CA on appeal from Newport (IOW) CC (Mr Recorder Murphy) before Mummery LJ; Scott Baker LJ; Sir Charles mantel. 4th April 2006.

Lord Justice Mummery :

The dispute

1. This dispute is between a tenant, Mr Aynsley Munt, and his landlord, Mr Richard Beasley. They are neighbours living in a two storey freehold house converted into two separate self-contained flats. Mr Munt is the current owner of a long lease of the first floor flat. Mr Beasley lives directly underneath in the ground floor flat. He is the freehold owner of the house.

2. The main disagreement is about the loft at the top of the house. At his own expense Mr Munt has converted the loft to provide himself with additional accommodation. In his defence to the action for trespass, for forfeiture of the lease and damages for breach of covenant brought by Mr Beasley Mr Munt asserted that the loft
   (a) was included in the lease of the first floor flat (the construction issue); or
   (b) ought to have been included in the lease (the rectification claim); or
   (c) ought now to be treated as if it were included in the lease (the proprietary estoppel claim)

3. Although the relevant facts are short, the legal arguments are not: they have ranged over a wide field covering the construction of the lease, rectification, proprietary estoppel, forfeiture for breach of covenant, waiver of breach and damages for trespass in lieu of injunction.

The appeal

4. Unfortunately, the first instance judgment is defective: it fails to make clear findings of fact on issues that were fully pleaded and argued and inadequate reasons are given for key rulings against Mr Munt. The overall outcome of the action is unsatisfactory for both parties. The result is neither just nor practical. Criticisms of case management aspects of the case are also made by Scott Baker LJ, with whose judgment I agree.

5. The appeal is from the order of Mr Recorder NJ Murphy (who is also a District Judge) dated 7 September 2005, the trial having taken place on 10 and 11 February and 23 May 2005. He heard evidence from 7 witnesses in addition to the parties. There was a written report on valuation questions from a joint expert (Mr Shaun Woolford, a surveyor). His evidence was that incorporating the loft into the first floor flat had added about £7,500 to its value. That amount was exceeded by his estimate of the cost of converting the loft.

6. The recorder's reserved judgment is dated 20 July 2005, but, as explained by Scott Baker LJ, it was not delivered to the parties until 8 September 2005. He gave judgment for Mr Beasley for a total sum of £9,000 (£7,500 for trespass and £1,500 for noise) and dismissed Mr Munt's counterclaim for rectification and damages, but he granted relief from forfeiture. By an order of 9 December 2005 (following an application under the liberty to apply in the earlier order) he ordered Mr Munt to pay 50% of Mr Beasley's costs.

Outline facts

7. Mr Beasley is the owner of the freehold of 5 Hilton Road, Gurnard in the Isle of Wight (the Property). Immediately prior to March 1991 Mr Beasley converted the Property into a ground floor flat (called No 5), and a first floor flat (called No 5A).

8. By a lease dated 18 March 1991 (the Lease) Mr Beasley granted to Mr Munt's predecessors in title, Mr & Mrs Rowley, a term of 99 years from 1 March 1991 in No 5A at a premium of £38,450 and at an annual ground rent of £25. The sales particulars of the estate agents (Crockers of Cowes, IOW) described the landing in No 5A as having "Access into loft space," but the Lease itself made no express mention of the loft space nor is it shown on the plans attached.

9. In their evidence for Mr Munt at the trial Mr & Mrs Rowley said that they believed that the Lease included the loft area beneath the roof of the Property, to which access could only be gained through an opening in the ceiling of the landing of No 5A leading into the loft. Although they only used the loft for storage purposes, they contemplated extending the living space of No 5A into the loft. They understood from conversations with Mr Beasley that he was at one with them about the extent of the premises included in the Lease and that he would have no objection to extending the living space within No 5A if they

embarked on it. The estate agents particulars prepared by Marvins (of Cowes IOW) on their behalf when they came to sell No 5A in 1997 mirrored their genuinely held belief about the loft. The sale particulars of the first floor flat described the landing in No 5A as having "Access to large roof space with possibility of loft conversion to form extra accommodation."

10. Although the recorder made adverse findings about the credibility of Mr Munt's evidence at trial, he made no adverse findings about the credibility of the Rowleys and does not appear to have rejected any of their evidence.

11. In December 1997 Mr & Mrs Rowley assigned the Lease to Mr Munt for £32,500. He lived there until 2004. Mr Beasley lived down stairs in No 5 throughout. Between 1999 and 2003 Mr Munt converted the loft into living accommodation, including the construction in 2001 of a permanent staircase to the loft on the landing of No 5A.

12. Although Mr Beasley's evidence was that "Mr Munt made his life miserable with his constant DIY projects" and that he was aware that he had put some flooring in the loft, there was no evidence that he objected to Mr Munt about the loft works before February/March 2003.

