LC-2023-000261

Neutral Citation Number: [2024] UKUT 14 (LC)

Case No: LC-2023-261

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT Ref: 2021/0117

The Rolls Building
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Fetter Lane
London
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23rd January 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LAND REGISTRATION – ADVERSE POSSESSION - the identity of the period of ten years referred to in paragraph 5(4)(c) of the Schedule 6 to the Land Registration Act 2002 – appeal against decision of the First-tier Tribunal determining that the period can be any period of ten years during the relevant period of adverse possession – whether the question determined by binding Court of Appeal authority – decision that the relevant Court of Appeal authority was not obiter but binding on the Upper Tribunal (notwithstanding the contrary view of the Upper Tribunal on the question) – appeal allowed – cross appeal against findings of the First-tier Tribunal in relation to the reasonable belief of the Respondents as to their ownership of the disputed land – permission to appeal not required for the cross appeal, but cross appeal dismissed on the substantive ground that there was no basis for challenging the relevant findings of fact made by the First-tier Tribunal

BETWEEN:

ALISTDAIR BARCLAY BROWN

Appellant

-and-

RICHARD JOHN RIDLEY (1)
SARAH LOUISE RIDLEY (2)

Respondents

Land at Moonrakers,
The Promenade,
Consett,
County Durham,
DH8 5NJ

The Chamber President, Mr Justice Edwin Johnson

5th December 2023

Stephanie Tozer KC and *Brynmor Adams* instructed by DWF Law LLP for the Appellant
Simon Goldberg KC instructed by EMG Solicitors Limited for the Respondents

The following cases are referred to in this decision:

Zarb v Parry [2011] EWCA Civ 1306 [2012] 1 WLR 1240
IAM Group plc v Chowdery [2012] EWCA Civ 505 [2012] 2 P.&C.R. 13
R (Kadhim) v Brent London Borough Council Housing Benefit Review Board [2001] QB 955
Thamesdown Borough Council v Goonery (unreported – 13th February 1995: Court of Appeal (Civil Division) Transcript No 147 of 1995)
Young v Bristol Aeroplane Co Ltd [1944] KB 718
Singh v Dass [2019] EWCA Civ 360
Crook v Zurich Assurance Limited [2023] UKFTT 00230 (PC)
R (O) v Secretary of State for the Home Department: R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department [2022] UKSC 3 [2023] AC 255
Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg [1975] AC 591
Wilkinson v Farmer [2010] EWCA Civ 1148
BP Properties Ltd v Buckler (1988) 55 P. & C.R.
Hepworth v Powell [2018] UKFTT 0058 (PC)
Haringey LBC v Ahmed [2017] EWCA Civ 1861 [2018] H.L.R. 9
Re Sprintroom Ltd [2019] EWCA Civ 932 [2019] B.C.C. 1031

Introduction

1. This is an appeal and (on a contingent basis) cross appeal against a decision of Judge Bastin in the First-tier Tribunal (Property Chamber) dated 2nd March 2023.

2. On 20th December 2019 Mr and Mrs Ridley, the Respondents to this appeal, made an application to the Land Registry for their registration as proprietors of certain land at Moonrakers, The Promenade, Consett, County Durham DH8 5NJ, on the basis of adverse possession. The application was opposed by Mr Brown, the Appellant in this appeal and the registered proprietor of the relevant land. The application was referred to the First-tier Tribunal and came before Judge Bastin (**"the Judge"**) for determination.

3. For the reasons set out in his decision (**"the Decision"**) the Judge determined the application in favour of the Respondents. The Judge directed the Chief Land Registrar to give effect to the application and register the Respondents as proprietors of the relevant land pursuant to the provisions of Schedule 6 to the Land Registration Act 2002.

4. With the permission of the Judge the Appellant appeals against the Decision.

5. The appeal is concerned with a short and interesting point of statutory construction in relation to paragraph 5(4)(c) of Schedule 6. Sub-paragraph (c) is part of a set of conditions which, if met, entitle a person in adverse possession of registered land to be registered as the proprietor of the land, in place of the previously registered proprietor. The condition in sub-paragraph (c) is in the following terms (italics have been added to quotations in this decision):

> *"(c) for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him"*

6. Sub-paragraph (c) refers to a period of ten years. During this period the applicant or a predecessor in title must have held the reasonable belief that the land to which the relevant application relates belonged to him. The point of construction raised by the appeal is whether this period of ten years: (i) is the period of ten years ending on the date of the relevant application or (ii) can be any period of ten years within the period of adverse possession.

