Neutral Citation Number: [2023] EWCA Civ 549

Case No: CA-2022-001391

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT MANCHESTER
Her Honour Judge Evans
Lower Court Claim No: H25MA381

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 May 2023

Before :

LORD JUSTICE MALES
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE NUGEE

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Between :

~~**MICHELLE MARY HEALEY**~~ ~~**(a protected person by her litigation friend Bernard Healey)**~~ **BERNARD HEALEY** **(representing the Estate of Michelle Mary Healey)**	**Claimant / Respondent**
- and -	
(1) WILLIAM FRAINE (senior) **(2) WILLIAM FRAINE (junior)** **(3) CALLUM FRAINE** **(4) CLARA BAR-HALL**	**Defendants / Appellants**
(5) PERSONS UNKNOWN	**Defendants**

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Thomas Grant KC and Stephen Hackett (instructed by **RHF Solicitors**) for **the Appellants**
Michael Walsh and Richard Miller (instructed by **Fladgate LLP**) for **the Respondent**

Hearing date: 27 April 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This second appeal arises in the course of a claim in the County Court at Manchester for possession of a house. The question is whether the 1st to 4th Defendants should be permitted to amend their Defence and Counterclaim in the form put forward by them. Permission to amend was initially granted by DDJ Corscadden. On appeal however HHJ Evans (**"the Judge"**) reversed that decision and refused permission to amend. The 1st to 4th Defendants now appeal to this Court, with permission granted by Asplin LJ.

2. The appeal primarily turns on the exercise of discretion in relation to amendments to a pleading on the facts of this particular case. This issue, although significant to the parties, raises no particular question of general importance and would not by itself have merited a second appeal to this Court. But the appeal also incidentally raises more fundamental questions about the nature of adverse possession in the context of registered land which are of more general significance.

Facts

3. The late Mrs Michelle Healey was, and had been since 1984, the registered freehold proprietor of a house at 13 Hartley Road, Chorlton-cum-Hardy, Manchester. Mrs Healey died shortly before the hearing of the appeal and the claim is being continued by her husband, Mr Bernard Healey, who, having previously been his wife's litigation friend, has now been appointed to represent her estate. This has no bearing on the questions argued. On 13 August 2021 Mrs Healey issued a claim for possession of the house in the County Court in Manchester against a number of defendants on the simple basis that they were in occupation of the property without ever having had her permission and were therefore trespassers.

4. Five defendants were named on the claim form but the fifth was "Persons Unknown" and can be ignored for present purposes; the effective defendants are the other four and I will refer to them as **"the Defendants".** The 1st Defendant is Mr William Fraine senior (**"Mr Fraine"**), who admits that he is in occupation and that he lives in the house as he has done for a number of years; the others are members of his family (two of his sons and one of their partners). Mr Fraine says that he has allowed them to stay in the house for various periods. No separate question arises as to their position, and the case turns on whether Mr Fraine has any defence to the claim for possession brought by Mrs Healey as registered proprietor.

5. The claim form was accompanied by Particulars of Claim. These were short and to the point. They pleaded, so far as relevant, that Mrs Healey was the registered proprietor and had been since 1984 (para 1); that the house had been occupied by her father until 1990 and that subsequently she believed that her brother, Mr John Maloney, was letting it out (para 2); that the Defendants went into occupation without permission (para 3); that they had never been tenants, sub-tenants or licensees of the house (para 4); and that, despite being sent a notice demanding possession, they continued to occupy it without her permission (paras 6 to 8).

6. A Defence and Counterclaim was served. This is undated but is said to have been

served on 3 September 2021. It admitted that Mrs Healey was the registered proprietor, although said that she had had no dealings with or played any part in the control, running or repair of the house, nor made herself known to the Defendants before April 2021 (para 2). It contained two suggested defences to the claim for possession.

7. The first was a plea that the Defendants were seeking adverse possession (para 3). The facts alleged in support of this plea were that Mr Fraine had from 2001 managed the house for Mr Maloney (Mrs Healey's brother), who he believed was the owner, and his business partner, a Mr Martin Quinn (paras 4 and 5); that in around 2006/7 the house needed significant refurbishment, and Mr Maloney and Mr Quinn agreed with Mr Fraine that he would be left to maintain and repair it himself, which he did (paras 6 and 8), it being understood that there was an acrimonious relationship between Mr Maloney and his sister resulting in her wishing to have nothing more to do with the house (para 7); and that Mr Fraine, believing the property to have been abandoned, took adverse possession of it in 2006/7 as a family home for himself and the other Defendants (para 9). At paras 15 and 16 it repeated that the Defendants had adverse possession of the house and would seek a declaration to that effect.

8. The second suggested defence was a claim in the alternative that the Defendants had acquired an equitable interest in the property. This was based on the expenditure they had carried out over the years, and the Defendants sought a declaration under the provisions of the Trusts of Land and Appointment of Trustees Act 1996 (**"TOLATA"**) to that effect (paras 17 and 18).

9. The Counterclaim again asserted that the Defendants were in adverse possession and sought a declaration that they were entitled to be registered as proprietors; and in the alternative it sought a declaration as to their beneficial interest in the property.

10. Mr Thomas Grant KC, who appeared with Mr Stephen Hackett for the Defendants (and who did not appear below), did not seek to defend this pleading, which he admitted suffered from a number of shortcomings. Prominent among those is that under the Land Registration Act 2002 (**"LRA 2002"**) adverse possession of registered land no longer operates by itself as a defence to possession; indeed there is no limitation period applicable at all to a claim for possession of registered land. The scheme of the LRA 2002, as explained in more detail below, is that adverse possession does not prevent the registered proprietor from recovering the land, or entitle the adverse possessor to claim a right to be registered as proprietor, save in certain narrowly specified circumstances.

11. On 1 October 2021 the case came before DJ Iyer for directions. He made an order dealing with a number of matters. These included giving the Defendants permission to amend their Defence and Counterclaim to correct a typographical error; directions for service of any Reply and Defence to Counterclaim; and liberty to the Defendants to respond to any such pleading.

12. A Reply and Defence to Counterclaim dated 1 October 2021 was duly served on behalf of Mrs Healey. This pointed out some of the deficiencies in the Defence and Counterclaim. In particular, in relation to the defence of adverse possession, it took the point that a claim to adverse possession of registered land could only be advanced in accordance with the LRA 2002; that the County Court lacked jurisdiction to

determine such a claim which needs to be made to the Land Registry; that no such claim had been made to the Land Registry; and that in any event the facts alleged would not bring the Defendants within the narrow circumstances in which adverse possession can be relied on under the LRA 2002. And in relation to the TOLATA claim, it was said that this was not legally coherent and should be struck out.

13. The Defendants served a Rejoinder dated 20 October 2021. This contained some further details of the Defendants' expenditure on the property and of their belief that Mr Maloney was the owner, but it did not specifically answer the points raised in the Reply on adverse possession under the LRA 2002 and on the TOLATA claim.

14. The upshot was that after a certain amount of correspondence both parties issued applications. That for Mrs Healey, dated 3 December 2021, was for summary judgment or a strike out of the Defence on the grounds that the defences pleaded were bound to fail as a matter of law; that for the Defendants, dated 21 January 2022, was for permission to amend the Defence and Counterclaim, the proposed amendment consisting of a complete re-writing of the Defence and Counterclaim. It is not clear if this pleading was technically a draft re-amended pleading (on the basis that DJ Iyer had given permission for a minor amendment already) or was a draft amended pleading (on the basis that this permission was overtaken by events and never taken up) but nothing to my mind turns on this. I will refer to it (as it does itself) as the (draft) Amended Defence and Counterclaim. I will have to look at it in detail below, but for present purposes it can be noted that the general thrust of the pleading was to set up a claim of proprietary estoppel. Among various other things however paragraph 8 pleaded that Mr Fraine had been in possession as a licensee since 2009 while paragraph 13 maintained the plea (and this was not said to be an alternative case) that he had been in adverse possession since 2009.