13. The solicitors' correspondence shows that there were "subject to contract" negotiations between the parties from December 2002 for the sale of the Property to Mr Munt for just under £75,000. Mr Beasley was looking for suitable rented accommodation, but later decided not to proceed with the sale.

14. Mr Beasley first raised objections to the conversion in February/March 2003. On 20 March 2003 a mediation meeting between the parties was held at the Newport Law Centre arranged by IOW Independent Housing Advice, but no agreement was reached settling the dispute about the past and future works to the loft. According to the notes of the meeting concerning the loft Mr Beasley admitted that he had given verbal permission for the loft conversion and the staircase, but after the event and under duress. The first solicitor's letter alleging that the conversion of the loft was without permission and alleging trespass and breaches of covenant was sent on 23 April 2003. The proceedings were issued on 5 April 2004. Mr Munt went on doing works to the loft after receiving letters of protest from Mr Beasley's solicitors.

The judgment

15. The recorder held Mr Munt liable for trespass and breach of covenant and decided that Mr Beasley was entitled to substantial damages and to forfeiture of the Lease, but granted relief against forfeiture on payment by Mr Munt of the total of £9,000 damages awarded to Mr Beasley.

16. The main issues argued before him were whether the loft was included in the Lease, what Mr Munt did when he carried out the conversion; and whether Mr Munt acted in breach of covenant in converting the loft. There were other disputes as to the manner in which Mr Munt used No 5A, whether Mr Beasley knew of the works carried out by Mr Munt and whether he had waived his rights in respect of them. There was also a dispute as whether there was a breach of covenant by Mr Beasley in respect of exterior repairs and what Mr Munt spent on guttering and fascia work done by him.

17. In his judgment the recorder found that the conversion of the loft by Mr Munt involved maiming, injuring structural parts, roofs or walls and making structural alterations and additions. He found that Mr Beasley gradually became more and more aware that there was an extension, or that extension was being continued, and he would have seen evidence of it when he visited No 5A.

18. The recorder concluded, however, that the loft was not included in the Lease, that no case had been established for rectification of the Lease so as to include the loft, and that Mr Beasley had not waived, and was not estopped from enforcing, his right to claim trespass and breach of covenant by Mr Munt.

Permission to appeal

19. On 14 October 2005 and 31 January 2006 Lloyd LJ granted permission to appeal on numerous grounds. As they are an indication of the extent of the concern about the recorder's judgment I will list all the main grounds before dealing with them individually.

    1) **Credibility of the parties**. The recorder preferred the evidence of Mr Beasley, but it is contended that the reasons given by him are so inadequate that Mr Munt is unable to understand why he was regarded as a less credible witness.

2) **Assessment of damages in lieu of an injunction**. The recorder awarded Mr Beasley £7,500 for trespass and breach of covenant. The amount was related to the increase in value of the Lease if the loft was incorporated in it. It is contended that the recorder erred in his assessment of quantum.

3) **Construction of the Lease.** The recorder held that the loft was not included in the Lease. It is contended that the roofspace and/or the roof were included in the Lease and that the conversion of it by Mr Munt was not a trespass.

4) **Rectification.** The recorder refused rectification of the Lease on the ground that there was no convincing proof of an "outward expression of accord" that No 5A should include the loft. It is contended that this conclusion was not open to him on the evidence and involved an error of law.

5) **Adverse possession**. The recorder held that the use of the loft by the Rowleys "for storage purposes" between 1991 and 1997 did not show the required intention to possess the loft exclusively. It is contended that the Rowleys were in possession of the loft and that their possession was sufficient to count and could be relied on by Mr Munt for the purposes of the Limitation Act 1980.

6) **Forfeiture.** The recorder held that Mr Beasley was entitled to forfeit the Lease for breach of covenant pursuant to the section 146 notice served on 12 September 2003, but relief against forfeiture should be granted on condition of the payment by Mr Munt of damages totalling £9,000. It is contended that Mr Beasley had waived the right to forfeit and that, in rejecting waiver, the recorder overlooked material evidence and misdirected himself as to the terms of the Lease.

7) **Acquiescence and proprietary estoppel**. The recorder held that Mr Munt failed to establish reliance on anything done by Mr Beasley. The marketing particulars were prepared on the instructions of the Rowleys, not by Mr Beasley. The recorder held that the elements required for proprietary estoppel were not established by the evidence. It is contended that the rejection of Mr Munt's case on proprietary estoppel was inconsistent with the findings of fact and was unsupported by adequate reasons.

8) **Damages for nuisance by noise**. The judge awarded £1,500 for noise in the form of audible music between 11pm and 8am over a long period and from the floor of the flat being uncarpeted. It is contended that the award was wrong in law, was arithmetically inaccurate and was unsupported by evidence.

