the third floor for no purpose or would require the Claimant to allow Omani to access it when it has no right to do so. Even if Omani could in some way access the third floor, I am not convinced that it would be equitable that it should be allowed to benefit from the work done by the Claimant and her late husband in creating that third floor and the new roof.

120. The next issue, if the Claimant's proprietary estoppel claim were to fail, is that referred to in paragraph 41 of the List of Issues – whether damages in lieu of an injunction should be awarded, such an award being possible where an injunction is refused on discretionary grounds. In this regard, the parties seem to be agreed that the appropriate measure of damages would be negotiating damages. This would be the sum that the parties, in a hypothetical arm's length negotiation conducted in good faith, would have agreed that the Claimant should pay in return for a grant of the relevant rights – i.e. for a grant whereby land demised under the Frimpong Lease but occupied by the Claimant was treated as an accretion to the Claimant's Lease.

121. For the Claimant, Mr Jackson submitted that the best evidence of the relevant sum was the £5,000 that Mrs Baffour-Awuah had asked the tenants to pay for her freehold in early 1996 or the £7,500 premium that Mr Frimpong allegedly paid for his interest under the Frimpong Lease in late 1996. The £96,000 purportedly paid by Omani in 2017 can, in my judgment, be discounted by reason of the matters set out in paragraph 46 above. Mr Jackson also relied on the evidence of Mr Rellis, namely that an appropriate figure for negotiating damages would either be the £7,500 paid by Mr Frimpong for his lease or, alternatively 15% of the £90,000 which it cost the Claimant and her late husband to do the works – i.e. £16,700.

122. In response, Mr Thorowgood pointed out that Mr Rellis was a building surveyor, not a valuer and that there was, in any event, no basis for taking a percentage of the building costs as the sum the parties would have negotiated for the grant of the relevant rights. I agree. It is much more likely that the parties would have negotiated a figure based on a percentage of the increase in value of the Claimant's Lease (after deducting the costs of the works).

123. Whilst I agree that there is, effectively, no expert valuation evidence, I do not accept Mr Thorowgood's argument that there is currently no admissible evidence to assist the court. In my view, the figures of £7,500 and £5,000 to which Mr Jackson referred are of assistance. They are real figures that were put forward at around the relevant time as the price payable for interests that included title to land now comprising the third floor. Mr Thorowgood argued that, given that the Claimant's case was that Mr Frimpong was in collusion with the Hamiltons, the Claimant could hardly rely on the figure of £7,500. Even if that were the case, the same objection cannot be levelled at the figure of £5,000 which was put forward by Mrs Baffour-Awuah in arms' length negotiations for the sale of her freehold to the tenants. Of course, the eventual price was £2,000, a reduced price which Mrs Baffour-Awuah may have been willing to accept because she had by then (but without telling the tenants) granted the Frimpong Lease and which may, therefore, be of less assistance.

124. As there is some evidence before the court, the question is whether, as Mr Thorowgood submitted, it is or may be necessary for the court to direct some sort of further enquiry on the issue of negotiating damages.

125. In my judgment it would not be appropriate to order any further enquiry. The issue of damages was apparent from the pleadings and there was never any direction that there should be a split trial. This trial was of both liability and quantum and the parties were under an obligation to put forward their full cases on both issues.

126. On this basis, factual evidence on the issue of damages could and should have been served with any other factual evidence by 28 July 2023 in accordance with the directions given by Master Clark on 2 February 2023. Further, those same directions expressly provided for the parties to call a joint expert on, inter alia, the issue of "*valuation for the purpose of assessment of damages in lieu of injunctive relief*". Later, on 24 October 2023, Deputy Master Arkush gave each party permission to call expert evidence as regards, inter alia, "*valuation for the purpose of assessment of damages (if awarded at trial)*", with exchange of reports to be by 10 November 2023. That time was extended to 17 November 2023 by Master Clark but, in the event, no expert evidence was served by the Defendant. Finally, although the order of Fancourt J dated 15 December 2023 provided for an expert for the Defendant (together with the Defendant's lawyers) to inspect the relevant property, it did so on the express basis of a confirmation by the Defendant that it would not seek to call expert evidence at trial. In the event, no expert acting for the Defendant actually attended to inspect the property.

127. For these reasons, it would now be too late for the Defendants to seek to put in further factual and, possibly, expert evidence on the issue of damages. The issue is one that was supposed to be resolved at the trial before me. Accordingly, if (contrary to my findings) the Defendant is entitled to damages, those damages must be assessed on the basis of the evidence that was before me. Doing the best

I can on the figures before me, I would have ordered negotiating damages in the sum of £7,500 in respect of the Defendant's counterclaim.

128. Paragraph 43 of the List of Issues asks whether the Defendant is entitled to use and occupation damages. Given my finding that the Defendant and its predecessors were never entitled to possession, I am not convinced that a sum based on the Claimant's use and occupation properly represents the Defendant's loss. There are two further problems with such a claim. First, that I have very little evidence on which to base an assessment of such damages. Second, I do not think that the Defendant can properly claim both negotiating damages representing the sum that the Claimant would have to have paid in order to obtain the necessary rights and damages for use and occupation that would be founded on the premise that the Claimant did not have those rights. The two claims are, it seems to me, mutually exclusive.

129. Finally, the issue at paragraph 42 of the List of Issues is what consequential order should be made as to directions to the Land Registry. I will hear further submissions on this and, in particular, on how my findings will affect Omani's registered title.

Conclusion

130. For the reasons set out above, I find that the Defendant is estopped from asserting its title to the third floor of the property at 93 Finborough Road, London SW10 (as currently occupied by the Claimant) and that the Claimant is entitled to damages for various acts of trespass committed by agents of the Defendant in relation to the second floor of that property. I dismiss the Defendant's counterclaim.

131. I will ask counsel to prepare a draft order to reflect the terms of the judgment.