REF/2021/0563

LAND REGISTRATION DIVISION, PROPERTY CHAMBER

FIRST – TIER TRIBUNAL

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) PHILIP RONALD BROWN
(2) KIERON HALSTEAD

Applicants

and

OLUFOLAKEMI OLOLADE ATOBATELE

Respondent

Property address: 17 Warnborough Road, Oxford, OX2 6HZ

Title number: ON50752

Before: Judge Stephen Jourdan KC

Hearing conducted in person in 10 Alfred Place, London WC1E 7LR on 10 May 2023

Applicants' Representation:	John Clargo of counsel, instructed by Harrison Clark Rickerbys
Respondent's Representation:	Byroni Kleopa of counsel, instructed by Bloomfields

DECISION

Adverse possession application under Sch 6 para 1 of the Land Registration Act 2002 - whether "lease in writing" for the purposes of Schedule 1 paragraph 5 of the Limitation Act 1980 - whether agreement that new head tenant should take over took effect variation or surrender and regrant - whether notice to quit served by former agent of deceased landlord terminated tenancy - whether Schedule 1 paragraph 5 applies to a periodic tenancy arising under s.5 Housing Act 1988 following expiry of fixed term tenancy granted by lease in writing

Introduction

1. On 5 March 2020, the Applicants, Philip Ronald Brown and Kieron Halstead, made an application ("the Application") to HM Land Registry to be jointly registered as proprietors of the registered freehold title to 17 Warnborough Road, Oxford, OX2 6HZ ("the Property"), title number ON50752.

2. The Application was made under Schedule 6 paragraph 1 of the Land Registration Act, which provides that a person may apply to the registrar to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for the period of 10 years ending on the date of the application.

3. The Property is a large semi-detached residential house in North Oxford. It is divided into two parts: a basement flat ("the Basement Flat") and a number of rooms comprising residential accommodation in the upper parts on the ground, first and second floors ("the Upper Parts"). There is a front garden, a side passage where there is a door leading into the Basement Flat, and a rear garden.

4. The Application was made on the ground that, since 1996, the Applicants had each occupied part of the Property - Mr Brown the Upper Parts and Mr Halstead the Basement Flat - as their home without paying rent or fees or acknowledging title to anyone else, including the registered proprietor, and they had accepted liability and paid all the costs and outgoings relating to the Property, e.g. for council tax, services bills, insurance, and maintenance and repairs, as the established owners of the Property, had exercised full control of access and entry into the Property, had barred

access and entry to anyone they wished to exclude including those claiming rights derived from the registered proprietor.

5. Under Schedule 6 paragraph 2 of the 2002 Act, when an application is made under paragraph 1, the registrar must give notice to the registered proprietor and also certain other specified classes of person. Under paragraph 3, supplemented by the Land Registration Rules 2003, a person given such a notice under paragraph 2 may require that the application to which the notice relates be dealt with under paragraph 5 by filing a form NAP within 65 business days. If no such form is so filed then, under paragraph 4, the applicant is entitled to be entered in the register as the new proprietor of the estate. If such a form is so filed then paragraph 5 applies, with the effect that the applicant is only entitled to be registered as the new proprietor of the estate if one of three narrowly-defined conditions is satisfied.

6. Since 27 October 1977, the registered proprietor has been Chief Obasola Atobatele ("Chief Atobatele"). However although this is not apparent from the register, he died intestate on 8 June 1989 in Nigeria.

7. On his death, the freehold title to the Property vested in the Probate Judge under s.9(1) of the Administration of Estates Act 1925 and subsequently in the Public Trustee, when s.9(1) was amended to replace the Probate Judge with the Public Trustee, with effect from 1 July 1995: see s.14 of the Law of Property (Miscellaneous Provisions) Act 1994.

8. On 11 February 1994, a Nigerian court made an order appointing four individuals to be administrators of the estate of Chief Atobatele ("the Estate") ad collingenda bona i.e. for the purpose of preserving the assets of the Estate. The four individuals were Chief Atobatele's oldest daughter, his oldest son, and two Nigerian lawyers. I will refer to them as "the Nigerian Administrators".

9. That order could have been given effect to in England and Wales either by having the order resealed by the High Court under the Colonial Probates Act 1892 or by the Nigerian Administrators obtaining from the High Court an order appointing the Nigerian Administrators as administrators of the Estate in England and Wales. Neither

of those things occurred, and no order has been obtained from the High Court appointing an administrator of the Estate. Accordingly, the freehold title to the Property has at all times since 8 June 1989 remained vested in the Probate Judge/Public Trustee.

10. The Respondent is one of Chief Atobatele's daughters. On 13 October 2020 she filed an objection to the application in form NAP, requiring the application to be dealt with under Schedule 6 paragraph 5, and also objecting to the application on the grounds that the Applicants had occupied the Property as tenants, with the consent of the Estate, and so had not been in adverse possession.

11. The registrar then determined that the Respondent was not entitled to file a form NAP, because she was not the registered proprietor, nor authorised to represent the Estate, nor otherwise entitled to be served with a paragraph 2 notice. This was because Judge Ann McAllister had determined in a previous reference, Duffett v Atobatele Ref 2019/0650, that the Respondent is not entitled to file a form NAP in respect of a registered estate where Chief Atobatele is the registered proprietor.

12. However, the registrar accepted that the Respondent was entitled to challenge the Applicants' assertion that they had been in adverse possession of the Property. Under s.73(1) of the 2002 Act, subject to immaterial exceptions, "anyone may object to an application to the registrar".

13. It was not possible to dispose by agreement of that objection, and so the registrar was obliged under s.73(5) to refer the matter to this Tribunal. On 30 September 2021, the registrar did refer the matter to this Tribunal, accompanied by a case summary in the form required by rule 3 of the Land Registration (Referral to the Adjudicator to HM Land Registry) Rules 2003. The case summary made it clear that the registrar had determined that the Respondent was not entitled to file a form NAP and the only matter being referred to this Tribunal was whether the Applicants' occupation had been as tenants of the Estate and with the consent of the Estate.

14. The parties then exchanged statements of case and witness statements, and the reference was heard by me at a hearing in person on 10 May 2023. The parties were

both represented at the hearing by counsel and I am grateful to them for the helpful and efficient way in which they conducted the hearing.

15. Although a number of witness statements were included in the hearing bundle, after the evidence of the Applicants had been heard, counsel agreed that there was no need for any of the other witnesses to be called. In the end, there was no dispute as to the essential facts, although there was a dispute as to the correct analysis of the facts and their legal consequences.

The facts

16. Based on the evidence, I make the following findings of fact.

17. After Chief Atobatele was registered as proprietor of the freehold title to the Property on 27 October 1977, the Property was managed on his behalf by Mr. Zbigniew Volak. Mr Volak let out the rooms in the Property to individuals who lived in them.