15. Both applications came before DDJ Corscadden on 1 February 2022. He decided to deal with the Defendants' application to amend first. One of the points argued on behalf of Mrs Healey was that the proposed Amended Defence was internally contradictory because it pleaded both that the Defendants were in adverse possession and that they were licensees. Those were opposite positions as a matter of law and such an inconsistent pleading should not be permitted.

16. DDJ Corscadden however gave a brief oral judgment granting the Defendants permission to amend. On the inconsistency argument he said that this was an issue to be explored at trial either by way of cross-examination of the witnesses or by way of legal submissions. In those circumstances he did not hear Mrs Healey's application for summary judgment or strike out, which he adjourned for directions.

17. Mrs Healey appealed, the first ground of appeal being that the Amended Defence and Counterclaim was internally contradictory. The appeal came before the Judge on 30 June 2022. She gave an oral judgment allowing the appeal and setting aside the permission to amend. I will have to consider her reasons in detail but in essence she accepted that adverse possession for the purposes of the LRA 2002 continues to mean what it has always meant; that one cannot be in adverse possession of a property if one occupies it under a licence; and hence that the claim for adverse possession and the defence advanced on that basis could not succeed because it was misconceived in law. After hearing further submissions she also rejected a submission by Mr Lewis, counsel then appearing for the Defendants, that she should permit him to amend

paragraph 8 of the Amended Defence and Counterclaim (which is where it was pleaded that Mr Fraine had been in possession as a licensee since 2009) in some unspecified way, saying that:

> "the solution for the Defendants, if they think they can come up one day with a properly pleaded claim, is for them to make another application to amend."

18. By her Order dated 30 June 2022 she therefore allowed the appeal, set aside the order of DDJ Corscadden and dismissed the Defendants' application to amend.

Grounds of appeal

19. The Defendants now appeal to this Court on two grounds.

20. Ground 1 is that the Judge wrongly approached the draft Amended Defence and Counterclaim on the basis that adverse possession was pleaded as a defence whereas the draft Amended Defence and Counterclaim did not in fact depend on adverse possession in any way. Alternatively she should not have refused permission for the whole pleading but should have given permission for everything except paragraph 13 (which is where adverse possession was pleaded).

21. Ground 2 is that the Judge was wrong to conclude that the pleaded case that Mr Fraine was a licensee was incompatible with adverse possession of registered land.

22. Although logic might suggest that Ground 2 should be decided first, Mr Grant in fact argued Ground 1 first and it is convenient to consider the grounds in the same order that he did. We notified the parties at the conclusion of his submissions that we did not need to hear from Mr Michael Walsh (who appeared with Mr Richard Miller for Mrs Healey's estate) on Ground 1. I will therefore first explain why I agreed that Ground 1 should be dismissed, and then consider Ground 2.

Ground 1

23. In order to make sense of Ground 1 I must now refer to the draft Amended Defence and Counterclaim in considerably greater detail. As I have already said, this did not proceed by taking the existing Defence and Counterclaim and amending it by a series of deletions and additions, but was a complete replacement.

24. Paragraph 4 admitted that Mrs Healey was the registered proprietor but denied that she was entitled to possession "for the reasons given below". Paragraph 6 denied that the Defendants had entered without permission. The factual basis for this assertion was then pleaded as follows:

> "6.1 In approximately 2001 the First Defendant was engaged by Mr John Maloney, the Claimant's brother, and his business partner Mr Martin Quinn, to assist them in the management and maintenance of the Property (which was tenanted). Messrs Maloney and Quinn conducted themselves at that time and subsequently as though they were the owners of the Property and that is the impression the First Defendant formed. The Defendants are now aware from these proceedings that the Claimant was the

legal owner of the property at that and all material times, in which case the correct analysis is that Messrs Maloney and Quinn were acting as the Claimant's agents.

6.2 In or around 2006-2007, following the presentation of a detailed, schedule of repairs recommended by the First Defendant, Messrs Maloney and Quinn expressed the view that the cost of the required property updating was not justified by the anticipated rental yield. Messrs Maloney and Quinn, stating that they had no commercial use of the Property and as a gesture of friendship, told the First Defendant that the Property was to be his thereafter to do with as he wished once the then existing tenancy expired. By 2009 the Property had been repaired and maintained to a reasonable standard by the First Defendant at his own costs. Accordingly, the First Defendant moved into the Property in 2009 with Nick Fraine, his eldest son, and an associate called Richard Lockett. From time to time the First Defendant has tenanted the Property. On those occasions the tenancy agreements have all been in his own name and he has received all the rent. Whilst the First Defendant has occupied the Property others have stayed at the property, at the behest of the First Defendant to include the other Defendants.

6.3 From 2009 until these proceedings, there was no suggestion from the Claimant or from Messrs Maloney and/or Quinn that the Property was not the First Defendant's to do with as he wished. In reliance on the understanding given to him by Messrs Quinn and Maloney, the First Defendant has proceeded to his detriment on the understanding that the Property was his. In particular, the First Defendant has carried out considerable maintenance and improvement work."

25. Paragraph 7 gave some details of Mr Fraine's expenditure on the house. Paragraph 8 then pleaded to paragraph 4 of the Particulars of Claim (which alleged that the Defendants "have never been a tenant, sub-tenant or Licensee of the Property") as follows:

> "8 Paragraph 4 is denied for the reasons set out in this Defence. It is ludicrous to suggest the First Defendant has had unimpeded possession for 12 years and yet is not even a licensee. The correct analysis is that the First Defendant has been in possession as a licensee since 2009, and by reason of the matters alleged at paragraphs 6 and 7 above the Claimant is now estopped from asserting ownership or recovering possession. In the alternative the First Defendant has acquired beneficial ownership of the Property (or some part of the beneficial ownership) under a constructive trust by reason of his substantial investment of the Property over time, partially particularised at paragraph 7 above."

26. Paragraph 12 pleaded to paragraph 8 of the Particulars of Claim (which alleged that the Defendants continued to occupy without Mrs Healey's consent) by admitting that

Mr Fraine was in occupation but denying that he was obliged to give possession "for the reasons aforesaid".

27. Paragraphs 13 to 15 then pleaded:

> "13 In the premises pleaded above, the Defendants' position is that the First Defendant has been in adverse possession of the Property since 2009. On the date immediately preceding that on which the Claimant's claim was brought the Defendant was entitled to make an application in accordance with Schedule 6, paragraph 5(2) of the 2002 Land Registration Act to be registered as proprietor of the Land. Insofar as the Defendant's position on estoppel is vindicated in this claim, the Defendant anticipates making such an application.
>
> 14 Due to the facts set out above in this Defence, the Defendants contend that an equity has arisen in favour of the First Defendant, that it would be unconscionable for the Claimant to seek to dispossess the First Defendant and that therefore the Claimant is estopped from doing so. Further or alternatively, the First Defendant has acquired all or some of the equity in the Property pursuant to a constructive trust as pleaded above.
>
> 15 The Defendants deny that the Claimant is entitled to the relief sought or any relief as pleaded or at all for the reasons set out in this Defence."

28. The Counterclaim started in conventional fashion by repeating paragraphs 1 to 15 of the Defence (para 16). Paragraph 17 asked the Court to give effect to the equity pleaded above by declaring that an estoppel had arisen and that Mr Fraine was entitled to the ownership of the house or such other relief as the Court thought fit. Paragraph 18 asked the Court further or alternatively to declare that Mr Fraine was entitled to the beneficial interest in the house or some part of it under the constructive trust alleged, or such other order as the Court thought fit to do justice to the existence of the constructive trust. The relief sought was in effect corresponding declaratory relief. (There was also a claim to further or other relief and to interest on damages, the latter unexplained since there was no claim to damages as such).