9) As to the future use of the loft, the recorder, having ordered substantial damages in lieu of an injunction, left uncertain the legal basis of Mr Munt's continuing beneficial use of the loft. He failed to clarify the nature of Mr Munt's proprietary interest, if any, in the loft and whether the loft was to be treated as incorporated in the Lease or was occupied by Mr Munt on a purely personal basis. This uncertainty affected the value and marketability of the Lease.

A. Credibility

20. Mr Morshead, who appeared for Mr Munt, put his criticisms of the recorder's treatment of the parties' credibility at the forefront of his grounds and his detailed written submissions, but he rightly recognised that it is not the crucial point on this appeal.

21. The recorder had treated credibility of the evidence given by the parties as "overriding all the issues" and as going to the heart of the case. That is an exaggeration. Credibility is not in fact equally relevant to all the issues, in particular the construction issue and the rectification issue. The recorder then held that the evidence of Mr Beasley was to be preferred to that of Mr Munt. Mr Morshead argued by reference to the trial transcripts that in no less than 8 respects the recorder failed to use, or had misused, his advantage of having seen and heard the witnesses and had failed to stand back and weigh the overall probabilities of the situation. The disruptions and delays in the trial and the preparation of the judgment may have contributed to the recorder's failure to deal properly with material evidence. This was, he submitted, one of those exceptional cases in which an appellate court would be justified in interfering with the trial judge's evaluation of, and conclusion on, the primary facts. There were demonstrable errors and oversights in his judgment, which undermined his finding on credibility of the parties. The finding was unsupported by adequate reasons and was plainly wrong: **Assiccurazioni Generali Spa v. Arab Insurance Group** [2003] 1 WLR 577 at paragraph 12.

22. The problem with this ground of appeal is not its lack of substance. Indeed, I think that Mr Morshead's detailed criticisms of the finding on credibility are well founded, but they raise the appalling possibility of a re-trial of the entire case. If credibility of the parties on certain issues really affected the overall outcome of

the case, it would be impossible to avoid a re-trial. This court could not make different findings of fact based on a different view of the credibility of the parties.

23. A re-trial is not, however, a realistic proposition. The costs position is already so grave that a serious doubt exists as whether a re-trial would, if ordered, ever take place. Mr Munt's costs are in excess of £40,000. I am not surprised to learn from his counsel that he cannot afford a re-trial. He has been ordered to pay 50% of the costs of Mr Beasley, who is publicly funded.

24. In these circumstances I should examine all the other grounds of appeal in order to see if it is possible to avoid a re-trial.

B. Construction of Lease

25. Mr Morshead submitted that the recorder should have construed the Lease to include the loft and/or the roof. If that is correct, Mr Munt would not have been liable for trespass or breach of covenant in relation to conversion works in the loft and in No 5A.

26. No 5A is described in clause 1 as including (among other things) all internal non-load bearing walls and all the floors and ceilings of the Flat and in the First Part of the First Schedule to the Lease as the *"Flat Number 5A being on the first floor of Number 5 Hilton Road…TOGETHER with the entrance door and stair case on the ground floor and leading to the first floor more particularly delineated and shown in and by plans 1a and 1b annexed hereto and thereon edged red.."*

27. Although the roof of the building is mentioned both in the tenant's covenants and in the landlord's covenants, the loft situated between the roof of the house and the ceiling of No 5A is not mentioned in the Lease nor on the annexed plans prepared by Mr Beasley.

28. A lease should be construed on the principle that the extent of the parcels depends on the wording of the lease read in the context of the circumstances of the property. The circumstances include evidence of the state and condition of the property at the date of the grant of the Lease: see Vol 27(1) Halsbury's Laws of England (4th edition Reissue) paragraph 133. Background knowledge reasonably available to the parties would be relevant to ascertaining the extent of the premises demised.

29. In this case it was pointed out by Mr Morshead that access to the loft via the hatch opening in the ceiling of No 5A dated from the time before the Property was converted. The only means of access to the loft was then included in the upper floor flat on the grant of the Lease. In those circumstances it was extremely improbable that the intentions of Mr Beasley and the Rowleys were that Mr Beasley should retain beneficial ownership of a loft, to which he could only gain access via the landing and ceiling of No 5A. He might wish to retain a limited right of access to the loft for certain purposes, such as inspection of and repair to the roof, but there was no sensible reason for his retaining beneficial ownership of the loft: see **Graystone Property Investments Ltd v. Margulies** (1983) 47P & CR 472 at 478 per Lord Griffiths.