7. The Judge concluded that the answer was (ii). The Judge decided that the period of ten years during which the reasonable belief must exist can be any period of ten years within the relevant period of adverse possession. The Appellant says that the Judge was wrong, essentially on three bases. First, the Appellant says that there was Court of Appeal authority, binding on the Judge, to the effect that the answer was (i). Second, the Appellant says that the relevant Court of Appeal authority, even if not binding, was authority to which the Judge failed to give adequate weight. Third, and independent of authority, the Appellant says that the correct answer, as a matter of statutory construction, was (i).

8. In these circumstances the appeal is not confined to the construction of paragraph 5(4)(c). The appeal also raises a question of precedent. Specifically, the question of precedent is whether the point of construction is already the subject of Court of Appeal authority which

bound the Judge and binds me to determine the appeal in favour of the Appellant or, in the alternative, carries sufficient weight to lead to the same result.

9. There is also what is described by the parties as a contingent cross appeal brought by the Respondents. The Judge found in the Decision that the Respondents had failed to prove the existence of the required reasonable belief that they owned the relevant land beyond February 2018, well short of the date (20th December 2019) when the Respondents made their application to the Land Registry for registration as proprietors of the relevant land **("the Application")**. As such, the Respondents would have fallen short of satisfying the condition in sub-paragraph (c), if the Judge had decided that the period of ten years referred to in paragraph 5(4)(c) was confined to the period of ten years ending on the date of the Application. If the appeal is successful the Respondents say, by their contingent cross appeal, that the Judge was wrong to find that the Respondents' reasonable belief in their ownership of the relevant land ended in February 2018, and should have found that their reasonable belief continued to October 2019 which would, so the Judge decided, have been sufficiently close to the date of the Application to satisfy sub-paragraph (c).

10. It follows that the cross appeal is protective. It arises if the appeal is successful. If the appeal is successful the Respondents say that the Judge's direction to the Chief Land Registrar, to give effect to the application for registration, can still be upheld. This is on the basis that the Judge should have found that the Respondents, even on the Appellant's construction of paragraph 5(4)(c), still satisfied the condition in paragraph 5(4)(c). It also follows that it is not necessarily accurate to describe the Respondents' challenge to the relevant part of the Decision as a cross appeal. While it is convenient to continue to refer to this challenge as a cross appeal, I use this expression while keeping in mind that the cross appeal, if it arises, is said to be advanced for the purposes of upholding the direction to the Chief Land Registrar given by the Judge.

The hearing

11. At the hearing of the appeal and the cross appeal the Appellant was represented by Stephanie Tozer KC (who did not appear below) and Brynmor Adams. The Appellant's counsel divided the presentation of the Appellant's case between them. Ms Tozer presented the Appellant's case in support of the appeal. Mr Adams presented the Appellant's case in response to the cross appeal. The Respondents were represented by Simon Goldberg KC (who also did not appear below), in both appeal and cross appeal. I am grateful to all counsel for their assistance, in their written and oral submissions.

Definitions and conventions in this decision

12. I will continue to refer to Mr Brown as **"the Appellant"**, and to Mr and Mrs Ridley as **"the Respondents"**. It should be kept in mind that the Respondents, who made the original application to the Land Registry on 20th December 2019, were the applicants in the First-tier Tribunal (**"the FTT"**), with Mr Brown as the respondent.

13. In this decision references to Paragraphs are, unless otherwise indicated, references to the paragraphs of the Decision. I will refer to the Land Registration Act 2002 as **"the 2002 Act"**. References to Sections and Schedules are, unless otherwise indicated, references to the Sections of and Schedules to the 2002 Act.

The relevant background

14. The background to this case is fully set out in the Decision. It is only necessary to give a short summary of this background, for which I am indebted to the Judge, in order to set the scene for what I have to decide in the appeal and the cross appeal. My summary incorporates, where necessary, findings of fact made by the Judge, but does not, at this stage of the decision, go into the findings of fact which are the subject of the cross appeal.

15. The Respondents are the registered proprietors of a property known as Valley View, The Promenade, Consett, County Durham DH8 5NJ. The Respondents purchased this property in July 2004 from their predecessors in title, Mr and Mrs Gailles. The Gailles, in turn, purchased the property from a Mr Shaw in February 2000, who had created the property by the original purchase of part of the property and the subsequent purchase of the remaining part of the property. Title to the amalgamated property known as Valley View, which I shall refer to as **"Valley View"**, was first registered by the Gailles, under title number DU234551.

16. In about September 2002 the Appellant purchased land on the west side of The Promenade, which was subsequently registered under title number DU255518. In common with the Judge, I will refer to this land as **"Mr Brown's Land"**. Mr Brown's Land is described as rough uncultivated land, which the Appellant purchased with a view to development. Part of Mr Brown's Land is adjacent to the south-west boundary of Valley View.