29. Mr Grant argued Ground 1 on the assumption that the Judge was right that adverse possession is the converse of being a licensee such that one cannot both be a licensee and in adverse possession at the same time. Whether the Judge was in fact right on this point is the subject of Ground 2, but on the basis that she was, his submission was a simple one. It was that paragraph 13, which contained the assertion that Mr Fraine had been in adverse possession, was not an attempt to set up adverse possession as a defence. It was merely signalling an intention, if the proprietary estoppel claim were made out, to make a future application to the Land Registry. Nor was adverse possession relied on in the Counterclaim. As such the plea of adverse possession in paragraph 13 may have been unnecessary and otiose, but, being an inessential part of the pleading, it was no basis to refuse the amendment as a whole which set up two perfectly coherent defences of proprietary estoppel and constructive trust, which were in turn relied on by way of counterclaim. In those circumstances if it was necessary

to refuse permission to amend at all, the appropriate course would have been to refuse permission for paragraph 13 alone and allow the rest of the pleading to stand.

30. Even reading the pleading by itself, however, it is to my mind rather unclear what paragraph 13 was seeking to do by pleading adverse possession as it does. One starts with the fact that the contention that Mr Fraine had been in adverse possession of the house was a prominent feature of the existing Defence (where it was pleaded that he had taken adverse possession in 2006/07). If it had been intended to abandon that contention, it would not have been repeated in the Amended Defence. But it was repeated, and this cannot have been by oversight but must have been deliberate as the pleading was rewritten from scratch (and the pleader had taken the trouble to amend the date from which adverse possession started to 2009). So the Defence undoubtedly includes a plea of adverse possession, presumably for some reason.

31. The normal reason for pleading something in a defence is because it is, or forms part of, or is relevant to, a substantive defence to the claim. Indeed, subject to Practice Direction 16 para 12.2(1) (which permits a party to refer to a point of law in a pleading), a pleading should contain only material facts, that is those necessary for formulating a cause of action or a defence as the case may be: see *Civil Procedure (The White Book) 2023* §16.0.1. I accept that pleadings often do contain more than they should, but in principle one would expect to find that if a particular allegation is pleaded in a defence it was being advanced in support of a substantive defence. And here when one reads together paragraphs 4 and 8, each of which denies that Mrs Healey was entitled to possession "for the reasons given below" or "for the reasons set out in this Defence", paragraph 13 which pleads that "In the premises pleaded above the Defendants' position is that [Mr Fraine] has been in adverse possession of the Property since 2009", and paragraph 15 which denies that Mrs Healey was entitled to the relief sought or any relief "for the reasons set out in this Defence", it is natural to read paragraph 13, setting out as it does the Defendants' position, as intended to put forward something that amounts to, or is at any rate supportive of, a substantive defence.

32. This natural reading of the pleading is reinforced by a further point on the wording of the second sentence of paragraph 13, which I repeat here for convenience:

> "On the date immediately preceding that on which the Claimant's claim was brought the Defendant was entitled to make an application in accordance with Schedule 6, paragraph 5(2) of the 2002 Land Registration Act to be registered as proprietor of the Land."

This, as Popplewell LJ pointed out in argument, contains a noticeable verbal echo of s. 98(1) LRA 2002 (and also s. 98(3)). These respectively provide as follows:

> "**98 Defences**
>
> (1) A person has a defence to an action for possession of land 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.
>
> …
>
> (3) A person has a defence to an action for possession of land if on the day immediately preceding that on which the action was brought he was entitled to make an application under paragraph 6 of Schedule 6 to be registered as the proprietor of an estate in the land."

It is in fact entirely clear that neither sub-section affords Mr Fraine any defence. s. 98(1) only applies where sch 6 para 5(4) LRA 2002 applies, and that is concerned with the particular case where a neighbouring owner has been in adverse possession of registered land in the belief that it belonged to him; s. 98(3) only applies where sch 6 para 6 LRA 2002 applies and that is concerned with an adverse possessor who remains in possession for a further 2 years after his first application has been rejected. Any application by Mr Fraine would not be under those paragraphs but under sch 6 para 5(2) LRA 2002 which applies to the case of a person who has been in adverse possession and has the benefit of a proprietary estoppel such that he ought to be registered. But I think there is force in the point that the close echo of the language of s. 98(1)(a) and s. 98(3) LRA 2002 in paragraph 13 of the pleading left it rather unclear if the intention was to seek to rely on these matters as a defence, or as contributing to a defence, or not.

33. Moreover, quite apart from the question whether paragraph 13 was being relied on as contributing to Mr Fraine's defence to the claim, it undoubtedly did assert that Mr Fraine "has been in adverse possession of the Property since 2009". On the basis that one cannot both be a licensee and in adverse possession at the same time, paragraph 13 is on its face flatly contradictory with paragraph 8 which asserted that Mr Fraine "has been in possession as a licensee since 2009", and this is so whether or not the matters pleaded in paragraph 13 were an attempt to set up something by way of a defence or merely for information. There cannot be any doubt that it is a general principle that a pleading should not be internally contradictory. A party may plead two alternative cases but cannot plead as part of the same case two assertions that contradict each other. We were not referred to any authority specifically on the point but it was not disputed before us: cf Practice Direction 16 para 9.2 which provides that a subsequent statement of case must not contradict or be inconsistent with an earlier one. *A fortiori* a single pleading must not contradict, or be inconsistent with, itself. See also *The White Book* at §17.3.6:

> "The court may reject an amendment seeking to raise a version of facts of the case which is inherently implausible, self-contradictory …"

34. So I consider that the Judge was entirely justified in starting from the position that the draft pleading was unsatisfactory and should not be permitted because it pleaded two diametrically opposed things at the same time, and that that was so whether paragraph 13 was being relied on by way of defence or not.

35. Nevertheless if the appeal had been argued before her on the basis that paragraph 13 was unnecessary and for information only and could be omitted without altering the

rest of the pleading, there might have been mileage in Mr Grant's submission that the appropriate course would have been to require paragraph 13 to be excised but otherwise allow the amended pleading to stand. But in fact the transcript of the hearing before the Judge shows that this was not the position adopted by counsel then appearing for the Defendants, Mr Lewis.

36. Mr Lewis made a number of points in the course of his argument, many of which were not directed to the present question. But so far as relevant they included the following:

(1) At the outset of his submissions he said that the principal relief was based on a proprietary estoppel. That was linked to the adverse possession claim but could also stand alone. It would be open to the Court at trial to find that an equity had arisen but that the adverse possession claim was not made out, the only difference being the relief granted. If an adverse possession claim to which an equity has arisen as well is made out then the relief is title to the freehold ownership, whereas if the equity is made out without adverse possession, then the Court can grant such relief as it deems fit to give effect to the equity.

(2) When he came specifically to answer the inconsistency point, he first submitted that the law now recognises that there may be situations in which an individual may be in possession of the land, and for the purposes of the LRA 2002 in adverse possession of the land, but have a licence or right to be there. This is the subject of Ground 2 and I will deal with it below.

(3) There is then a lengthy passage which, with all respect to Mr Lewis, is not entirely easy to follow and is difficult to summarise, but which proceeds on the basis that Mr Fraine's case was that Mr Maloney had given him permission to be on the land and that this was the licence referred to in paragraph 8. Mrs Healey's case however was that Mr Fraine had not got her permission. In those circumstances it would be open to the Court at trial to find that there was no permission from Mr Maloney at all; or to find that Mr Fraine went in with the permission of Mr Maloney but that exceeded his authority; or that Mr Fraine did have a licence but it was extinguished. On Mrs Healey's case her brother did not have authority to grant the licence; that meant the Defendants did not have the consent of the paper owner; that meant the possession was adverse.

(4) He then referred the Judge to *Ofulue v Bossert* [2008] EWCA Civ 7 for the proposition that a person who wrongly believed himself to be a tenant could occupy the property in such a way that he had possession; and when the Judge asked where in the pleading it said that Mr Fraine wrongly believed himself to be a licensee, submitted that that was a natural implication from the parties' pleaded cases. Mr Fraine's case was that he was given permission by Mr Maloney. Mrs Healey's case was that he never had that permission from her, but her brother managed the property on her behalf, and hence it had to be that any permission given by Mr Maloney was unlawful (as exceeding his authority). It was possible in those circumstances that the Court might accept Mrs Healey's case. That meant that the Court might find that Mr Fraine went into occupation believing he had a right to do so from Mr Maloney and in

those circumstances his possession would still be adverse.