30. In addition to this powerful pragmatic point Mr Morshead relied on evidence from the Rowleys and from Mr Beasley himself that, at the time of the grant of the Lease, they all believed that the loft was included in the Lease of No 5A. This was reinforced by the estate agent's particulars. Mr Beasley continued to believe that the loft was included in the lease until he sought his solicitor's advice about the dispute with Mr Munt. His solicitors Robinson, Jarvis & Rolf, sent a letter to Mr Munt dated 7 May 2003 objecting to Mr Munt's work on the loft space and asking him to desist from carrying out further work and from making any use of it, saying that he had "no right whatsoever to use the loft space", that Mr Beasley had never given him any permission to carry out work in the loft space or to use it for any purpose and that *" ..until we advised him of such, our client tells us that he was not aware that the loft space did not form part of the premises demised to you under the Lease. Therefore, he had no reason for believing you needed his permission to use the loft space."*

31. The evidence of their belief is significant in the case, but it is, in my view, probably more relevant to the claim for rectification of the Lease than to the construction of it.

32. The construction question is not an easy one. Common sense supports Mr Munt. The language of the Lease supports Mr Beasley. On balance I think that the recorder was legally correct in holding that the Lease did not include the loft. The Lease was of the flat "on the first floor." While I would agree that the expression is not a term of art, the fact is that the loft was not on the first floor where No 5A was situated. It was above the ceiling of No 5A. It is true that the plans of the flats drawn by Mr Beasley refer to the "upstairs flat" and

to "the upper and lower flat" rather than to the "first floor flat", but the loft is not shown or mentioned on them nor is the roof. I very much doubt whether the omission of the loft was deliberate. It is more probable that the omission was the result of a mistake or oversight in documenting the agreement of the parties. If the latter, the availability of rectification of the Lease, to which I now turn, is all important.

C. Rectification

33. Mr Munt counterclaimed for rectification of the Lease by the addition of the words *"(including the loft space immediately below the roof)"* after the words "Isle of Wight" in the First Part of the First Schedule to the Lease. It was pleaded that the initial agreement between Mr Beasley and the Rowleys for the grant of the Lease included the loft, that they intended and believed that the Lease subsequently executed should and did so provide, that it was their common intention and belief continuing up to the grant of the Lease that No 5A should include the loft and that if, on its true construction, the Lease did not include the loft then the Lease should be rectified. In the defence to counterclaim it was pleaded that there had not been any relevant mistake which would entitle Mr Munt to an order for rectification of the Lease.

34. The recorder referred to the elements of a claim for rectification stated in **Swainland Builders Ltd v. Freeland Properties Ltd** (2002) 2 EGLR at 74 paragraph 33. The recorder concluded that Mr Munt had not discharged the burden of proving the elements necessary to show that the Lease did not reflect the mutual intention of Mr Beasley and Mr & Mrs Rowley. He said *"The proof of outward expression of accord needs to be convincing and I do not find that it is. The particulars refer to "Access into loft space" but loft space is not accorded a place in the particulars such [as] landing, lounge etc, nor is it put in capital letters as one might expect if a distinct part [is] being let or included. Mr and Mrs Rowley assert they understood and believed that the Claimant similarly understood that the loft space was included but there is no evidence of any actual expression of accord at the time that the instrument was executed and Mr and Mrs Rowley did nothing about having the lease rectified while they were living at 5A for many years. The belief of the Claimant (set out in the letter of [7] May 2003) is no more than an expression of belief (he now says mistaken) but is not reflected in any outward expression of accord preceding or contemporaneous with the lease."*

35. I am unable to accept this reasoning as justifying the rejection of Mr Munt's rectification claim. "Access into loft space" is expressly mentioned in the part of the sales particulars relating to the landing in No 5A. The sale particulars, which were prepared by Mr Beasley's agents and relied on by the Rowleys, are, in my judgment, sufficient to satisfy any legal requirement of an "outward expression of accord" to include the loft in the Lease of the first floor flat. On Mr Beasley's own evidence his belief was that the Lease included the loft. The Rowleys gave evidence of their belief that the loft was included. The fact that they did not seek rectification is neither here nor there. They had no reason for seeking rectification of a Lease which both they and Mr Beasley believed included the loft space to which access could only be gained through the opening in the ceiling of No 5A.

36. I would also accept Mr Morshead's submission that the recorder was wrong to treat *"an outward expression of accord"* as a strict legal requirement for rectification in a case such as this, where the party resisting rectification has in fact admitted (see the solicitors' letter of 7 May 2003) that his true state of belief when he entered into the transaction was the same as that of the other party and there was therefore a continuing common intention which, by mistake, was not given effect in the relevant legal document. I agree with the trend in recent cases to treat the expression *"outward expression of accord"* more as an evidential factor rather than a strict legal requirement in all cases of rectification: see **Gallaher v. Gallaher Pensions Ltd** [2005] EWHC 42 (Ch) at paragraphs 116-118; **Westland Savings Bank v. Hancock** [1987] 2 NZLR 21 at 29, 30; and **JIS (1974) Ltd v. MCP Investment Nominees Ltd** [2003] EWCA Civ 721 at paragraphs 33-34;cf **Frederick E Rose (London) Ltd v. Wm Pim & Co Ltd** [1953] 2 QB 450 at 462 per Denning LJ and **Swainland Builders Ltd v. Freeland Properties Ltd [**2002] 2 EGLR at 74.