18. On 1 July 1987, Mr Volak as "Owner" entered into a written agreement with Mark Baber as "Occupant" by which Mr Volak granted Mr Baber permission to occupy the Property and its garden in common with other occupants entitled thereto, from 1 July 1987 at a monthly "occupation fee" of £810. The agreement had been typed with the name of the Owner as Z Volak Properties (Oxford) Ltd, but the words "Properties (Oxford) Ltd" were deleted. I will refer to this as "the 1987 Written Agreement".

19. At the end of the agreement were additional provisions, one of which said: "Authority is hereby granted to Mark Baber to sub-let to" followed by a list of names, one of which was that of Mr Brown. Mr Brown then went into occupation of room 3 on the first floor of the Property, initially as a sub-tenant of Mr Baber. Mr Brown was given a copy of the 1987 Written Agreement when he moved into room 3.

20. It was common ground between the parties that the effect of the 1987 Written Agreement was to demise the whole of the Property to Mr Baber on a monthly periodic tenancy, which I agree is the correct analysis.

21. On 15 December 1987, Mr Volak wrote to Mr Baber. This letter is important and I will set it out in full:

> "Dear Mark,
>
> You will agree with me that I have displayed an inordinate amount of patience awaiting settlement of your rent and could not be accused by whatever definition as a ruthless landlord demanding his pound of flesh.
>
> But there is a limit dictated primarily by my financial commitments and I am not prepared any longer to tolerate this state of affairs. You still owe money for the previous month, although you have collected it from various sub-tenants, obviously using it for personal needs and blaming council for not supplying you with grants etc.
>
> I intend to transfer the responsibility over the property to Philip Brown. You will be welcome to remain in the property assuming you conform in every respect to the terms of the contract, but the overall control of the payments and implementation of the terms of lease must be handed over to person with some integrity. I sincerely hope you will read this in the same vein in which it was written. It is the further thing from my mind to embarrass you or anybody else or create aggravation and misunderstandings all round.
>
> I would hope you would co-operate in this respect and hand over responsibility to appointed person. In practise it will mean that you will relinquish the responsibility in writing and a new contract will be drawn and signed by Philip. There will be changes whatsoever in terms of the contract other than the commencement of the contract from the date when the handover takes placer terminating at the end of June 1988. The rest remains in tact.
>
> Please call at your earliest convenience to arrange a meeting in my office, preferably before Friday so Carole can attend to all the administration as she may be engaged in personal family pre-Christmas activities next week.
>
> Yours sincerely,
>
> Z Volak
>
> Copy to: Philip Brown and perusal of all tenants.
>
> PS I would still expect you to settle the outstanding rents etc. forthwith".

22. Although that letter said that Mr Volak intended that a new written agreement be entered into, that did not happen. Nonetheless, the proposal put forward in it was agreed to by Mr Baber and Mr Brown and was put into effect shortly after the letter was written. From late 1987 or early 1988 on, Mr Brown became the tenant of the Property on the terms of the 1987 Written Agreement. Mr Baber and took possession of the Property accordingly. He organised the collection of rents and also dealt with the payment of utility bills. He had the electricity and gas bills put in his name and continued thereafter to take responsibility for paying the utility bills and collecting contributions from the other occupiers of the upper parts, apart from one brief period when Mr Volak had one of the utility bills put in Mr Volak's name. However, Mr Volak did not then pay the amounts due and Mr Brown then arranged to take over again the relevant utility account.

23. At the time of the 1987 Written Agreement, the internal staircase ran from the basement to the second floor. At some time within about a year after the 1987 Written Agreement was entered into, Mr Volak arranged for the basement to be separated from the rest of the house, and that remained the position thereafter. The Basement Flat was thereafter treated separately to the rest of the Property and Mr Brown ceased to have any involvement with it. It is, therefore, clear that by the end of 1988, the Basement Flat had been surrendered out of the tenancy held by Mr Brown and subsequently it was let separately to the Upper Parts.

24. That was the position at the time that Chief Atobatele died on 8 June 1989 in Nigeria - Mr Brown was in possession of the whole of the Property other than the Basement Flat under a monthly periodic tenancy on the terms of the 1987 Written Agreement.

25. On 19 June 1989, Mr Volak wrote a letter on notepaper headed "Volak Properties (Oxford) Ltd" addressed to all the residents in the Property in which he said that

> "… the rent for the house is in arrears by the sum of £675, this is comprised solely of five months rent from Philip Brown. However, as the house is rented to Philip every portion of the deposit is in jeopardy - yours included.
>
> I must impress upon you that unless the rent is brought up to date within seven days the matter will be referred to the court and all deposits will be forfeit. This would be

as a result of one person's totally irresponsible attitude towards the payment of their share of the rent.

Because of this attitude I have been reluctant to reconfirm Philip as the leaseholder but have been willing to issue individual room contracts and these were sent to Philip on 25th May for distribution and signing. I understand that these are still in Philip's possession and that possibly you are still unaware of the existence of these new contracts which should take effect from 1st July 1989."

26. Two days later, on 21 June 1989, Mr Volak issued a money claim against Mr Brown in the county court for £675, being arrears of rent at £135 per month from February to June 1989 inclusive "in respect of room rented" at the Property. Mr Volak personally was named as the plaintiff.

27. On 1st February 1990, possession proceedings were brought by "Volak Properties (Oxford) Ltd" against Mr Brown in the Oxford County Court claiming possession of room 3 in the Property, arrears of rent of £900 and mesne profits. The Particulars of Claim pleaded 'a shared occupancy agreement dated 6th July 1989' and that a notice to quit had been issued at the beginning of January 1990. Neither that "shared occupancy agreement" nor the notice to quit referred to were in evidence. It was common ground between the parties that, regardless of what was said in those Particulars of Claim, there was no written agreement relating to Mr Brown's occupation other than the 1987 Written Agreement.

28. On 9 March 1990, Mr Brown wrote to the Court complaining about Mr Volak's failure to have regard to Mr Brown's circumstances, that he was going to clear the arrears by 10 April, that he was protected by the Rent Acts, and that he was aware that the owner of the house, Mr Atobatele, had died. Those proceedings were then adjourned generally with liberty to restore.

29. It appears that the following year, fresh possession proceedings were started against Mr Brown, again in the name of Volak Properties (Oxford) Ltd. The Particulars of Claim were not in evidence but the Defence was. That pleaded that Mr Brown took up occupation at the premises in or about August of 1987 under the terms of a monthly periodic tenancy at a rent of £130.00 per month and became a protected tenant under the terms and provisions of the Rent Act 1977 and that Mr Brown was "a protected

tenant under a periodic tenancy and the rent payable under the periodic tenancy is £130.00 per month."

30. On 31 January 1991, a notice to quit was served on Mr Brown on behalf of Volak Properties (Oxford) Ltd.

31. On 21 February 1992, Mr Volak wrote to Mr Brown complaining that Mr Brown was seeking to exercise control over the Property and asking him to cease any activity outside his room.