(5) In summary he said:

> "I accept taken in isolation paragraph 8 of the reamended defence suggests "I am a licensee", and one would automatically think, "Well that must mean with the consent of the paper owner" and, therefore, it cannot be adverse"; this case is markedly different from the classic case; it is consent given by a non-owner of the property, and the claimant's own case [is] that he did not have permission to give such consent."

37. I consider it abundantly plain from these (and other) passages that Mr Lewis was seeking to uphold the plea of adverse possession in paragraph 13. His opening remarks (summarised at paragraph 36(1) above) indicate that he submitted that the plea of adverse possession was potentially significant in terms of the relief that could be granted if the estoppel were made out (and so was a matter for trial); and the other submissions (summarised at paragraph 36(2)-(5) above) are all directed at persuading the Judge that the plea of adverse possession in paragraph 13 can stand with the plea of licensee in paragraph 8 because one possibility at trial would be that although Mr Maloney did give Mr Fraine permission, that exceeded his authority and hence Mr Fraine's possession was indeed adverse to the paper owner, Mrs Healey.

38. Far therefore from adopting the position that Mr Grant urged upon us, namely that the plea of adverse possession was otiose and for information only and even if misconceived could be ignored, Mr Lewis's submissions were all directed at the opposite conclusion which was that the plea of adverse possession was justified and should stand, despite the plea in paragraph 8 that Mr Fraine was a licensee, as his "licence", coming from Mr Maloney, might at trial be held not to have bound the claimant.

39. In those circumstances I consider that the Judge was fully entitled to take the course that she did and allow the appeal. Her reasons for doing so were as follows:

> "13 … The Claimant says, as a matter of law, if one is in possession as a licensee one cannot at the same time acquire adverse possession. One might have thought that was trite law….
>
> 14 This pleading clearly avers that the First Defendant has been in a possession as a licensee since 2009. At the same time, it avers that he has been in adverse possession since 2009. There is no way in which the document can be read as to suggest that they are meant as alternative positions. They are plainly meant to stand together."

She then referred to Mr Lewis's submissions on what is now Ground 2, and continued:

> "19 In my judgment, adverse possession in para. 1 of Schedule 2 [viz of LRA 2002] continues to mean that which it has always meant at law, such that one cannot be in adverse possession of a property if one occupies it under a licence. If there was to be a new definition

which required or permitted licensees in some circumstances to acquire adverse possession concurrently with their possession under a licence that would, in my judgment, have been included in the Act and it was not.

20 Therefore it follows that the claim for adverse possession, and the defence advanced on that basis to the claim in the Re-Amended Defence and Counterclaim cannot possibly succeed, because it is misconceived in law.

21 Mr Lewis valiantly for the Defendant tried to argue that perhaps the adverse possession claim could succeed dependent on the factual findings of the trial Judge. The trial Judge might find, for example that Maloney and Quinn were not agents of the Claimant and so the Defendants did not occupy as licensees. The difficulty with that argument is that that is not how the Defendants put their case. The Defendants could (if it was their case) have pleaded that as an alternative factual basis, but they did not.

22 The issues in any case are defined by the pleadings. The Defendants choose to run this case on a positive case that Maloney and Quinn are agents of the Claimant, and the Defendants are licensees of Mrs Healey. It seems to me that they cannot possibly pin their colours to the mast unequivocally in that way and then say, "Ah, but I might still have an adverse possession claim on some different factual basis yet to be determined on which I have not pleaded as an alternative basis".

23 Now that may be the fault of the pleader rather than of the Defendants, and I say again that Mr Lewis is not the person who pleaded this document, but that really is not the point in this appeal. The point is that permission has been given for a pleading to be filed which advances a wholly misconceived point of law. In my judgment, it is wrong as a matter of law and it is certainly wrong, plainly wrong, in terms of the exercise of a discretion to permit an amendment to a pleading to allow it to plead a cause of action or a defence which must as a matter of law fail.

24 There were of course three different causes of action, or potential defences, contained within the Re-amended Defence and Counterclaim of which this was but one. The Deputy District Judge could have refused permission in entirety; he could, if he so chose and if the exercise can properly be done, have allowed part of the pleading in and refused permission for other parts of it. What it was not open to him to do, in my judgment, was to permit a wholesale amendment which included something which had to fail as a matter of law.

25 Notwithstanding the broad ambit of discretion open to him and the particular reluctance of Appellate Courts to overturn case management decisions, this appeal must therefore succeed."

40. Subject always to Ground 2, I see no flaw in this judgment. On the contrary I think this unreserved oral judgment is an admirably succinct and cogent explanation of why the appeal should be allowed. In the light of the way in which the case was argued before her, she was right to regard the question as being whether the plea of adverse possession in paragraph 13 could be defended as Mr Lewis valiantly tried to do, and right to regard it as inconsistent with the plea in paragraph 8 that Mr Fraine had at all times been in possession as a licensee. Having reached this conclusion, I think it inevitably followed, as she said, that DDJ Corscadden's order, which had simply allowed in the whole pleading, could not stand and the appeal had to be allowed.

41. Mr Grant had a second submission under Ground 1 which is that even if the Judge was right to reach this conclusion, she should not have disallowed the whole pleading but only paragraph 13. The option of granting permission for parts of the pleading was not one that the Judge overlooked. As her judgment shows (at [25]) she appreciated that one course open to DDJ Corscadden was to allow part of the pleading in and refuse permission for the rest. She went on to say that she had on appeal the same powers as he did, and hence that this was a course also open to her (at [27]). She continued:

> "28 So there are, it seems to me, three options open today to me. One is simply to allow the appeal, and then to refuse the application to amend on the basis that the pleading is, as I have already identified, defective and so it should not be allowed. The second is to take a pen, and excise the parts which are hopeless and allow the rest to remain. I suppose there is a further one which I did not canvass with the parties but which occurred to me afterwards which is that I could refuse the application but grant permission to the Defendants to have another go and file a still yet further Re-amended Defence."

It is apparent that what the Judge had in mind as the third option was to grant permission in advance for a pleading which had not yet been formulated. She rejected this option as completely unsatisfactory as it gave the Court no control over the content of the pleading. It has not been suggested that that was wrong.

42. She then said that given how late it was already, and that if she were to go down the route of a partial permission, she would have to hear further submissions from both parties and give a further judgment, the overriding objective was best served by refusing the application altogether (at [34]).

43. In fact however after the judgment had been delivered Mr Lewis did make further submissions and she did not try to stop him. He initially put forward three options. One was to allow the Defendants to amend paragraph 8 in accordance with his earlier submissions. The second was to impose an unless order or some sanction requiring the Defendants to amend paragraph 8 within a limited time. The third was to remit the matter. He then said:

> "Your Honour, the court can make conditions upon giving permission. The only element of this document in accordance with the court's judgment today for which permission should not be given – albeit I am asking for the indulgence to correct that – is paragraph 13, the

> assertion of adverse possession …
>
> … Whilst the court has found that ground 1 is made out, and that paragraph 8 of the amended pleading cannot stand alongside paragraph 13, the averment of adverse possession and the averment of a licence, it can plainly be resolved: rather than simply saying that permission is refused altogether, in my submission it is more proportionate, given where we are at this stage in the litigation, given the court has the document, and given the usual costs consequences that will follow – and indeed from a prejudice point of view, it was flagged up by my learned friend in submissions today if we want to have another crack – I do ask the court to grant that indulgence to have another crack, because –"

The Judge then suggested to Mr Lewis that he did not need permission to make another application, and he responded:

> "Your Honour, it will no doubt be met by the claimant asserting that any further application is an abuse of process because we have had a go. That is why, rather than encouraging satellite litigation, I seek that permission now, rather than my clients having to pay the fee of an N244 further amendment, when those amendments can be dealt with by the court today as a more proportionate way forward. I can specify quite easily – and it is in accordance with the court's judgment, your Honour – the court has found it is not pleaded in the alternative, and it was maybe a different case; if it was pleaded in the alternative that resolves the ambiguity."