37. In my judgment the case for an order for rectification is clearly established. I would order rectification of the Lease as sought by Mr Munt (see paragraph 30 above). The order will have retrospective effect so that the Lease will be read as if it had always included the loft.

D. Proprietary estoppel

38. Mr Munt alleged in his defence that he acquired the unexpired term of the Lease on 19 December 1997 in reliance on the marketing particulars mentioned above and that, soon after acquiring No 5A, he did

various works to and in connection with the loft: installing a velux roof light in 1998 to give light to the loft, buying and fitting a loft hatch ladder, completing decking of the loft's floor area, building stud walls in the loft, and installing sound insulation below the loft and installing electric power points and spot lights. He also removed the cold water storage tank (which served only No 5A) from the loft as part of the installation of central heating in the flat in March 2000. In 2001 he substituted a wooden staircase on the landing of No 5A for the loft hatch ladder. He pleaded that Mr Beasley knew or ought to have known of the works, as throughout their duration he was living immediately below No 5A and he was informed by Mr Munt that he had moved his main music playing equipment into the loft and put insulation below the loft flooring area. This lowered the noise levels for which Mr Beasley expressed gratitude and raised no objection. Mr Beasley had also visited No 5A sometime before 2003 to discuss a water leak and had seen the staircase to the loft added in 2001, but had raised no objection.

39. Mr Munt also alleged that in late March 2003 he informed Mr Beasley of his proposals to undertake further works to strengthen the ceiling/loft floor area, install soffit vents and to install 2 further roof lights in November 2003. According to Mr Munt Mr Beasley raised no objection and said he should get on with them as soon as possible. Mr Munt completed the conversion works by the end of the year.

40. The defence and counterclaim pleaded that it would be inequitable for Mr Beasley to deny that the loft formed part of No 5A, in view of his words, conduct and omissions which represented to Mr Munt and his predecessors that the loft formed part of the flat, that he had acquiesced in the use of the flat by Mr Munt and his predecessors and that Mr Munt had relied on the representations and acquiescence to his detriment in undertaking the works.

41. In his judgment the recorder dismissed the pleaded proprietary estoppel claim by simply saying that he was "unable to discern from the evidence any aspects which would establish the required elements for the purpose of the rule set out by Mr Justice Oliver in **Taylor Fashions Ltd v. Liverpool Victoria Trustee Company Ltd ..**"

42. There is considerable force in Mr Morshead's complaint that the recorder rejected the pleaded claim without making relevant findings of fact, without giving adequate reasons and without explaining the effect on the right to occupy the loft of his decision awarding substantial damages for trespass in lieu of an injunction. He made no detailed findings as to the various stages in which the conversion works were done nor did he attempt to explain why the requisite elements of the doctrine were not established.

43. Fortunately, from the viewpoint of avoiding a re-trial, there were sufficient, though scattered, findings of fact which, taken together with the Rowleys' evidence, establish, contrary to his view, a case of proprietary estoppel. As I pointed out earlier, the recorder made no adverse finding about the Rowleys' credibility when summarising their evidence that, as reflected in the estate agent's particulars, they genuinely believed that the Lease included the loft, that they used it for storage when they lived in No 5A and that they understood from conversations with Mr Beasley that he had no objection to extending living space within the loft of they embarked on it He found that Mr Munt carried out " invasive work" in the loft before, as well as after, 20 March 2003 when the mediation meeting took place. Mr Beasley "did gradually become more and more aware that there was an "extension" or extension was being continued." (One of Mr Beasley's complaints against Mr Munt was his DIY work in No 5A from the start of his occupation.) Mr Beasley would have seen evidence of such when he visited No 5A. Though living next door under the same roof Mr Beasley made no complaint about the works until February/March 2003. The recorder noted that Mr Beasley "believed that the loft space was included in No 5A." He found that Mr Beasley was "made aware that the Defendant had moved his music system from the 1st floor to the loft space." He found that Mr Beasley hoped for "a quiet life" and "was likely to have indicated concurrence about matters when in fact he did not concur or agree at all." It was unconscionable of Mr Beasley to leave it until February/ March 2003 to assert that the Lease did not include the loft and that Mr Munt's conversion and use of the loft was a trespass and breach of covenant .

44. The application of the proprietary estoppel doctrine as expounded in **Taylor's Fashions** and as summarised in Snell's Principles of Equity (31st edition) paragraphs 10-16 to 10-27 resolves the problems both about the effect of the award of damages in lieu of an injunction and about the future continued beneficial use of the loft. The doctrine applies even though Mr Beasley did not realise that the loft was his

before he took legal advice in the Spring of 2003. Such knowledge is not required if the circumstances are such that it would be unconscionable for Mr Beasley to rely on his legal rights to the loft. It would be unconscionable in this case, as Mr Beasley acquiesced in the works and Mr Munt suffered detriment in executing them in the belief that the loft was included in the Lease.

