flooring company was held to owe a duty of care to the building owner, because the owner *nominated* it as specialist sub-contractor. *Junior Books* survived being overruled in *Murphy* v. *Brentwood District Council* [1991] 1 A.C. 398, reinterpreted as falling under the *Hedley Byrne* principle.

There are perhaps two main reasons underlying the court's decision. The first is the fact that Appleton himself has the primary claim against El-Safty, for his own personal injury. The problem is not double-recovery (since WBA and Appleton suffered different losses), but the courts' fundamental reluctance to depart from the general rule that negligently causing personal injury to X does not support a subsidiary duty of care to Y for financial loss. Judicial tinkering with this rule invariably causes problems, as with the so-called "principles" applied to secondary victims of psychiatric harm. If Appleton really was WBA's property (like a slave in Roman law times) the case would be simple, but English law must of course eschew this analysis. As Rix L.J. put it, "reference to WBA's players as being Club assets … is ultimately nothing more than a metaphor. Race-horses cannot have contracts with their vets and do not consent to treatment".

Secondly, the availability of insurance is crucial. It is commonplace for premiership clubs to take out "disablement insurance", which pays the club in the event of serious injury to a player, and therefore it is reasonable to expect this. Moreover, even though WBA did not appear to have the benefit of insurance, a finding in their favour would in future have permitted *subrogated* claims by insurance companies against advisers like El-Safty. Overall, it is a pity that WBA, now relegated out of the big-money premiership, have decided not to appeal to the House of Lords, but the Court of Appeal decision reminds us, once again, that the contract / tort border is a fascinating place to study.

JANET O'SULLIVAN

ADVERSE POSSESSION AND "PALM TREE" JUSTICE

IN *Tower Hamlets L.B.C.* v. *Barrett* [2005] EWCA Civ 923, [2006] 1 P. & C.R. 9, Mr and Mrs Barrett were the tenants of the Palm Tree public house in Mile End. The pub was next to a demolition site of which the Council was the registered proprietor. Since 1977 the Barretts had established their possession over the site by treating it as their own. They believed, wrongly, that the freehold in it belonged to their landlord and that it was included in their lease. They later

acquired the freehold reversion of the pub through their intermediate and head landlords.

In 2003 the Council sought to recover possession of the site on which the Barretts had encroached. Rejecting the Council's claim (which was brought under the now superseded regime of the Land Registration Act 1925), the Court of Appeal held that its title was extinguished by at least 12 years' adverse possession of the site by the Barretts. They could take advantage of the rebuttable presumption of fact in *Kingsmill* v. *Millard* (1855) 11 Ex. 313 that a tenant who adversely possesses land adjoining the leased premises intends to hold it for his landlord's benefit. The tenant's adverse possession of the encroachment creates a possessory freehold title to it in the landlord. The Barretts could therefore combine their later period of adverse possession as freeholders with the earlier period which they had earned for the landlords who assigned the freehold reversion to them. Together these were enough to bar the Council's title.

Barrett resolves two important aspects of the presumption that were in doubt and does much to explain its operation. It confirms that the presumption applies when the land encroached upon belongs to a third party, and that the freehold possessory title vests in the landlord as soon as the paper owner's title has been barred by lapse of time.

Cases where the tenant encroaches on a third party's land seem to be rare. More commonly, the tenant encroaches on adjacent land belonging to the landlord. Here the presumption tends to reflect the real intention of the parties. The tenant often treats the encroachment as an extension of the land actually included in his lease, or, at least, it can realistically be said that he could not have used the encroachment if the landlord had not first let him into possession of the leased land: *Whitmore* v. *Humphreys* (1871) L.R. 7 C.P. 1, 4-5 *per* Willes J. The effect of the presumption has been explained as operating like an estoppel between the landlord and tenant: *Perrott (J.F.) & Co.* v. *Cohen* [1951] 1 K.B. 705, 708, 710 *per* Somervell and Denning L.JJ.; *Batt* v. *Adams* [2001] 2 E.G.L.R. 92, 96 *per* Laddie J. The tenant cannot justifiably withhold the encroachment from the landlord when the lease determines, nor can he deny that his duties under the lease (such as a covenant to repair) also make him liable to the landlord for his use of the encroachment.

But when, as in *Barrett*, the tenant encroaches on a third party's land it is harder to explain why a presumption about the tenant's intention as against his landlord should have any bearing in a dispute between the third party and the tenant or landlord. *Barrett* explains why it does: the third party's right to recover possession of the encroachment is barred by 12 years' continuous dispossession, rather than by 12 years' continuous possession by either the landlord or the

tenant: [2006] 1 P. & C.R. 9, at para. [36] *per* Neuberger L.J. Provided that this period of dispossession is proved against the third party, it is irrelevant to his claim whether the better freehold title to the encroachment is in the landlord or the tenant. The relative strength of the landlord's or tenant's respective rights to possess the encroachment is immaterial to the third party. His claim to recover the land fails for the negative reason that he simply has no title to sue upon.

What, however, of the converse case where the landlord positively seeks to rely on the presumption to enforce his title to the encroachment against the third party? He might, for example, rely on it in an application to rectify the land register so that it records him as the proprietor of the encroachment instead of the third party. This happened in *Batt* v. *Adams* [2001] 2 E.G.L.R. 92. On the face of it, it might be thought that there is no reason why the presumption should bind a third party to the landlord and tenant relationship: *ibid.*, 96 per Laddie J. *Barrett* confirms that even here the landlord can rely on the presumption to prove his possessory title against the third party. If the third party argued that the presumption could not bind him and that as between the landlord and tenant the better right to possess the encroachment was in the tenant who had actually been in possession, he would effectively be pleading a *jus tertii* to defeat the landlord's application for rectification. Orthodox property reasoning holds such an argument to be bad. It has long been settled that a person can only resist another's claim to possession of land by proving that his own title is positively stronger than the claimant's rather than by pointing to the weakness of the claimant's title, relative to that of a third person who is not joined as a party to the action: see Fox [2006] C.L.J. 330.

As to the time when the possessory freehold vests in the landlord, *Barrett* seems right to hold that it vests as soon as the limitation period elapses: [2006] 1 P. & C.R. 9, at paras [90]-[92]. This puts paid to the contrary view that the possessory freehold only vests in the landlord once the tenant's lease expires: *cf. Batt* v. *Adams* [2001] 2 E.G.L.R. 92, 99 *in arg*. "The ownership of land should not … be in limbo": [2006] 1 P. & C.R. 9, at para. [90] *per* Neuberger L.J. While there may be evidential uncertainty during the term of the lease whether or not the presumption applies and whether the freehold of the encroachment vests in the landlord or in the tenant, this need not lead to the conclusion that the ownership of the land is in abeyance until that uncertainty is resolved in favour of one or other of them. A court's finding of fact always applies retrospectively, however difficult it might have been to predict which of the alternative findings it would actually make. The court simply declares what was the true state of affairs at the time.

D.M. Fox