17. Running along part of the boundary between Valley View and Mr Brown's Land there is a strip of land (**"the Disputed Land"**) which lies within the boundary of Mr Brown's Land, as the boundary is shown on the registered title plan for Mr Brown's Land.

18. At the hearing before the Judge, in the FTT, the Judge heard evidence from several witnesses, including Mr Ridley (the First Respondent) and the Appellant. There were also witness statements from Mrs Ridley (the Second Respondent) and Mr Shaw, but these last two witnesses were not required to be cross examined. After an extensive review of the evidence the Judge found that the Respondents had been in exclusive possession of the Disputed Land since their purchase of the Disputed Land in 2004 until the date when they made the Application. The Judge found that the Disputed Land had originally been enclosed by Mr Shaw, who put up a picket fence around the south-western perimeter of the Disputed Land and planted a leylandii hedge just inside the fence.

19. In March 2018 the Respondents obtained planning permission for the construction of a new dwelling adjacent to the existing house on Valley View. The site of the new dwelling encroached into the Disputed Land and necessitated the clearing of the leylandii hedge and the picket fence, in July 2018. The new dwelling, which is known as Moonrakers, was constructed between June 2019 and October 2020. The south-western corner of Moonrakers is constructed on the Disputed Land.

20. In October 2019 the Appellant became aware of the construction work, and discovered that the Disputed Land lay within the registered title to Mr Brown's Land. Following correspondence between the parties and their representatives, the Respondents made the Application, by Form ADV1 dated 10th December 2019, on 20th December 2019. They claimed to be entitled to be registered as proprietors of the Disputed Land, pursuant to the provisions of Schedule 6, on the basis of adverse possession. The Appellant was given

notice of the Application on 15th September 2020. On 9th December 2020 the Appellant, by his solicitors, gave notice of his objection to the Application on the basis that the Respondents had not been in adverse possession of the Disputed Land for the requisite period and, in addition, required the Application to be dealt with under paragraph 5 of Schedule 6. In these circumstances the Land Registry referred the Application to the FTT for determination on 18th February 2021.

The relevant legislation

21. It is convenient at this point to identify the relevant provisions of the 2002 Act with which the appeal and cross appeal are concerned.

22. The 2002 Act introduced a new legal scheme for acquiring title to registered land by adverse possession. Section 96 of the 2002 Act disapplies the provisions of the Limitation Act 1980 which previously governed claims to title to registered estates in land on the basis of adverse possession. Section 97 then introduces Schedule 6, which contains the new legal scheme.

23. I will return to the original purposes behind the new legal scheme later in this decision, but it is fair to say that the new scheme was intended substantially to restrict the circumstances in which a person would be able to obtain title to registered land, on the basis of adverse possession, in the face of objection from the registered proprietor.

24. The new scheme is, as I have said, set out in Schedule 6. The starting point is paragraph 1 of Schedule 6 (**"paragraph 1"**), which provides as follows:

> *"(1) A person may apply to the registrar to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for the period of ten years ending on the date of the application.*
> *(2) A person may also apply to the registrar to be registered as the proprietor of a registered estate in land if—*
> *(a) he has in the period of six months ending on the date of the application ceased to be in adverse possession of the estate because of eviction by the registered proprietor, or a person claiming under the registered proprietor,*
> *(b) on the day before his eviction he was entitled to make an application under sub-paragraph (1), and*
> *(c) the eviction was not pursuant to a judgment for possession.*
> *(3) However, a person may not make an application under this paragraph if—*
> *(a) he is a defendant in proceedings which involve asserting a right to possession of the land, or*
> *(b) judgment for possession of the land has been given against him in the last two years.*
> *(4) For the purposes of sub-paragraph (1), the estate need not have been registered throughout the period of adverse possession."*

25. It will be noted that paragraph 1 does not alter the concept of adverse possession. What paragraph 1 does is to permit an application to be made, for registration as the proprietor of a registered estate in land, on the basis of a period of adverse possession of ten years ending on the date of the application. In order to determine whether there has been ten years of adverse possession in any particular case, it is still necessary to have resort to the Limitation

Act 1980 and to the common law (case law), in order to determine whether the requirements of adverse possession have been met. This is provided for by paragraph 11(1) of Schedule 6. Paragraph 11 is in the following terms:

> *"(1) 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.*
> *(2) A person is also to be regarded for those purposes as having been in adverse possession of an estate in land—*
> *(a) where he is the successor in title to an estate in the land, during any period of adverse possession by a predecessor in title to that estate, or*
> *(b) during any period of adverse possession by another person which comes between, and is continuous with, periods of adverse possession of his own.*
> *(3) In determining whether for the purposes of this paragraph a period of limitation would run under section 15 of the Limitation Act 1980, there are to be disregarded—*
> *(a) the commencement of any legal proceedings, and*
> *(b) paragraph 6 of Schedule 1 to that Act."*

26. Paragraph 2 of Schedule 6 provides for the registrar to give notice of the application made under paragraph 1 to the proprietor of the estate in land to which the application relates and various other parties. Paragraph 3 provides that a person given notice of the application may require that the application be dealt with under paragraph 5 of Schedule 6 (**"paragraph 5"**). If such a requirement is not made, the applicant is entitled to be registered as the new proprietor of the relevant estate in land.

27. It follows that an applicant only has an unqualified right to be registered where there is no requirement that the application be dealt with under paragraph 5. Where, as in the present case, such a requirement is made, the right of registration is subject to the qualifying conditions in paragraph 5. Paragraph 5(1) provides as follows:

> *"(1) If an application under paragraph 1 is required to be dealt with under this paragraph, the applicant is only entitled to be registered as the new proprietor of the estate if any of the following conditions is met."*

28. Where paragraph 5 applies, the applicant has to meet any one of three conditions, in order to be entitled to registration as proprietor of the relevant estate in land. The three conditions are set out, respectively, in sub-paragraphs (2), (3) and (4). These sub-paragraphs are in the following terms, with sub-paragraph (5) included for completeness:

> *"(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.*
> *(3) The second condition is that the applicant is for some other reason entitled to be registered as the proprietor of the estate.*
> *(4) The third condition is that—*

(a) the land to which the application relates is adjacent to land belonging to the applicant,

(b) the exact line of the boundary between the two has not been determined under rules under section 60,

(c) for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him, and

(d) the estate to which the application relates was registered more than one year prior to the date of the application.

(5) In relation to an application under paragraph 1(2), this paragraph has effect as if the reference in sub-paragraph (4)(c) to the date of the application were to the day before the date of the applicant's eviction."

29. In the present case the Respondents' case was that they were able to satisfy the third condition, in paragraph 5(4). It was common ground between the parties, before the Judge, that the conditions, or more accurately sub-conditions in sub-paragraphs (a), (b) and (d) were met. The issue was whether the Respondents could meet the sub-condition in sub-paragraph (c), by reason of the dispute, which I have identified above, over the identification of the period of ten years during which the reasonable belief in ownership must exist. Where it is convenient to do so, and as an alternative to making reference to paragraph 5(4)(c), I will use the shorthand expression **"the Reasonable Belief Condition"** to refer to the sub-condition in paragraph 5(4)(c).

30. The above is very far from a comprehensive description of the legal scheme for acquiring title to registered land by adverse possession introduced by the 2002 Act. It is intended only to explain, in outline, the legislative background to the Application and the appeal.

The Decision

31. In summary, the findings, reasoning and conclusions of the Judge in the Decision were as follows.

32. After summarising the background facts, the Judge identified the cases of the parties at Paragraphs 7 and 8. The cases of the parties can be summarised in the following terms:

(1) The Respondents' case was that they had been in adverse possession of the Disputed Land for well in excess of the required period of ten years. They only became aware that there was an issue concerning ownership of the Disputed Land in October 2019 and, thereafter, acted promptly by making the Application within two months. So far as the conditions in paragraph 5(4) were concerned, the Respondents' case was that they satisfied all of the conditions, including the Third Condition.

(2) The Appellant challenged the Respondents' case on adverse possession, disputing both that they had been in possession of the Disputed Land for the required period of time and disputing that they had had the required intention to possess the Disputed Land.

(3) The Appellant also contended that the Respondents had, by a letter from their solicitors dated 11th November 2019, acknowledged the title of the Appellant to the Disputed Land, thereby starting time running again for the purposes of adverse possession.

(4) The Appellant also contended that the Respondents had not satisfied the Reasonable Belief Condition because, if they were in adverse possession of the Disputed Land, any reasonable belief that they owned the Disputed Land came to an end either from February 2018 or, alternatively, October 2019. On either basis the Reasonable Belief Condition was not satisfied because the period of ten years referred to in paragraph 5(4)(c), during which the reasonable belief had to exist, was the period of ten years ending on the date of the Application. As this date (**"the Application Date"**) was 20th December 2019, the Reasonable Belief Condition could not be satisfied because if the reasonable belief existed, it came to an end before the Application Date. It is that part of the Appellant's case before the Judge which comprises the subject matter of the appeal.