45. In my judgment, if I am wrong on the rectification issue, Mr Beasley is estopped from denying that the loft area is subject to the lease and that the lease is to be treated as if it included the converted loft, so that Mr Munt and his successors in title are entitled to it as part of the demised premises on this ground, quite apart from an order for rectification of the Lease. That relief is proportionate to the detriment suffered by Mr Munt. The suggestion by Mr Garrood that Mr Munt ought on payment of the damages (without deduction of the costs of conversion) to enjoy only a personal right of immovability from the loft and the status of a "tolerated trespasser" akin to a non-transferable licence to occupy is not proportionate to the expenditure of money and time on the conversion.

46. As explained below, the claims for trespass and breach of covenant cannot stand if, in the light of the order for rectification and/or the application of proprietary estoppel, the loft is subject to the Lease of No 5A and Mr Beasley is estopped from objecting to the works of conversion to and use of the loft.

E. Adverse possession

47. The recorder rejected Mr Munt's defence of adverse possession of the loft since 1991 on the ground that the acts relied on were insufficient for the purposes of the Limitation Act 1980 as interpreted in **JA Pye (Oxford) Ltd v. Graham** [2003] 1 AC 419 at paragraph 41. Between 1991 and 1997 the Rowleys only used the loft "for storage purposes." He said that he did not find that that use *"constituted dealing with the loft space in such a manner befitting of an occupying owner nor did it show the required intention to possess the loft space exclusively."*

48. The recorder was criticised by Mr Morshead for not applying the correct legal test for factual possession, which was whether the use of the loft was *"as an occupying owner might be expected to use it while no-one else has done so":* see **Wretham v. Ross** [2005] EWHC 1259 (Ch) at paragraph 22. The point was that, while the loft was in its unconverted state, it was only suitable for storage and that was how it would be commonly used by its legal owner. The acts of the Rowleys could amount to exclusive legal possession of the loft without them having to go to the lengths of converting it as Mr Munt did. Mr Morshead challenged Mr Garrood's submission that the Rowleys' use of the loft should be attributed to an easement of storage

49. Further, he submitted that it was not necessary, as the recorder said, for Mr Munt to establish an intention to possess the loft exclusively. It was sufficient to show that there was factual possession and the necessary intention to possess for more than 12 years before Mr Beasley began proceedings on 5 April 2004.

50. In view of the conclusions I have reached on the rectification and proprietary estoppel issues it is unnecessary to express a concluded view on the recorder's reasons for rejecting the defence of adverse possession.

F. Breach of covenant

51. In my judgment the claims for forfeiture and breach of covenant are not maintainable if, as I would hold, the Lease should be rectified so that it was always included the loft and/or the court holds that Mr Beasley is estopped by his conduct from denying that Mr Munt was entitled to do the works that he did. For the reasons already given Mr Beasley was estopped by March 2003 from denying that the loft was part of No 5A and of relying on the works already done and acquiesced in as breaches of covenant giving rise to a claim for damages or forfeiture.

52. As for works done by Mr Munt after that date despite Mr Beasley's objections, they were mainly done to the roof, for example the installations of the two additional velux windows. Mr Morshead correctly submitted that such works were not a breach of clause 3(7) relied on by Mr Beasley, as that covenant was confined to works to the flat No 5A and the works in question were to parts of the Property not included in the first floor flat. No findings were made by the recorder as to any other un-remedied breaches.

53. As to any further works done to the loft after March 2003 I would hold that Mr Beasley's claims cannot be maintained by reason of rectification of the Lease. I would also hold that his acquiescence down to that

date, as a result of which it was unconscionable for him to deny that the loft was part of No 5A, means that it is too late for him to object to loft conversion works by Mr Munt.

G. Damages

54. Mr Morshead criticised the award of £7,500 damages in lieu of an injunction on the basis that the recorder had simply taken the figure from the expert's report without taking account of the costs of the works or of the fact Mr Munt had made no profit from the conversion and without regard to the price which might reasonably be demanded by Mr Beasley for granting permission for the conversion works: **Jaggard v. Sawyer** [1995] 1 WLR 269 at 281-282.The sum awarded bore no relation, he submitted, to the losses suffered by Mr Beasley or to the net gain made by Mr Munt.

55. In view of my conclusions in Mr Munt's favour on the rectification and proprietary issue it is unnecessary to express a final view on this point save to say that the arguments are cogent.