32. On 21 May 1992, a consent order was entered into in the possession proceedings. Judgment was given to the Plaintiff for £2,866 and all other claims were dismissed. The consent order included the following recital:

> "AND UPON the parties acknowledging (for the avoidance of doubt) that the Defendant holds a contracted periodic tenancy protected under the Rent Act 1977 from the Plaintiff of Flat 3, 17 Warborough Road, Oxford at a current rent of £130 per calendar month upon the terms contained in clauses 4, 5, 6, 7 and 9 in the written agreement dated 1st day of July 1987 expressed to be between the Plaintiff and Mr Mark Barber".

33. Para 1 said: "There be leave to amend the amended particulars of claim and summons herein to name Mr Zbigniew Volak T/A The Volak Group (Oxford) as Plaintiff in place of Volak Properties Ltd." From this, and the other evidence summarised above, it is apparent that Mr Volak used the name "Volak Properties (Oxford) Ltd" as a trading name to refer to him, rather than to a registered company of that name.

34. On 9 September 1992 a fair rent was registered in respect of a statutory tenancy held by Mr Brown of a bed-sitting room on the first floor of the Property with shared use of the kitchens and bathroom in the sum of £45 per week. The landlord's name was given as "Volak Group (Oxford)".

35. On 22 October 1992, Mr Volak wrote to Mr Brown on notepaper headed "Volak Group (Oxford)" complaining about rent arrears due from him and also about him attempting to assume responsibility over the Property.

36. On 1 September 1995, a written tenancy agreement granting a tenancy of the basement flat in the Property was entered into between "Volak Group (Oxford)" (which it is apparent was a trading name used by Mr Volak) as landlord and Mr Halstead and Caroline Alder as tenant. It granted a tenancy for a term of 12 months commencing on 1 September 1995 at the monthly rent of £360.

37. On 25 April 1996, Nadine Wong & Co, solicitors wrote to "the Occupiers" at the Property. They said they acted for Miss LAY Atobatele the intending administrator of the estate of Chief Atobatele who had died in June 1989 and asked "for the identity of the person or company to whom you pay your rent".

38. After receiving that letter, Mr Brown refused to pay any further rent, because he was not satisfied that Mr Volak was entitled to be paid the rent. The last month in respect of which he paid rent was March 1996.

39. On 18 June 1996, Mr Volak applied to register an increased fair rent of £235.28 per month in respect of Mr Brown's tenancy. On 16 October 1996 a rent of £2,808 per annum, equal to £234 per month was registered. The rent register stated that Mr Brown occupied under a statutory tenancy which commenced in 1987.

40. Mr Volak died on 28 November 1996. He left a will appointing as his executors his wife, Mrs Enid Volak, his son and a solicitor. Probate was granted to them on 11 July 1997.

41. After Mr Volak's death, Mr Brown was in sole control of the Upper Parts. He continued to live in room 3. As occupiers moved out, he selected new occupiers and collected rent from them. By 2005, everyone living in the Upper Parts had been allowed into occupation by Mr Brown and was paying rent to Mr Brown.

42. On 14 January 1997, Mrs Enid Volak wrote to "Krystle and Kieran, basement flat, 17 Warnborough Road, Oxford saying:

> "Thank you for your letter enclosing rent cheque for £450. I immediately gave up responsibility for the management of 17 Warnborough Road when Mr Volak died (28 November), and this is now in the hands of solicitors. I am therefore returning

> the cheque herewith together with a refund of your last cheque for £400, which inadvertently went through after my husband's death. I don't know what is happening now. It is all in the hands of the legal people and I imagine someone will eventually turn up to explain what is happening. But this will take a very long time and I should enjoy it while you can".

After that, Mr Halstead did not pay any further rent to anyone.

43. From that time on, the front garden, the side passage and the rear garden were jointly controlled by the Applicants. They demolished a large bicycle shelter which had been at the front of the house, pulled up weeds and from time to time trimmed plants and grass. No-one made any use of those areas other than the Applicants and the occupiers of the rooms in the Upper Parts who were, from 2005 on, all individuals who were occupying with Mr Brown's permission and paying rent to Mr Brown.

44. In March 2001, Ms Alder left the Basement Flat, leaving Mr Halstead in sole occupancy.

45. On 5 March 2007, Abbey Folami was registered as proprietor of the freehold title to the Property. On 24 April 2007, he issued possession proceedings in respect of the Property against the Applicants. Mr Brown took legal advice, and was advised that he should allow Mr Folami to inspect the Property and give him a key, which he did.

46. In June 2007 Mr Folami inspected the Upper Parts, accompanied by someone he introduced as his Property Development Manager, Mr Valentine. In August 2007, Mr Folami and Mr Valentine made two further visits to the Upper Parts. After the second visit, Mr Brown changed the locks and issued new keys to the other residents.

47. Mr Folami's possession claim was tried by Mr Recorder Alastair Wilson QC. In his judgment dated 17 June 2014 he held that Mr Folami's claim to title was based on forged documents. He therefore dismissed the possession claim and ordered the proprietorship register to be altered to reinstate Chief Atobatele as proprietor.

48. In 2015 and 2016, solicitors acting for Chief Atobatele's oldest son, one of the Nigerian Administrators, wrote to the solicitors then acting for the Applicants, and

also to Mr Halstead directly, asking for information about the rents payable and asking that the Applicants make arrangements to vacate. The Applicants ignored these letters.

49. On 5 March 2020, the Applicants made the Application.

The meaning of "adverse possession"

50. The issue in this reference is whether the Applicants were in "adverse possession" of the Property for 10 years prior to the making of the Application, from 6 March 2010 to 5 March 2020.

51. Under the Limitation Act 1980, where a person is in possession of unregistered land without the consent of the person entitled to possession, time for bringing an action to recover the land will run against the person entitled to possession under s.15 as supplemented by Schedule 1. If no action to recover the land is commenced within the limitation period provided for in s.15, the title of the person entitled to possession will be extinguished under s.17.

52. The position is different in the case of registered land where the limitation period had not expired prior to 13 October 2003, the date when the Land Registration Act 2002 came into force. On that date, s.96 of the 2002 came into force. It provides that no period of limitation under s.15 of the Limitation Act 1980 shall run against any person, other than a chargee, in relation to an estate in land the title to which is registered.

53. However, Schedule 6 paragraph 1 of the 2002 Act provides that a person may apply to the registrar to be registered as the proprietor of a registered estate in land if they have been in adverse possession of the estate for the period of 10 years ending on the date of the application. Under Schedule 6 paragraph 11(1), a person is in "adverse possession" of an estate in land if, but for s.96, a period of limitation under s.15 of the Limitation Act 1980 would run in their favour in relation to the estate.