44. As can be seen these submissions did not – or at any rate did not clearly – advance the submission that Mr Grant made to us, which is that permission should be given for everything except paragraph 13 which could be excised. Mr Lewis's primary submission was that the way to cure the inconsistency was to permit him to make an amendment (not actually formulated) to paragraph 8, and then, although he did suggest that the only paragraph for which permission should not be given was paragraph 13, he followed that up with the suggestion that he should be given permission to amend that, again in some way that was not actually formulated, but so that it was pleaded in the alternative.

45. The Judge then gave a short supplemental judgment. She said that Mr Lewis had suggested that she give him permission to amend paragraph 8 so that the Defendants could plead their case on the various alternative bases that he came up with in the course of his submissions (at [36]), or that she make an unless order requiring them to amend paragraph 8. She continued:

> "38 It is not entirely clear to me – in fact, it is not at all clear to me – what amendment it is precisely that Mr Lewis proposes would be made today or, if I were to give some time to do it, later. He suggests that amending para. 8 would be enough, but he also suggests that the amendment will include some kind of amendment to the status of Maloney and Quinn, which of course is not pleaded in para. 8 but elsewhere in the document: so

> amending para. 8 on its own will not deal with the issue. Insofar as I could understand his submissions, what he was proposing by way of amendment seems to me inconsistent with other parts of his pleaded case.
>
> 39 So I am not going to give permission today for an amendment the text of which I have no idea what it is, which I cannot properly understand in submissions, and which I am not at all sure will cure the problem. If anything it is going to give rise to more satellite litigation. The solution for the Defendants, if they think they can come up one day with a properly pleaded claim, is for them to make another application to amend. The fact it is going to cost them money to do it perhaps will encourage them or their solicitors in future to make sure that, when they do make an application, they make it on the basis of a properly pleaded pleading and not one that is misconceived in law."

She then went on to give another reason for dismissing the entire application which was that it was not the job of the Court to take a defective pleading and edit it, or tell someone how to edit it, until it is adequate. The burden is on the defendant to satisfy the Court that the pleading it puts forward is one for which it is appropriate to give permission. A document which requires a significant amount of work doing to it for it to become a document which the Court could permit is not one which a defendant should be putting forward (at [41]).

46. Again I think the Judge made no error here. She was well entitled in my judgement to take the view that she should not give permission for suggested amendments which had not been reduced to writing and hence which she had not seen. A Court is usually well advised not to grant permission to amend without seeing the precise text for which permission is sought. And I also think she was entitled to conclude that the amendment which Mr Lewis was suggesting to paragraph 8 might require revision to other parts of the pleading, and that it might be inconsistent with other parts of the Defendants' case. What I think she probably had in mind here was this. Mr Lewis's submission on the appeal had been to the effect that the adverse possession plea might arise in circumstances where it turned out that permission was given by Messrs Maloney and Quinn to Mr Fraine but it was not effective as against Mrs Healey because it exceeded their authority. That might indeed mean that Mr Fraine and the other Defendants had no permission from Mrs Healey and were trespassers. The difficulty with that however is that if Messrs Maloney and Quinn had no authority to let Mr Fraine have the house, it is difficult to see how he could establish either a proprietary estoppel or a constructive trust that affected Mrs Healey, and under the LRA 2002 adverse possession alone would not amount to a defence. I am not surprised in those circumstances that the Judge thought it was not clear quite what amendment Mr Lewis was suggesting and was in any event unsure whether it would cure the problem.

47. Mr Grant submitted that the Judge herself should have followed the logic of her decision on the appeal and simply refused permission for paragraph 13, even in the absence of any request to do that. But I do not think that is right. Had Mr Lewis clearly suggested that paragraph 13 was not needed and could be omitted and that that would cure the problem, then the Judge could have ruled on that submission. But he

did not: he suggested that amendments should or might be made both to paragraph 8 and to paragraph 13, and in particular that paragraph 13 might be pleaded in the alternative. In those circumstances I do not think the Judge was obliged of her own motion to suggest or consider alternative ways in which other parts of the pleading could be salvaged. She was entitled to decide the case on the basis of the submissions made to her.

48. Those are the reasons why I agreed that Ground 1 should be dismissed.

Ground 2 – Adverse possession

49. Ground 2 is that the Judge was wrong to proceed on the basis that adverse possession under the LRA 2002 was always inconsistent with being a licensee.

50. The LRA 2002 made very far-reaching changes to the law on adverse possession, and it is necessary to look at these. I propose to do so by looking first at the position with unregistered land, then with registered land under the Land Registration Act 1925 (**"LRA 1925"**), and then consider the LRA 2002.

51. The basic principles applicable to the law of adverse possession in relation to unregistered land are well established and not in dispute. They can be found for example in *Megarry and Wade, The Law of Real Property* (9th edn, 2019), chapter 7 on Adverse Possession and Limitation. The law of adverse possession arises from the law of limitation: *ibid* §7-001. The time limit for an action to recover unregistered land is 12 years: *ibid* §7-020. This is the effect of s. 15(1) Limitation Act 1980 (**"LA 1980"**); the section simply refers to "an action to recover land", but s. 96 LRA 2002 disapplies it to registered land so it now only applies to unregistered land. Time does not begin to run until (i) the person with the right of action has discontinued possession or been dispossessed, and (ii) someone else has taken adverse possession: *ibid* §7-028. This is the combined effect of sch 1 para 1 and sch 1 para 8(1) LA 1980, the latter of which provides:

> "No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to below in this paragraph as "adverse possession"); and where under the preceding provisions of this Schedule any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land."

52. The question therefore, where the paper owner is not in possession, is whether there is someone else in possession who is a person "in whose favour the period of limitation can run". The LA 1980 does not itself explain what this requires but sch 1 para 8(1) is a re-enactment of s. 10(1) Limitation Act 1939, of which Evershed MR said in *Moses v Lovegrove* [1952] 2 QB 533 at 540:

> "The notion of adverse possession, which is enshrined now in section 10, is not new; the section is a statutory enactment of the law in regard to the matter as it had been laid down by the courts in interpreting the earlier Limitation Statutes."

53. The effect of the decided cases is summarised in *Megarry & Wade* at §7-029 as follows:

> "Before 1833, "adverse possession" bore a highly technical meaning. Today it merely means possession inconsistent with and in denial of the title of the owner of land, and not, e.g. possession under a licence or under some contract or trust… To establish adverse possession, a squatter must prove both factual possession of the land and the requisite intention to possess (*animus possidendi*). If a person is in possession of land with the permission of its owner, his possession cannot be adverse."

That was of course the basis on which the Judge thought that it was trite law that if one is in possession as a licensee one cannot at the same time acquire adverse possession (see her judgment at [13], cited in paragraph 39 above).

54. Mr Grant submitted that there was an exception to that general principle in the case of a purchaser who took possession under an uncompleted contract. That is a point I will have to come back to below, but subject to that, the proposition that one cannot at the same time be in possession with the permission of the owner and in adverse possession is well established in relation to unregistered land. Indeed, although this was not cited to us, it has the *imprimatur* of the House of Lords: see *J A Pye (Oxford) Ltd v Graham* [2002] UKHL 30 at [37] per Lord Browne-Wilkinson:

> "It is clearly established that the taking or continuation of possession by a squatter with the actual consent of the paper title owner does not constitute dispossession or possession by the squatter for the purposes of the Act."