Counterclaim relating to exterior repairs

56. The recorder dismissed Mr Munt's counterclaim for £283.50 in respect of the balance of expenditure for exterior repair works undertaken by him to guttering and fascia work. Mr Munt alleged that the works were the responsibility of Mr Beasley under the repairing and re-decoration covenant in clause 5(1) of the Lease, but, as he had done the works, Mr Beasley was liable to contribute ½ the cost. Mr Beasley had only paid him £600. According to Mr Munt the total cost of the work was £2067, but he had reduced the figure to £1767, making Mr Beasley's share £883.50. Liability was denied by Mr Beasley and he put Mr Munt to proof of the need for exterior works.

57. The recorder dismissed the counterclaim on the ground that a breach of covenant by Mr Beasley had not been proved and that there was no satisfactory evidence of expenditure by Mr Munt on guttering and fascia work (ie appropriate vouchers or paid invoices) "beyond £1200."Mr Morshead criticised the recorder for failing to take into account relevant evidence.

58. I would not interfere with the recorder's dismissal of this counterclaim. He was entitled to take the view that there was a lack of documentary evidence from Mr Munt proving expenditure of the full amount claimed by him.

Conclusion

59. The question of remitting the case to the county court for a re-trial does not arise. There are sufficient findings of fact in the recorder's judgment, which are unaffected by his finding on credibility, to enable this court to allow Mr Munt's appeal on the rectification issue and the proprietary estoppel issue. That disposes of the issues of breach of covenant, forfeiture and damages in lieu of an injunction.

60. I would allow the appeal to the extent of setting aside the order for damages for trespass and forfeiture and ordering the Lease to be rectified in the manner referred to in paragraph 30 above.

Noise

61. As for the award of damages for noise I have nothing to add to the judgment of Scott Baker LJ on that point. Mr Munt's appeal against the award of damages for noise is allowed only to the extent of substituting the sum of £1250 for the sum of £1,500.

Lord Justice Scott Baker:

62. I agree that this appeal should be allowed for the reasons given by Mummery L.J. I wish to add something on two matters.

Noise nuisance

63. In his particulars of claim Mr Beasley alleges that throughout Mr Munt's occupation of the flat he played music and/or otherwise caused unreasonable amounts of noise to emanate from the flat. There is a further claim that Mr Munt has failed to lay suitable floor covering and that this has caused noise, on a daily basis, to be transmitted into Mr Beasley's premises. The claim is made concurrently for breach of covenants in the Lease and in nuisance at common law.

64. The relevant covenants appear in the Third Schedule to the Lease. They are:

1. *"No act or thing which shall or may be or become a nuisance damage or annoyance inconvenience to the Landlord or any occupier of the Building or the neighbourhood shall be done or suffered to be done in the Flat or any part thereof….."*
2. *"No music or singing whether by instrument voices wireless gramophone television or other means nor any dancing shall be allowed in the Flat or the Building so as to be audible outside the Flat between 11pm and 8am.*
6. *"No person shall reside in the Flat unless the floor thereof is covered with carpet rugs or other similar materials except that the same may be removed for cleaning repairing or redecorating or for some similar temporary purpose."*

65. The judge's findings are at page 15 of his judgment under the heading: "In what manner did (Mr Munt) use 5A". He begins by referring to his previous conclusion that where there is a variance between the evidence of the Mr Munt and Mr Beasley he prefers that of Mr Beasley. Then he said: *"I find that the (Mr Munt) engaged in playing music so that it was audible to the (Mr Beasley) and did so after the time when the restrictions under the lease started. Further, whilst I accept that this was not done extensively – the (Mr Munt) was away for working periods – the suggestion by the (Mr Munt) that if there was any music or social gathering with music being played it was but occasional, I reject. As for the matter of carpets and floor coverings what was likely and the (Mr Munt's) attitude to his obligations is indicated by 20 March mediation notes where it records one of the (Mr Munt's) responses as "No carpets for some time –why raise now" and before that: "Floors sanded" The first of those responses is clear in its import, the second makes plain that the (Mr Munt's) preference was to have exposed floor boarding which necessarily would create noise and the provision of some rugs was never going to provide on its own, the "covering" of the floor.*

66. The judge expressed his conclusion on the value of the claim in economical terms. He said: *"As for the noise nuisance in fixing on a figure of damages. I take into account those factors (i) – (iv) set out in paragraph 16 of Mr Garrood's skeleton argument which are all pertinent. I assess the damages in this regard, at £1500 being 5 x £250."*

67. The first problem is that the judge's mathematics were awry because 5 x £250 = £1250 and not £1500. The second problem is that the judge gives no explanation why he has taken a multiplier of 5 or indeed any multiplier.

68. The points made in Mr Garrood's skeleton argument were these:
i) The noise nuisance was not the most serious but was significant and interfered with the respondent's use of his home.
ii) It was not continuous but was frequent and often at unsocial hours.
iii) It did not arise from normal or lawful user particularly given the breach of covenant as to the floor covering.
iv) It had continued since 1998 notwithstanding Mr Beasley's complaints.