54. Accordingly, the question is whether, if the title to the freehold estate in Property had not been registered, time to bring an action to recover the Property would have run against the Public Trustee, in whom the freehold estate was vested, during the 10 year period from 6 March 2010 to 5 March 2020.

55. Time runs under s.15 of the 1980 Act if someone is in possession of land without the owner's consent. In very brief summary, a person will be treated as being in possession for the purposes of s.15 if:

(a) they physically deal with the land in question as an occupying owner might have been expected to deal with it and no one else does so; and

(b) they have and unequivocally manifest by their actions the intention to exercise exclusive control of the land for their own benefit;

see JA Pye (Oxford) Ltd v Graham [2002] UKHL 30.

56. In addition, time can run under s.15 where the person in possession does have the owner's consent to occupy pursuant to an oral periodic tenancy. Schedule 1 paragraph 5 of the 1980 Act provides:

"(1) Subject to sub-paragraph (2) below, a tenancy from year to year or other period, without a lease in writing, shall for the purposes of this Act be treated as being determined at the expiration of the first year or other period; and accordingly the right of action of the person entitled to the land subject to the tenancy shall be treated as having accrued at the date on which in accordance with this sub-paragraph the tenancy is determined.

(2) Where any rent has subsequently been received in respect of the tenancy, the right of action shall be treated as having accrued on the date of the last receipt of rent".

I will refer to Schedule 1 paragraph 5 of the Limitation Act 1980 as "Paragraph 5".

57. It has been held that, in order to be a "lease in writing" for the purposes of Paragraph 5 there must be a document which itself creates a leasehold estate. It is not sufficient if there is a document which merely evidences the existence and terms of a lease; it must actually create the lease: see Long v Tower Hamlets London Borough Council [1998] Ch 197. This was not disputed by Ms Kleopa.

The parties' submissions

58. Mr Clargo submitted that for the 10 years prior to the making of the Application:

(a) Mr Brown was in adverse possession of the Upper Parts of the Property. He originally held the Upper Parts under a periodic tenancy without a lease in writing which was determined by the 1991 notice to quit making him a statutory tenant of room 3 under s.2 of the Rent Act 1977, and he last paid rent in 1996 so that Paragraph 5 applied.

(b) Mr Halstead was in adverse possession of the Basement Flat. He held the Basement Flat under a periodic tenancy without a lease in writing which arose under s.5 of the Housing Act 1988 following the expiry of the fixed term of the tenancy granted to him and Ms Alder in September 1995 and he, too, last paid rent in 1996 so that Paragraph 5 applied.

(c) Mr Brown and Mr Halstead jointly were in adverse possession of the front garden, the side passage and the rear garden. Those parts of the Property had been demised by the periodic tenancy granted to Mr Brown, so that Paragraph 5 applied, but during the 10 year period he had shared possession of them with Mr Halstead.

59. Ms Kleopa said that if I determined that was the case, then the Respondent accepted that the Application ought therefore to succeed. That being so, and given that the registrar would clearly have been willing to grant the Application but for the Respondent's objection, it is unnecessary for me to consider any objections that might have been made to that course based on the fact that Mr Brown and Mr Halstead were not jointly in possession of the whole of the Property for the 10 years ending on the date of the Application.

60. However, Ms Kleopa did submit that neither Applicant was in adverse possession of any part of the Property for the relevant period, and also that if I upheld one Applicant's claim, but rejected the other's, then I should direct that the Application be cancelled.

61. The reasons that Ms Kleopa submitted that neither of the Applicants were not adverse possession were as follows:

(a) Each of them occupied with the consent of the Estate by virtue of a lease in writing. Ms Kleopa pointed out, correctly, that where there is a lease in writing non-payment of rent by a tenant does not cause time to run under s.15 of the 1980 Act: see Doe d Davy v Oxenham (1840) 7 M & W 131.

(b) Even if that was not the case, neither of them had the intention to possess, given the reasons that caused them to stop paying rent in 1996.

(c) In the case of Mr Brown, he had allowed Mr Folami into the Upper Parts and had given him a key, showing that Mr Brown did not have the necessary intention to possess.

(d) Solicitors on behalf of one of the Nigerian Administrators had written to the Applicants in 2015 and 2016 demanding that they give up occupation.

62. I will now address the issues that arise from those submissions.

(1) Prior to the death of Chief Atobatele, did Mr Brown hold the Property under a periodic tenancy without a lease in writing?

63. The first issue I must address is whether Mr Brown held the Property under a periodic tenancy without a lease in writing prior to the death of Chief Atobatele.

64. It was common ground between counsel in their closing submissions that in late 1987 or early 1988, Mr Volak, acting with the authority of Chief Atobatele, agreed with Mr Baber and Mr Brown that Mr Brown would become the tenant of the Property in place of Mr Baber, with Mr Brown holding the Property on the terms of the 1987 Written Agreement, and that thereafter Mr Brown was entitled to the rights and was subject to the obligations set out in the 1987 Written Agreement. The evidence for the existence of this agreement is the letters referred to in paragraphs 21 and 25 above.

65. Ms Kleopa submitted that the effect of this agreement was to vary the 1987 Written Agreement to substitute Mr Brown for Mr Baber. The 1987 Written Agreement was a lease in writing, and the agreed substitution of Mr Brown meant that he became party

to the 1987 Written Agreement. His tenancy was, therefore, granted by a lease in writing.

66. Mr Clargo submitted that the effect of the agreement was not to vary the 1987 Written Agreement, but rather to create a new tenancy vested in Mr Brown, with the tenancy previously vested in Mr Baber being surrendered by operation of law.

67. If a landlord agrees with their existing tenant and a proposed new tenant that the existing tenant will cease to be the tenant, and the new tenant will become the tenant, and the parties act on that agreement with the new tenant taking possession and complying with the terms of the tenancy, that can take effect in law as a surrender of the existing tenancy and the grant of a new tenancy: see e.g. Metcalfe v Boyce [1927] 1 KB 758.

68. It is less clear if it can also take effect by way of a variation of the tenancy agreement. It has been held that a tenancy agreement can be varied to add a new tenant: see Trustees of Saunders v Ralph (1993) 66 P & CR 335. This is a case which I drew to the attention of counsel when Ms Kleopa submitted that there had been a variation of the 1987 Written Agreement.

69. In Ralph, the tenant of a farm holding under a yearly tenancy and his son entered into a written agreement with the landlords that the son would become joint tenant of the farm. The agreement took the form of a memorandum of agreement sewn into the original tenancy agreement. The memorandum said: "… it is mutually agreed that with effect from 10th October 1957 … The said Victor James Ralph shall become joint tenant of the said holding and the said Gilbert James Ralph and Victor James Ralph shall jointly and severally become responsible for the due performance of all the agreements on the part of the Tenants contained in the within written Agreement and Memorandum thereto."