55. This indeed is no more than the logical consequence of adverse possession being concerned with limitation. The fundamental basis on which a person in adverse possession can defeat the claim of the paper owner to possession is the same as underlies any other limitation defence, namely that the claimant had a right to bring an action but has failed to do so for the statutory period. The consequences are more far-reaching than for most other limitation defences, as the effect of the 12 years elapsing without action being brought is not only to give the person in adverse possession a defence but to extinguish the paper owner's title altogether. This has been the case since the Real Property Limitation Act 1833 and is now found in s. 17 LA 1980. But the foundation of the defence, as with other defences of limitation, is that the paper owner had a right of action but did not bring proceedings within the statutory period. That therefore presupposes that the paper owner could have sued the defendant for possession. But where the party in possession is there with the continuing permission of the paper owner, he is not guilty of trespass (or any other wrong), and he cannot be sued for possession until the permission has been withdrawn. Hence time does not begin to run in his favour until then, and hence he is not in adverse possession.

56. In relation to unregistered land the operation of the limitation period is said to fulfil two functions: *Megarry & Wade* §7-014. One is that it is more important that established and peaceable possession should be protected than that the law should assist the agitation of old claims: "long dormant claims have often more cruelty than

of justice in them" (*A'Court v Cross* (1825) 3 Bing 329 at 332 per Best CJ).

57. The other is that it plays an important role in facilitating the investigation of title. I explained the background to this in *White v Amirtharajah* [2022] EWCA Civ 11 at [56] as follows (where O is the paper owner and S the adverse possessor or squatter, and references are again to *Megarry & Wade*):

> "Possession by itself gives a good title against all the world except someone having a better legal right to possession: *ibid* §7-004. If S dispossesses O, S therefore acquires all the rights of a person in possession. This enables him to bring claims in tort such as trespass and nuisance, and to recover the land if he is himself dispossessed by a third party (T), assuming that T is not claiming under O: *ibid* §7-008. Indeed although it is common to think of S acquiring a title after 12 years' adverse possession, this is not strictly accurate. S acquires a fee simple estate in the land on taking possession, albeit it is subject to O's superior right until O's title has been extinguished by limitation: *ibid*. The extinction of O's title (usually after the lapse of 12 years) therefore does not confer a title on S; what it does is make his title good against O as well."

This means that in unregistered conveyancing the vendor proves title by showing that he and his predecessors have possessed the land for a time sufficient to exclude any reasonable probability of a superior claim. It is by limitation that any such claim will have been extinguished; "adverse possession and limitation together are therefore the foundations of a good title": *Megarry & Wade* at §7-012. Indeed the Law Commission in its consultative document that ultimately led to the LRA 2002 (Law Com No 254: *Land Registration for the Twenty-First Century*) said at §10.9 that:

> "the principal reason for having limitation statutes in relation to real property appears to have been to facilitate conveyancing."

58. Under the LRA 1925 no significant change to the principles was made in relation to registered land, although the mechanics were necessarily adapted because the paper owner had a registered title. This was given effect to by s. 75(1) LRA 1925 which provided as follows:

> "The Limitation Acts shall apply to registered land in the same manner and to the same extent as those Acts apply to land not registered, except that where, if the land were not registered, the estate of the person registered as proprietor would be extinguished, such estate shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for the person who, by virtue of the said Acts, has acquired title against any proprietor, but without prejudice to the estates and interests of any other person interested in the land whose estate or interest is not extinguished by those Acts."

59. The LRA 2002 however effected a radical change in the application of limitation to registered land. Following the response to its consultative document Law Com No 254, the Law Commission produced a draft Land Registration bill with commentary (Law Com No 278: *Land Registration for the Twenty-First Century, Land*

Registration Bill and Commentary). The primary aim of the bill was to "create the necessary legal framework in which registered conveyancing can be conducted electronically" (§1.1). But the Law Commission also proposed a "wholly new system of adverse possession to be applicable to registered land" (§14.2). The Law Commission explained, as it had in Law Com No 254, that the most important justification for having a principle of adverse possession is in relation to unregistered land where title is relative and rests ultimately on possession; adverse possession extinguishes earlier rights to possess and thereby facilitates and cheapens the investigation of title to unregistered land (§14.2). None of these considerations applies to registered land, where title rests on the fact of registration rather than possession (§14.3). The Law Commission therefore recommended the almost wholesale disapplication of the doctrine of adverse possession to registered land.

60. The essence of the scheme it proposed was that (1) adverse possession by itself, for however long, would not bar the owner's title in a registered estate; (2) a squatter could apply to be registered after 10 years' adverse possession in which case the registered proprietor would be notified; (3) if the registered proprietor did not object, the squatter would be registered; (4) if the registered proprietor did object, the squatter's application would be refused unless he could bring himself within one of three limited exceptions; (5) the registered proprietor would then have 2 years to bring proceedings or regularise the squatter's possession, and if the squatter remained in possession for 2 years without the proprietor having done either, the squatter would then be entitled to be registered; and (6) if the registered proprietor brought proceedings to recover possession from a squatter, adverse possession would not be a defence, subject to limited exceptions (§14.5).

61. This scheme is given effect to by the LRA 2002 as follows (omitting some provisions which have no relevance to the present case):

(1) By s. 96(1) LRA 2002 no period of limitation runs under s. 15 LA 1980 against a proprietor of registered land, and accordingly by s. 96(3) s. 17 LA 1980 does not operate to extinguish the registered proprietor's title.

(2) By s. 97 LRA 2002 effect is given to sch 6 which concerns the registration of an adverse possessor as proprietor of a registered estate.

(3) By sch 6 para 1(1) a person who has been in adverse possession of registered land for 10 years may apply to be registered as proprietor. But by para 1(3) a person may not make such an application if he is a defendant in possession proceedings.

(4) Notification of any such application is given to the registered proprietor (sch 6 para 2). The proprietor may require the application to be dealt with in accordance with para 5 (sch 6 para 3). If he fails to do so, the adverse possessor is entitled to be registered (sch 6 para 4).

(5) If the registered proprietor does require an application to be dealt with under para 5, then the adverse possessor is only entitled to be registered if one of 3 conditions is met (sch 6 para 5(1)).

(6) The first is that he has the benefit of a proprietary estoppel (sch 6 para 5(2)) as

follows:

> "(2) The first condition is that—
>
> (a) it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant, and
>
> (b) the circumstances are such that the applicant ought to be registered as the proprietor."

(7) The second condition is that the applicant is for some other reason entitled to be registered as proprietor of the estate (sch 6 para 5(3)).

(8) The third condition is that the applicant owns adjacent land to the land he claims, the exact boundary between the two has not been settled, and the applicant has for at least 10 years reasonably believed that the land he claims belonged to him (sch 6 para 5(4)).

(9) An applicant whose application is rejected but who remains in adverse possession for a further 2 years can apply again (sch 6 para 6(1)), in which case he is entitled to be registered as proprietor (sch 6 para 7). But this does not apply if he is a defendant in possession proceedings (sch 6 para 6(2)).

(10) Sch 6 para 11(1) contains a definition of adverse possession for the purposes of sch 6 as follows:

> "A person is in adverse possession of an estate in land for the purposes of this Schedule if, but for section 96, a period of limitation under section 15 of the Limitation Act 1980 (c. 58) would run in his favour in relation to the estate."

(11) Finally, as already referred to, by s. 98 LRA 2002 a person has a defence to an action for possession if on the day before commencement of the action he was entitled to make an application to be registered either under sch 6 para 5(4) (the boundary exception) or under sch 6 para 6 (the 2 years provision): see s. 98(1) and 98(3) as set out at paragraph 32 above.

62. The practical effect is that in most cases there is no limitation period applicable at all to a claim for possession of registered land. Unless the person in possession can bring himself within one of the narrow exceptions provided in sch 6, it does not matter how long he has been in possession, or how much he may have reasonably believed himself to have some right to the land. That can be seen to be a choice by the Law Commission, accepted by Parliament, to depart from the primacy given in unregistered conveyancing to long enjoyed possession and instead to accord priority to the security of a registered title.

63. Against that background, Mr Grant's submission on Ground 2 was that it was not always the case under the LRA 2002 that adverse possession was inconsistent with the person in possession being a licensee. He referred to a number of passages in Law Com No 271 which he submitted showed that the Law Commission intended this to be so. These were the following.