69. Mr Garrood suggests, and this appears to be correct, that the multiplier of 5 represents a period between 1998 and 2002 when Mr Beasley sold his flat.

70. Like Mummery LJ I do not think the judge's preference for the credibility of the Mr Beasley as against Mr Munt – a finding reached without any explained rational basis – is sustainable. But in my judgment his conclusion on credibility is irrelevant to the noise nuisance claim because he made clear that the basis of his assessment was the four points set out in Mr Garrood's skeleton argument. It seems to me that those points broadly reflect the situation admitted by Mr Munt, albeit he denied there were any complaints.

71. Mr Munt's admissions in evidence included that he had taken part of the carpet up, sanded the floor and replaced it with part covering by rugs; that he was a disc jockey and had decks and amplifiers and that he had a few friends round from time to time. Also, he practised using the music he would use in night clubs although he did not play techno blast music. He practised mainly on a Saturday afternoon but sometimes in the evenings between 7pm and 9pm. It was louder than television but not a great deal. Further, he had an interest in doing D.I.Y work. The judge made no specific findings about complaints by Mr Beasley, other than that, by accepting the point in paragraph 16 (iv) of Mr Garrood's skeleton argument, there had been some.

72. In my judgment the judge was entitled, on the admitted admissions made by Mr Munt in his evidence, to conclude that he was in breach of the covenants of his Lease relating to noise. Bearing in mind the nuisance

was intermittent rather than continuous and that it was significant rather than in any more serious category a modest award was called for. On the basis that the conduct of which complaint is made occurred over a period of approximately 5 years I do not consider £1250 was outside the appropriate range. Subject to the mathematical correction I would not therefore disturb the judge's award on this aspect of the case.

Case management

73. This case reveals an unsatisfactory state of affairs which in my view is a poor advertisement for civil justice and it is to be hoped that it will not recur.

74. The trial started at noon on 10 February 2005 in the Southampton County Court before a district judge sitting as a recorder, (Mr Recorder Murphy). The case continued on the following day, 11 February. It was then adjourned part heard. Mr Beasley had given his evidence and Mr Munt was in the witness box part way through cross-examination. The trial did not resume for over 3 months until 23 May when two further days were set aside. In the event the second day was not required.

75. On inquiry we were told that the cause of the delay was not due to counsels' unavailability but due to the administration's inability to provide a court and the recorder. We were told that the Mr Recorder Murphy normally sits as a district judge in Winchester and that 23 May was the first date on which a court could be found. That date was given to the parties on 25 February. Worse, we were told by the Respondent's counsel that in his experience delays of this kind were "par for the course". If that is correct, there is something seriously wrong with the administration. I suspect that the fact that the recorder ordinarily sat as a district judge in Winchester whereas this case was initially heard in Southampton may not have been unconnected with the difficulties.

76. Be that as it may, delays of this kind during the course of a trial are inherently unsatisfactory especially when one side's evidence has been completed and the main witness for the other side is part way through his evidence. It is no answer that the district judge was booked to hear other cases or that court time or space was not available. The completion of this case should have been given priority and in my view it was up to the recorder to ensure that this occurred. In the event of apparently insuperable obstacles he should have taken the matter up with the Presiding Judge of his circuit.

77. Unfortunately the unsatisfactory state of affairs did not end on 23 May for the parties were not provided with a copy of the recorder's judgment until 8 September 2005, almost 7 months after the hearing had began and this in a case that had taken a little over 2 ½ days of court time. The recorder's typewritten judgment that is signed by him bears the date 20 July 2005. The judgment was accompanied by an order from the Winchester County Court bearing two dates, 20 July 2005 and 7 September 2005. There was also another order of the latter date transferring the proceedings to Newport (I.O.W.) County Court, the court in which they had began. It is not clear why, if he signed the completed judgment on 20 July, the court order bears the date 7 September 2005 and the parties did not receive a copy until 8 September. The appellant's counsel told us that there were regular chasing telephone calls to the court until the judgment was eventually received. Following receipt of the judgment the appellant on 23 September applied to the court under the liberty to apply in respect of the costs order. This was eventually heard by the recorder, sitting in Winchester on 6 December 2005 when he varied the order he had previously made.

78. In my judgment bearing in mind the long delay prior to the adjourned hearing in May the recorder should have taken steps to ensure that the Court Service give him sufficient time to produce his reserved judgment much more promptly after the hearing was concluded and it should have been handed to the parties and the order drawn up straight away.

Sir Charles Mantell:

79. I agree that this appeal should be allowed for the reasons given by Mummery LJ. I also wish to associate myself with the comments made by Scott Baker LJ.

MR TIMOTHY MORSHEAD (instructed by Gurney-Champion & Co) for the Appellant
MR JEREMY GARROOD (instructed by RJR Solicitors) for the Respondent