70. An issue arose as to whether this had taken effect as the grant of a new tenancy to the existing tenant and his son in substitution for the original tenancy, or as a variation of the original tenancy. Jowitt J held that whether the this depended on the intention of

the parties, and their intention had been to vary the original tenancy and not to substitute a new agreement.

71. At the hearing, Mr Clargo and Ms Kleopa made submissions on that basis - that the question was whether the agreement between Mr Volak, Mr Baber and Mr Brown was intended to vary the 1987 Written Agreement or to substitute a new agreement.

72. On further consideration of the Ralph decision, I have doubts as to the correctness of the reasoning. It is understandable that Jowitt J reached the decision that he did, given the way that the case was argued. He recorded that counsel for the landlords "… submitted was that whether an additional tenant can be brought in by variation of the tenancy agreement has to be resolved by general contract law principles". He cited and applied decisions on variations of contracts, where it was held that new terms could be agreed without rescinding the contract and replacing it with a new contract, provided the new terms were not so inconsistent with the original terms as to go the very root of the original contract.

73. However, a tenancy agreement entered into by a landlord who holds the freehold estate in the demised premises not only creates a contract, but also creates a term of years absolute, a transmissible legal estate in the land, conferring on the tenant the right to the exclusive possession of the demised premises for the term granted by the tenancy agreement, enforceable against the world, not just against the landlord. This is a matter of property, not contract. The legal estate created by a tenancy agreement can only be assigned by deed, even where the tenancy was created orally: see s.52 of the Law of Property Act 1925 and Crago v Julian [1992] 1 WLR 372. The effect of Jowitt J's decision is that the legal estate vested in the original tenant by the tenancy agreement became vested in him and his son jointly without a deed. That is why I have doubts as to the correctness of the reasoning in Ralph, although it may be that the same result could have been arrived at on the basis of an estoppel.

74. However, I have not thought it necessary to invite submissions on this question, because I am satisfied that even if the reasoning in Ralph is correct, the correct conclusion here is that the parties intended to create a new agreement and not to vary the 1987 Written Agreement.

75. First, whereas in Ralph the agreement was to add a new party to an existing agreement, which could sensibly be considered to be a variation of the existing agreement, here the effect is that the existing tenant ceased to be bound by the terms of the agreement or entitled to the rights conferred by it, and a new tenant became bound and entitled to the benefit. In contractual terms, this would be regarded as a novation rather than a variation.

76. Second, Mr Volak's letter proposing the agreement said that Mr Baber: "… will relinquish the responsibility in writing and a new contract will be drawn and signed by Philip." That language clearly indicates that the intention was that there would be a new contract, rather than a change to the existing contract. It is true that the proposal was that there would be a new written contract, and that never happened, but I do not think that detracts from the point that what Mr Volak was proposing, and what was then agreed, was a new contract between Mr Volak and Mr Brown.

77. Accordingly, what happened in late 1987 or early 1988 is that a new periodic tenancy was granted by Mr Volak on behalf of Chief Atobatele to Mr Brown, on the terms of the 1987 Written Agreement, and the previous tenancy vested in Mr Baber was surrendered. The new tenancy granted to Mr Brown was not created by a lease in writing.

78. Even if that is incorrect, I consider that, for a tenancy to be created by a lease in writing, there must be a document or documents which create the tenancy. In this case, what created the tenancy vested in Mr Brown was a document - the 1987 Written Agreement - together with a separate and later oral agreement. I do not think that tenancy can be said to have been created by a lease in writing.

(2) Was that tenancy determined by notice to quit?

79. The next question would only arise if I am wrong in my conclusion on the first issue. Mr Clargo submitted that any tenancy that Mr Brown had was determined by the notice to quit served by Mr Volak in January 1991. Thereafter, Mr Brown occupied by virtue of a statutory tenancy arising under s.2 of the Rent Act 1977. When he

stopped paying rent in 1996, Paragraph 5 had the effect that time started to run under s.15 of the Limitation Act 1980.

80. The difficulty with that submission is that the death of a principal automatically terminates the authority of an agent, subject to immaterial exceptions: see Halsbury's Laws vol 1 (2022) paragraph 189. Mr Volak's authority to act on behalf of Chief Atobatele therefore ended on 8 June 1989, and he was never given any authority by the Probate Judge or the Public Trustee.

81. In my judgment, nothing that Mr Volak did after 8 June 1989 could have had any effect on the rights of the Estate against the Applicants. Agreements between Mr Volak and Mr Brown could have created contractual or estoppel rights between them, but could not have affected the rights of the Estate. Accordingly, if (contrary to my findings above) Mr Brown's tenancy was granted by a lease in writing, the notice to quit served by Mr Volak did not bring that tenancy to an end.

82. If Mr Volak had continued to have authority to bind the Estate after Chief Atobatele's death, the facts would justify the inference that Mr Brown and Mr Volak agreed a surrender of the original tenancy and the grant of a new periodic tenancy of room 3 only, which was then acted on. In that case, Paragraph 5 would have applied to the periodic tenancy of room 3 and time would have run against the Estate in respect of room 3 from the date of the last payment of rent. Mr Brown would have had no right to take possession of the remainder of the Upper Parts as he clearly did after Mr Volak's death, and therefore time would have run against the Estate because Mr Brown was in possession of the Upper Parts other than room 3 without the consent of the Public Trustee.

83. However, as I have said, Mr Volak had no authority to bind the Estate after Chief Atobatele's death. If the tenancy granted to Mr Brown in late 1987 or early 1988 had been created by a lease in writing, then nothing that Mr Volak did could have brought about the termination of that tenancy, and in that case time would not have run against the Estate in respect of the premises held under that tenancy.

(3) Did Paragraph 5 apply to Mr Halstead?

84. Mr Clargo submitted that Mr Halstead held the Basement Flat under a periodic tenancy without a lease in writing and therefore Paragraph 5 applied.

85. I do not think that the Applicants need to rely on Paragraph 5 in respect of the Basement Flat. The tenancy which Mr Volak granted to Mr Halstead and Ms Alder on 1 September 1995 was granted after the death of Chief Atobatele, and without the authority of the Public Trustee. It therefore took effect as a tenancy by estoppel binding on Mr Volak, Mr Halstead and Ms Alder, but not binding on the Estate.

86. When a person such as Mr Volak, with no title to property, grants a tenancy of the property, they are treated as being in possession of the property through their tenant. If the intention of the person granting the tenancy is to act on behalf of and for the benefit of the owner of the property, time does not run against the owner, because that intention precludes the grantor of the tenancy from being in possession for the purposes of s.15 and Schedule 1 of the 1980 Act. The intention of the tenant is immaterial so long as that continues to be the position. If, however, the grantor of the tenancy abandons the property, it is the tenant's intention that becomes relevant, and as the tenant intends to occupy for their own benefit, time then will run against the owner: see Opanubi v Daley at [15-20] and Mount Carmel Investments Ltd v Thurlow [1988] 1 WLR 1078.