(1) In §14.7 the Law Commission gives two examples of cases where a squatter would be otherwise entitled to the land, namely (i) where he or she was a purchaser in possession who had paid the whole of the contract price or (ii) by application of the principles of proprietary estoppel.

(2) In §14.40 the Law Commission explains that the first condition (in sch 6 para 5(2)) is intended to embody the equitable principles of proprietary estoppel, under which the applicant will have to show that in some way the registered proprietor encouraged or allowed the applicant to believe that he or she owned the land.

(3) In §14.42 the Law Commission gives two examples of the typical kinds of case in which the proprietary estoppel exception is likely to be in issue, as follows:

> "(1) Where the squatter has built on the registered proprietor's land in the mistaken belief that he or she was the owner of it, and the proprietor has knowingly acquiesced in his or her mistake. The squatter eventually discovers the true facts and applies to be registered after 10 years.
>
> (2) Where neighbours have entered into an informal sale agreement for valuable consideration by which one agrees to sell the land to the other. The "buyer" pays the price, takes possession of the land and treats it as his own. No steps are taken to perfect his or her title. There is no binding contract either because the agreement does not comply with the formal requirements for such a contract, or, once electronic conveyancing is fully operative, because the agreement has not been protected on the register by means of a notice. The "buyer" discovers that he or she has no title to the land. If he or she been in possession of it for 10 years he or she can apply to be registered as proprietor."

The Law Commission says that in each case an equity would arise by estoppel and it would be just to give effect to that equity by registering the squatter as owner of the registered estate in place of the existing proprietor.

(4) In §14.43 the Law Commission gives examples of squatters who would satisfy the second condition, that of having some other right to the land (sch 6 para 5(3)). The second example given is:

> "The claimant contracted to buy the land and paid the purchase price, but the legal estate was never transferred to him or her. In a case of this kind, the squatter-buyer is a beneficiary under a bare trust, and, as such, can be in adverse possession."

64. In his written submissions Mr Grant suggested that in the light of these passages there must have been a change in the meaning of adverse possession for the purposes of the new self-contained regime in the LRA 2002 such that the requirement that a person in

adverse possession did not have the permission of the landowner must have fallen away.

65. That I regard as an unsustainable contention. There is not the slightest hint in the Law Commission's commentary on its proposals in Part XIV of Law Com No 271 (headed "Adverse Possession") that it intended adverse possession to bear a different meaning in the draft bill from its existing and well understood meaning. On the contrary there are statements to the effect that one cannot be in adverse possession if one is a licensee: thus for example footnote 19 to §14.5 refers to a case where the squatter's position "would no longer be adverse, as where the squatter agreed to be the tenant or licensee of the registered proprietor" and footnote 20 to §14.6 is to the same effect. More importantly in §14.20 the Law Commission says in terms that "adverse possession has the same meaning as it does under the Limitation Act 1980". This is subject to two exceptions explained in §14.23, but neither is of any relevance to the present question.

66. Moreover sch 6 para 11 LRA 2002 provides that a person is in adverse possession for the purposes of sch 6 if a period of limitation would run in his favour under s. 15 LA 1980 were it not for s. 96 LRA 2002 (see paragraph 61(10) above). That to my mind makes it quite impossible to conclude that the requirements for adverse possession under the LRA 2002 are in some fundamental respect different from those applicable to unregistered conveyancing.

67. Mr Grant had a further submission that he developed orally which is that the Law Commission's examples showed that a person could enter land with the consent of the landowner and still be in adverse possession. This submission makes it necessary to look at the examples given by the Law Commission with some care.

68. Three examples are given of cases where a person in adverse possession could successfully claim to be registered, namely (i) the squatter building on the land in the mistaken belief that they owned it and the owner acquiescing in the mistake (§14.42(1)); (ii) an informal sale agreement (§14.42(2)); and (iii) a purchaser who paid the purchase price but where a transfer was never completed (§14.43) (see paragraph 63(3) and (4) above). The first two are said to be examples of cases within the proprietary estoppel condition in sch 6 para 5(2), and the third an example of a case of a squatter who is otherwise entitled to be registered within sch 6 para 5(3).

69. The first example does not assist Mr Grant. It is a classic case of proprietary estoppel arising from acquiescence. That is not a case of licence at all: the person in possession builds on the land in the mistaken belief that he or she is the owner of it and the owner stands by and allows them to do so. But the owner does not give any sort of permission to the person in possession. The example in fact illustrates that there are many examples of estoppel where there is no question of the possessor having permission or a licence to be on the land.

70. I will take the third example next. This is expressly based on *Bridges v Mees* [1957] Ch 475. Here the plaintiff orally contracted in 1936 to buy a small parcel of registered land for £7 from the company that owned it. He paid a deposit of £2 and went into occupation. By 1937 he had paid the balance of £5 but no conveyance or transfer was executed. In 1956 the defendant acquired such rights as the company had in the land and was registered as proprietor. Harman J held that the plaintiff had

acquired a title by adverse possession and ordered that he be registered as proprietor.

71. His reasoning was as follows. So long as part of the purchase price was outstanding the vendor had a lien on the property, and the plaintiff's possession when originally taken could no doubt be referred to the vendor's leave and licence. But once the vendor had been fully paid and its lien disappeared, the position was altered, and the vendor became a bare trustee of the land for the purchaser (at 484). At that point time could begin to run in favour of the plaintiff, and after 12 years the vendor's title (but for the provisions as to registered land) would have been extinguished (at 485). It was argued that from 1937 the vendor company as trustee could never have brought an effective action to recover the land because he would have been met by the plea that the whole beneficial interest was vested in the purchaser, but Harman J thought that the question could not turn on whether the action would have succeeded, following the decision of Kekewich J in *In re Cussons* (1904) 73 L J Ch 296 at 298 which was to like effect (at 485).

72. This decision has now stood for over 60 years. But its correctness is not universally accepted. *Megarry & Wade* refer to it with what would seem to be less than wholehearted endorsement, saying: "Where a purchaser is in possession under an uncompleted contract of sale and the vendor has been paid, it has been held that time will run against the vendor, who is in effect a bare trustee" (at §7-054). In *Jourdan & Radley-Gardner, Adverse Possession* (2nd edn, 2011 with 2017 supplement) the question is considered at some length, the whole of chapter 28 being devoted to a discussion of the position of a beneficiary in possession to the exclusion of a trustee. The authors pose the question whether, if the legal title is in A but B is entitled to possession in equity, B's possession can be adverse so that time runs against A. They refer to a number of decisions on the point which they describe as very difficult to reconcile. Their own preference is that the answer to the question is No, on the basis that B's possession is not wrongful (at §28-01). They discuss *Bridges v Mees* at §28-26ff and suggest that the decision on the adverse possession point is questionable.

73. Mr Walsh invited us if necessary to say that *Bridges v Mees* was wrong and overrule it. Mr Grant said that it had been repeatedly referred to, but we were not shown anything to suggest that this aspect of the decision has been approved by any higher court, and it would seem that the decision is most frequently cited as an illustration of the principle that the vendor under a contract of sale is a trustee for the purchaser from the date of the contract and a bare trustee once the purchase price has been fully paid. So far as anything we have been shown is concerned, we would therefore be at liberty to hold that it was wrong.

74. But I have come to the conclusion that this is not necessary, and that it would be better not to reach any concluded view on the question if we do not need to decide it. There are two reasons why I think it is unnecessary to consider the correctness of *Bridges v Mees*. First in terms it is only authority for the proposition that where the legal title is in A and A is a bare trustee for B, B's possession can be adverse to A's title. That is not the situation here. What was sought to be pleaded here was not a contractual arrangement at all. What was sought to be pleaded was that Messrs Maloney and Quinn as a gesture of friendship told Mr Fraine that the house was to be his. That is not the language of contract but of informal gift. Even assuming that Messrs Maloney and Quinn were acting within the scope of their authority from Mrs Healey she did not thereby become a bare trustee for Mr Fraine. By itself an informal

and unperfected gift gives the intended donee no interest of any sort: there is no equity to perfect an unperfected gift. What might give Mr Fraine an equity is if, as he says he did, he acted to his detriment on the understanding that the house was to be his. That might well raise an equity by virtue of a proprietary estoppel, but it still would not constitute Mrs Healey as a bare trustee for him, at any rate unless and until the Court had decided that the appropriate way to give effect to the equity was to declare him the sole beneficial owner.