87. Here, when Mr Volak died in November 1996, he ceased to have any intention. His reversion by estoppel then vested in his executors. It is apparent that his executors did not intend to possess the Property and that they abandoned the Property. After that, the only intention that mattered was that of Mr Halstead and Ms Alder, and after Ms Alder vacated the Basement Flat, Mr Halstead's intention. They did intend to occupy the Basement Flat for their own benefit and therefore time did run against the Estate.

88. Accordingly, I consider that time ran against the Estate in respect of the Basement Flat from, at the latest, the date of the letter from Enid Volak in January 1997 referred to in paragraph 42 above. However, I will address the submission that Paragraph 5 applies.

89. The tenancy agreement dated 1 September 1995 was a lease in writing and created a tenancy for a term of 12 months commencing on 1 September 1995 and ending on 31 August 1996. The tenancy was an assured tenancy, because the tenants occupied the Basement Flat as their only principal home. Therefore on the expiry of the fixed term, s.5 of the Housing Act 1988 applied.

90. S.5(2) of the 1988 Act provides that, subject to immaterial exceptions, if an assured tenancy which is a fixed term tenancy comes to an end: "the tenant shall be entitled to remain in possession of the dwelling-house let under that tenancy and … his right to possession shall depend upon a periodic tenancy arising by virtue of this section."

91. S.5(3) provides:

> "The periodic tenancy referred to in subsection (2) above is one—
> (a) taking effect in possession immediately on the coming to an end of the fixed term tenancy;
> (b) deemed to have been granted by the person who was the landlord under the fixed term tenancy immediately before it came to an end to the person who was then the tenant under that tenancy;
> (c) under which the premises which are let are the same dwelling-house as was let under the fixed term tenancy;
> (d) under which the periods of the tenancy are the same as those for which rent was last payable under the fixed term tenancy; and
> (e) under which, subject to the following provisions of this Part of this Act, the other terms are the same as those of the fixed term tenancy immediately before it came to an end, except that any term which makes provision for determination by the landlord or the tenant shall not have effect while the tenancy remains an assured tenancy."

92. Accordingly, on 1 September 1996, a periodic tenancy of the Basement Flat came into existence not by virtue of a lease in writing, but by virtue of the above statutory provisions. The effect of s.5(3)(b) is that a periodic tenancy is deemed to have been granted by Mr Volak to Mr Halstead and Ms Alder immediately before the fixed term granted by the 1995 tenancy agreement came to an end, but there is no direction that the periodic tenancy is deemed to have been created by a lease in writing.

93. Ms Kleopa submitted that the effect of s.5 had to be read in conjunction with the written tenancy agreement, and that therefore the periodic tenancy arising under s.5(2)

should be treated as one created by a lease in writing. I do not think that is correct. The periodic tenancy arising under s.5(2) is not one created by a lease in writing. It is true that it only comes into existence because there was a fixed term tenancy which was created by a lease in writing. But the periodic tenancy itself was not created by the lease in writing. It was created by a statutory fiction, requiring one to suppose that Mr Volak granted a new periodic tenancy to Mr Halstead and Ms Alder immediately before the end of the fixed term.

94. The periodic tenancy deemed to arise by s.5(2) is itself an assured tenancy and therefore cannot be terminated by a notice to quit: see s.5(1). In those circumstances, does Paragraph 5 apply?

95. There is a county court decision in which it was held that Paragraph 5 does not apply to a periodic tenancy which cannot be terminated by a notice to quit because of a statutory prohibition on such termination - Perry v New Islington & Hackney Housing Association (unreported decision of HHJ Cowell dated 14 January 2004). It is referred to in a book of which I am the co-author. Ms Kleopa did not refer to or rely on this decision. I asked Mr Clargo for his position on it, and he submitted it was wrongly decided.

96. The judgment is summarised in an article entitled 'Squatters' rights' published in the Estates Gazette on 11 September 2004, and also in a paper which can be downloaded from the Falcon Chambers website. I have not been able to obtain a transcript of the judgment itself, but I set out in an appendix to this Decision the summary of the judgment from the Estates Gazette article. Before considering that judgment, I will first consider two decisions of the Court of Appeal on which Mr Clargo relied.

97. In Moses v Lovegrove [1952] 2 QB 588, the plaintiff purchased a property in 1934 of which the defendant was tenant, holding under an oral tenancy but with a rent book. In 1935, the plaintiff obtained a declaration under the Rent Acts that the property was free from control. There then arose a dispute about the amount of rent payable and, from 28 May 1938 on, the tenant paid no rent. Time therefore started to run in his favour under s.9(2) of the Limitation Act 1939, which contained the provisions now contained in Paragraph 5. As a result of new legislation, as from 2 September 1939

the property was brought within the ambit of the Rent Acts, so that after that the landlord could not have obtained possession without persuading a county court judge that it was reasonable to make an order for possession. More than 12 years after the last payment of rent, the plaintiff sued for possession. The defendant successfully claimed to have acquired title by adverse possession.

98. Sir Raymond Evershed MR, with whom Birkett LJ agreed, said that the argument that the Rent Acts prevented time from running was:

> "… somewhat startling, for it would necessarily follow therefrom that in a case of premises controlled or covered by the Rent Restriction legislation, unless the statutory period under the Limitation Act, 1939, had expired before they came under the control, no Limitation Act could ever run in favour of the tenant, or could ever run at all, so long as the Rent Restriction legislation remains on the statute book".

99. Later, he said that the fallacy in the argument: "… lies in the assumption that the test of adverse possession is that it postulates an unqualified right to recover possession throughout the period alleged. I do not find in the section any language to justify that conclusion." He added that possession "… is none the less adverse because Parliament has thought fit to put certain serious qualifications upon the right of a person whose land is in adverse possession to enter and to recover the possession of that property."

100. Romer LJ said:

> "As no notice to quit was given, the tenant could not thereafter be said to be in immediate adverse possession in the ordinary sense, for he remained on under his contractual tenancy. Nevertheless, for the purposes of the Limitation Act, 1939, his tenancy ceased to exist, and therefore he is deemed to have remained on in adverse possession. Accordingly, the fact that for some purposes his contractual right remained in the absence of a notice to quit or a writ for possession is irrelevant, as also is the precise date on which the lessor could properly have started proceedings in ejectment. The point is that after the expiration of one week from the date of the last payment of rent, the defendant is deemed to have had no contractual right to possession, and therefore to have been a trespasser or a squatter."

101. That was a case where there was a contractual periodic tenancy, time started to run under the Paragraph 5 provisions, and the issue was whether the imposition of statutory security of tenure caused time to stop running. In Jessamine Investment Co

v Schwartz [1978] 1 QB 264, the Court of Appeal had consider whether the Paragraph 5 provisions applied where the contractual tenancy had come to an end and a statutory tenancy had arisen under the Rent Acts.

102. "Statutory tenancy" is the term used to describe the personal right of a former tenant to remain in occupation of their home after the termination of the tenancy. A statutory tenancy is not an interest in land but a purely personal right to retain possession of the property, a statutory status of irremovability. In Jessamine at p.270H, Sir John Pennycuick said: "A statutory tenant has no estate or property as a tenant at all but a purely personal right to retain possession of the property". At p.271A-E he quoted from earlier authority, Keeves v Dean [1924] 1 KB 685 in which Bankes LJ said it was a pity that the expression "statutory tenant" was ever introduced because it is a misnomer "for he is not a tenant at all; although he cannot be turned out of possession so long as he complies with the provisions of the statute, he has no estate or interest in the premises such as a tenant has. His right is a purely personal one". Scrutton LJ in that case said that a statutory tenant: "… has a right as against all the world to remain in possession until he is turned out by an order of the court, and that he could maintain trespass against any person who entered the premises without his permission".

103. In Jessamine, Mrs David held a long lease of a house and granted a weekly tenancy to Mr Levy and his wife, who later remarried and changed her name to Mrs Schwartz. The contractual tenancy was converted into a statutory tenancy by the service of a notice of increase of the rent some time shortly before or after 1939. The tenants then remained in occupation as statutory tenants under the Rent Acts. Some years later, Mrs David moved house and from 1945 stopped demanding rent. The tenants did not know Mrs David's new address, had no means of paying the rent and were worried at their inability to do so. Mr Levy then died leaving Mrs Schwartz as the sole statutory tenant.

104. More than 12 years after the last payment of rent, an issue arose as to whether Mrs Schwartz had acquired title to the house by virtue of the Paragraph 5 provisions, then contained in s.9(2) of the Limitation Act 1939. The Court of Appeal held that she had. Sir John Pennycuick, with whom Stephenson LJ agreed, said that the argument that a statutory tenant cannot acquire a possessory title under the Limitation Act 1939 was

"quite irreconcilable not only with the terms of section 9 but with the reasoning of the Court of Appeal in Moses v Lovegrove [1952] 2 QB 533."

105. In Perry v New Islington & Hackney Housing Association HHJ Cowell held, according to the Estates Gazette summary of his judgment, that the reasoning in those Rent Act cases does not apply where a statute - in that case the Landlord and Tenant Act 1954 part II - prevents the termination of a tenancy by a notice to quit given by the landlord. HHJ Cowell is reported as saying that it is implicit in Paragraph 5 that the tenancy must be capable of termination by a notice to quit, even if a statute makes it impossible for the landlord to actually recover possession. He is reported as having said that, for Paragraph 5 to apply:

> "…there must be not only, as here, a tenancy from year to year or other period (in this case a weekly period) without a lease in writing, but there must also be no impediment precluding the determination of the tenancy, that being an essential feature without which the right of action to recover the land cannot arise. In short, the paragraph presupposes that the tenancy is one determinable by notice to quit. In 1939 there may well have been or were no such periodic tenancies without a lease in writing which were not determinable by notice to quit; at any rate the usual tenancy was so determinable."

106. I can see no justification for that view in the language of Paragraph 5 or in the judgments in Moses and Jessamine, and I consider it is contrary to the decision in Jessamine. Paragraph 5 does not say that the deemed determination of the tenancy at the end of the first period of the tenancy depends on the ability of the landlord to serve a notice to quit, and I see no reason to imply such a condition into the statutory language. It would produce an arbitrary distinction between statutory protection of the kind provided by the Rent Act 1977, where a contractual tenancy can be terminated by a notice to quit after which a statutory status of irremovability arises, and that of the kind provided by the Housing Act 1988, where the statute deems a periodic tenancy to have been granted at the end of the and precludes its termination by notice to quit. A statutory tenancy cannot be terminated by a notice to quit, but in Jessamine the Court of Appeal held that the Paragraph 5 provisions nonetheless applied.

107. Schedule 5 creates a notional determination of the tenancy, with time running against the landlord from the date of the notional determination. It is a deeming provision,

creating a statutory fiction that the tenancy has been determined. The fact that in the real world, the tenancy has not been determined, and could not be determined because of a statutory provision seems to me to be entirely irrelevant. The policy apparent from Paragraph 5 is that a landlord under an informal tenancy who neglects to collect the rent for 12 years should lose their title. Moses and Jessamine make it clear that this policy applies even if the landlord cannot in reality recover possession without obtaining an order of the Court because of statutory protection afforded to the tenant. I can see no valid reason for not applying that policy in the case of a statutory periodic tenancy arising under s.5 of the Housing Act 1988 or, indeed, a periodic tenancy of business premises where the contractual tenancy has been terminated by a notice under s.25 of the Landlord and Tenant Act 1954 and the tenancy is being continued under s.24.

108. I do not think that a county court decision is binding on this Tribunal and, with great respect to HHJ Cowell, I consider that his reasoning, at least as reported in the Estates Gazette, was plainly wrong.

109. Accordingly, even if the tenancy granted by Mr Volak to Mr Halstead and Ms Alder had bound the Estate, I consider that Paragraph 5 applied and therefore time ran from the date of the last payment of rent.

(4) Did the Applicants lack the intention to possess because of the reasons that they stopped paying rent?

110. Ms Kleopa submitted that neither of the Applicants had the requisite intention to possess, because the reason that they stopped paying rent was not because they intended to take possession of the relevant part of the Property. In the case of Mr Brown, it was because he came to believe Mr Volak was not entitled to the rent, and in the case of Mr Halstead, it was because of the letter from Mrs Enid Volak.

111. I reject that submission. The reasons that caused Mr Brown and Mr Halstead to stop paying their rent in 1996 are not relevant to the enquiry into whether they intended to possess from 2010 to 2020. During the 10 year period leading to the Application:

(a) Mr Brown lived in room 3 and allowed other individuals to occupy the other rooms in the Upper Parts, paying rent to Mr Brown. He intended to exercise exclusive control over the Upper Parts for his own benefit and manifested that intention by his actions.

(b) Mr Halstead lived in the Basement Flat. He intended to exercise exclusive control over the Basement Flat for his own benefit and manifested that intention by his actions.

(c) Mr Brown and Mr Halstead jointly used the front garden, side passage and rear garden as an occupying owner would do. They intended to exercise exclusive control over the front garden, side passage and rear garden for their own benefit and manifested that intention by their actions.

112. That is all that is required to establish that Mr Brown was in possession of the Upper Parts, Mr Halstead was in possession of the Basement Flat, and they jointly were in possession of the front garden, side passage and rear garden.

113. In any event, in a case where Paragraph 5 applies, it is unnecessary to investigate whether the tenant has the intention to possess. Unless the tenant has abandoned the premises their possession is deemed to continue: see Williams v Jones [2002[3 EGLR 69 at [19-21]. In a Paragraph 5 case, the reason that the tenant stops paying the rent is quite irrelevant. For example, in the Jessamine case, the reason that the tenants stopped paying the rent was that the landlord had moved and they had no way of finding them to pay the rent. That did not prevent time running in their favour under the Paragraph 5 provisions.