75. Secondly, and quite apart from this, the reason why Mr Grant wished to rely on the example in the Law Commission report was to illustrate that the Law Commission assumed that one could be in possession as a licensee and yet in adverse possession. But the Law Commission's example is expressly drawn from *Bridges v Mees* and it is apparent from the decision itself that Harman J proceeded on the basis that the plaintiff was only in possession under a licence so long as the purchase price was not fully paid and the vendor therefore had a lien on the property; once the plaintiff had paid the full £7 the vendor's lien had gone and his possession was no longer by the vendor's licence. So understood, the decision is in any event no authority for the proposition that a person can be in possession as a licensee and in adverse possession at one and the same time. Indeed Harman J plainly assumed that time did not start running so long as the vendor was unpaid, and that was precisely because so long as the vendor had a lien the purchaser's possession could only be by the leave and licence of the vendor. A similar conclusion was in fact reached by this Court in *Hyde v Pearce* [1982] 1 WLR 560 where a purchaser was allowed into possession before completion and without having paid the purchase price, but *Bridges v Mees* was not cited and the decisions are not entirely easy to reconcile for the reasons given by *Jourdan & Radley-Gardner* at § 28-40f. I do not propose to lengthen this judgment with a consideration of *Hyde v Pearce*, which has its difficulties, as it is plainly not authority for the proposition that a person may be in possession as licensee and in adverse possession at the same time.

76. That leaves the second example given by the Law Commission of an informal sale agreement where the "buyer" pays the purchase price and takes possession. Although the Law Commission treats this as a case of proprietary estoppel, it is not clear to me how this example differs from that of the third example or from *Bridges v Mees*: where A orally agrees that B should have an interest in A's property and B fully performs his side of the bargain, one would have thought that a classic case for a constructive trust to arise to give effect to the agreement even though the agreement is informal and unenforceable as a contract for want of formalities. If so, the example raises no separate point.

77. But suppose for some reason this is wrong and the example is properly analysed as a case of proprietary estoppel rather than constructive trust. Nevertheless I do not think this is really a case of the purchaser B being in possession as the licensee of the owner A. If one asked either party if B's occupation of the property after payment of the purchase price was referable to A having given him permission to do so, I think the reaction of both would be No. They would both be likely to say that B was occupying the property because he had bought it and it was his. The point can be tested by asking what B would plead if A sought possession. It would not be that he was there with A's permission or licence; it would be that a constructive trust or estoppel would have arisen by virtue of the payment of the purchase price under the informal

contract.

78. A real-life example corresponding to that given by the Law Commission was considered by Judge Paton in the First-tier Tribunal (Property Chamber, Land Registration) in *Ashworth v Stroud* (28 July 2021, REF 2020/0092). Mr Ashworth owned a house which included half a driveway, the other half belonging to the neighbouring property, with both titles being registered. In 2004 the owner of the adjoining house, which by then had a separate vehicular access, agreed to sell him his half ("the disputed part") for £10,000 on terms that Mr Ashworth built a wall incorporating it into his property. There had been something in writing to that effect but it could not be found so it was not known if it complied with the formalities required by s. 2 of the Law Reform (Miscellaneous Provisions) Act 1989 and the case was argued on the basis that the agreement was an oral one. Mr Ashworth paid the £10,000 and built the wall but there was never any transfer to him of the disputed part. He occupied it for over 14 years until the Respondents, who had acquired the neighbouring house, knocked down the wall. He then applied to be registered as proprietor of the disputed part relying on having been in adverse possession of it for over 10 years and having the benefit of a proprietary estoppel. One of the points taken by the Respondents was that he could not have been in adverse possession as he was in possession with the licence of the neighbour.

79. Judge Paton rejected this submission as follows (at [59]):

> "In the "oral contract" proprietary estoppel situation, the whole basis of the possession taken is that it is as of assumed and assured right and entitlement to the land: not that the possessor has a mere temporary or revocable permission or licence from the owner to be there. The assurance and reliance upon it generates an independent proprietary entitlement – an equity by estoppel. It is inapposite to characterise that as possession by "licence" or "consent". Alternatively, in the "oral contract" situation where the full price has been paid, I consider the position to be analogous to that in *Bridges v. Mees*."

That analysis seems to me to be in all material respects the same as that I have suggested above.

80. In those circumstances I do not think any of the examples put forward by the Law Commission demonstrate that the Law Commission thought, or that it is the law, that a person in possession of another's land as that other's licensee can at the same time be in adverse possession. I would therefore hold that the Judge was right to conclude that adverse possession under the LRA 2002 continues to mean what it has always meant such that one cannot be in adverse possession of a property if one occupies it under a licence.

81. Mr Grant said that this was an unnecessarily strict reading of the draft pleading. What was really meant in paragraph 8 by saying that Mr Fraine was a licensee was that he entered with the consent of Messrs Maloney and Quinn acting as agents for Mrs Healey. But I do not think this answers the difficulty. The plea in paragraph 8 is not just that he had entered with their consent, but that he had been a licensee "since 2009". It necessarily follows that the case there put forward is that he was still a licensee in 2021 when the claim was brought. For the reasons I have sought to give

that seems to me inconsistent with the assertion that he was then, and had been for 15 years, in adverse possession.

82. I would therefore dismiss Ground 2 as well.

Conclusion

83. The Judge was in my judgement right to allow the appeal from DDJ Corscadden on the ground that the draft pleading was unsatisfactory as it was internally self-contradictory, and entitled to take the view that the appropriate course was to disallow the pleading in its entirety rather than give permission for some unformulated amendment.

84. I would however endorse her comment that the solution for the Defendants is to put forward a properly formulated and sustainable amendment. I think it would be profoundly unsatisfactory if the case were to be decided on the basis of the current Defence, which everyone accepts is deficient. The factual case that Mr Fraine and the other Defendants wish to advance is tolerably clear: it is that Messrs Maloney and Quinn, as agents for Mrs Healey, told him he could have the house and he spent large amounts of money on it on the basis of that understanding. If he can make out that factual case it would appear to be a straightforward case of proprietary estoppel, although the question of what relief should be given to give effect to the equity would remain open to debate. The question of adverse possession seems to me, as indeed Mr Grant submitted, an unnecessary distraction which is neither necessary nor sufficient to enable Mr Fraine to establish his defence. It is not necessary because if he has the benefit of an estoppel, he does not need to also establish that he was in adverse possession; it is not sufficient because if he does not have the benefit of an estoppel – for example if he fails to establish that Messrs Maloney and Quinn told him he could have the house, or if he fails to establish that they were acting as Mrs Healey's agents in doing so – adverse possession will not in the circumstances amount to any defence. Nor do I see that it is necessary for the estoppel case to plead that Mr Fraine was a licensee, which again has proved something of a distraction from the real issues.

85. It is not a matter for us, any more than it was for the Judge, to give permission in advance for a further iteration of the pleading which we have not seen, but I would not myself wish to encourage any suggestion that it is too late for the Defendants to have another attempt at putting their case in order. Pleadings are intended to aid in the just resolution of disputes, not to prevent them being resolved justly, and in the present case although the proceedings have been on foot for some time they are in any event some way from being ready for trial. I think the Court ought to be inclined in those circumstances to look favourably on a pleading which succinctly identified the factual issues for trial.

86. For the reasons I have given however I would dismiss the appeal.

Lord Justice Popplewell:

87. I agree.

Lord Justice Males:

88. I also agree.