(5) Did Mr Brown lack the intention to possess because he allowed Mr Folami access?

114. Ms Kleopa submitted that, in the case of Mr Brown, he had allowed Mr Folami into the Upper Parts and had given him a key, showing that Mr Brown did not have the necessary intention to possess.

115. Given the factual situation in 2007, I do not consider that what Mr Brown did justifies a finding that he ceased to have the intention to possess. But even if that is wrong, it makes no difference. After the visits by Mr Folami in 2007, Mr Brown changed the locks which is the clearest possible manifestation of an intention to possess. That was long before the 10 year period leading to the Application started to run in 2010.

(6) Did the letters demanding that the Applicants vacate prevent time from running?

116. Ms Kleopa submitted that the letters written in 2015 and 2016 demanding that the Applicants vacate prevented time from running. This is wrong - demands for possession do not prevent time from running: see Mount Carmel Investments Ltd v Thurlow [1988] 1 WLR 1078.

Conclusion

117. It follows from my decision on the above issues above that the Applicants were in adverse possession of the Property for 10 years prior to the making of the Application. I will, therefore, direct the registrar to give effect to the Application in whole as if the objection had not been made.

Costs

118. The usual order as to costs in a land registration case is that the unsuccessful party pay the costs of the successful party, but the Tribunal may make a different order. My provisional assessment, subject to any submissions that may be made, is that the Applicants are the successful party and therefore an order for costs ought to be made in their favour.

119. The normal basis for assessment of costs is the standard basis, but in an appropriate case the Tribunal will order costs to be assessed on the indemnity basis. In either case, the Tribunal will not allow costs which have been unreasonably incurred or are unreasonable in amount. The difference is that, on the standard basis, the Tribunal will only allow costs which are proportionate to the matters in issue, and will resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

If costs are assessed on the indemnity basis, proportionality is not taken into account, and doubts as to reasonableness are resolved in favour of the receiving party.

120. In Amoudi v Glenside Holdings [2018] UKFTT 174 (PC), a judge of this Tribunal held that the Tribunal may only make an order for costs in respect of the period after the matter was referred to the Tribunal by the registrar. That is not binding on me, but as a decision by a judge of co-ordinate jurisdiction, I would follow it unless convinced it was wrong.

121. My provisional view is, therefore, that I should order that the Respondent pay the costs of the Applicants incurred since 30 September 2021, to be assessed on the standard basis.

122. If either party wishes to apply for an order as to costs they should write to the Tribunal with a copy to the other party by 5 pm on 9 June 2023 stating what order they are seeking, the amount of the costs claimed. If it is different to the order suggested in paragraph 121 above, the letter should explain why.

123. The other party must then send to the Tribunal a written response to that application, copied to the party applying for a costs order, indicating whether the order claimed is agreed or disputed and, if disputed on what basis. This response must be received by the Tribunal by 5 pm on 23 June 2023.

124. The Tribunal will then determine the appropriate order as to costs and give directions either for the summary or the detailed assessment of the costs.

DATED THIS 12th DAY OF MAY 2023

BY ORDER OF THE TRIBUNAL

STEPHEN JOURDAN KC

Appendix - summary of Perry v New Islington & Hackney Housing Association (unreported 14 January 2004) taken from the Estates Gazette

In the 1950s, Mr Perry's father, a scrap dealer, had taken over approximately an acre of land in Hackney, at a rent of 10 shillings per week. In 1982, Hackney Council (which had by then acquired the reversion) decided to use the site as a car park, and served a section 25 notice on the father, terminating his tenancy. At the same time, the council decided that they should no longer accept rent. An application to court for the grant of a new tenancy was duly made; this was opposed on the redevelopment ground of section 30(1)(f). The proceedings were then adjourned to allow for negotiations, which came to nothing. The last step in the proceedings was taken in 1986.

Some years later, the site was sold to the defendant, a housing association, which planned to develop the site for much needed low-cost social housing. By this time, the site was worth a great deal of money, and Mr Perry argued that he had acquired title by adverse possession, in view of the long-standing non-payment of rent. Mr Perry therefore issued proceedings for a declaration to that effect. It was common ground between the parties that:

● the possession had commenced with an oral periodic tenancy;

● rent had not been paid for a period exceeding 12 years prior to the commencement of proceedings; and

● the tenancy had always been governed by the 1954 Act.

Mr Perry argued that the Rent Act cases applied with equal force to a business tenancy protected by the 1954 Act. The housing association responded that, although both statutes conferred security of tenure upon tenants, they operated in ways that were critically different for the purposes of Schedule 1 to the 1980 Act. In particular, the 1954 Act prevents the right of action to recover land from accruing, with the result that the limitation period cannot begin to run in cases to which it applies.

The relevant provisions are contained in section 24(1), which provides that "a tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act", and section 64, which provides for the date specified in the section 25 notice to be substituted by a later date, being three months after the date of final disposal of the tenant's application to court for the grant of a new tenancy "and not at any other time". To put it another way, it is implicit that paragraph 5 of Schedule 1 applies only to periodic tenancies that — in the ordinary way — are terminable by notice to quit. The combined effect of sections 24(1) and 64 of the 1954 Act is that a landlord cannot determine a business tenancy simply by serving an ordinary notice to quit.

Judge Cowell accepted the housing association's arguments and held that it was implicit in sections 15 and 17 of, and paragraph 5(1) of Schedule 1 to, the 1980 Act that there should be a "right of action to recover land" (section 15(1)) and a period during which a landowner may "bring an action to recover land" (section 17) and, more particularly, a "right of action" on the part of "a person entitled to the land subject to the tenancy". The judge concluded:

> "[F]or paragraph 5(1) to apply there must be not only, as here, a tenancy from year to year or other period (in this case a weekly period) without a lease in writing, but there

> must also be no impediment precluding the determination of the tenancy, that being an essential feature without which the right of action to recover the land cannot arise. In short, the paragraph presupposes that the tenancy is one determinable by notice to quit. In 1939 there may well have been or were no such periodic tenancies without a lease in writing which were not determinable by notice to quit; at any rate the usual tenancy was so determinable."

He distinguished Moses. In that case, the continuation of the tenancy was merely a qualification on the landlord's right to possession, since the service of a notice to quit would end the estate of the tenant. In Perry, the continuation tenancy was:

> "a complete and insurmountable barrier which no ordinary notice to quit could remove."

The right of action to recover land would have arisen in Moses following the service of a valid notice to quit. In Perry, no right of action could arise because the continuation tenancy was not terminable by notice to quit.

The judge therefore dismissed Mr Perry's claim. An application to the Court of Appeal for permission to appeal was subsequently compromised.