33. In Paragraphs 9-11 the Judge set out the legal framework. The Judge then identified the issues which he had to resolve, and where the burden lay, at Paragraphs 12 and 13:

> *"12. The headline issues are as follows:*
>
> *12.1 Can the Ridleys establish adverse possession of the Disputed Land 'for the period of ten years ending on the date of the application' being 20 December 2019 as required by paragraph 1(1) Schedule 6 (see paragraph 9.1 above)? Subsidiary issues are (a) can the Ridleys show factual possession of all of the Disputed Land throughout the relevant 10 year period, (b) did they hold and manifest the requisite intention to possess, and (c) did the Ridleys acknowledge Mr Brown's title thereby re-starting the running of time?*
>
> *12.2 Can the Ridleys establish that they reasonably believed that the Disputed Land belonged to them for the relevant period of 10 years as required by paragraph 5(4)(c) Schedule 6 (see paragraph 10 above)? Subsidiary issues are (a) what is the test for reasonable belief, (b) do the Ridleys satisfy the test or did any reasonable belief they might have had end by February 2018 when they submitted their planning application, or, alternatively, October 2019 when Mr Brown pointed out the trespass?*
>
> *13. Since it is the Ridleys who have brought this application, the burden of proof is on them to the civil standard (being the balance of probabilities)."*

34. At Paragraphs 14-36 the Judge reviewed the evidence, both oral and documentary (including the witness statements which were not challenged), in considerable detail.

35. At Paragraphs 37-48 the Judge dealt with the question of whether the Respondents had proved that they had been in adverse possession of the Disputed Land for the required period of ten years ending on the Application Date. At Paragraph 48 the Judge expressed himself as satisfied that the Respondents had established the two required elements of adverse possession; namely, and throughout the required period, (i) the appropriate degree of exclusive physical control of the Disputed Land and (ii) the required and clearly manifested intention to possess the Disputed Land to the exclusion of all others. In reaching these conclusions the Judge rejected the Appellant's argument that the Respondents had, by their solicitors' letter dated 11th November 2019, made a written acknowledgment of the

Appellant's title to the Disputed Land, such as to start time running again for adverse possession purposes.

36. This left the question of whether the Respondents could demonstrate their reasonable belief in their ownership of the Disputed Land for the period of ten years required by paragraph 5(4)(c). This is turn engaged the question of statutory construction identified above. The Appellant argued that the period of ten years, as referred to in paragraph 5(4)(c), meant the period of ten years ending on the Application Date or, on the basis that one could disregard a short gap between the ending of the reasonable belief and the making of the Application, the period of ten years ending shortly before the Application Date. The Respondents argued that they could rely on any period of ten years within the period of their adverse possession of the Disputed Land, with the consequence that it did not matter if their reasonable belief ended, as the Appellant contended, either in February 2018 or in October 2019.

37. In support of the Appellant's case, counsel for the Appellant relied upon two decisions of the Court of Appeal which, so he contended, supported the Appellant's construction of the Reasonable Belief Condition. The relevant decisions are *Zarb v Parry* [2011] EWCA Civ 1306 [2012] 1 WLR 1240 (***"Zarb"***) and *IAM Group plc v Chowdery* [2012] EWCA Civ 505 [2012] 2 P.&C.R. 13 (***"IAM"***). I will need to consider both decisions in detail later in this decision, but for present purposes it is sufficient simply to identify the decisions.

38. The Respondents also relied upon *Zarb* for the purposes of a fallback argument which they deployed. The Respondents argued that if, contrary to their primary case, the reasonable belief had to be maintained up to the Application Date, there was a grace period between the date when the reasonable belief came to an end and the Application Date, provided that the Respondents acted promptly in making the Application following their discovery that there was an issue over the title to the Disputed Land. The Respondents' case was that they had only become aware that there was an issue in October 2019, and had thereafter acted promptly in making the Application.

39. So far as the issue of the construction of paragraph 5(4)(c) (the Reasonable Belief Condition) was concerned, the Judge decided this issue in favour of the Respondents. The essential reasoning of the Judge on this issue can be found in Paragraphs 52 and 53, which it is easiest to quote directly:

> *"52. The wording of paragraph 5(4)(c) is ambiguous as is evidenced by the debate that it has engendered and there is no clear authority on its construction. In both Zarb v Parry and IAM Group plc v Chowdrey it was found that the reasonable belief continued until the date of the proceedings and construction was not argued. I am, therefore, not bound by either of them. What is clear to me is that Parliament cannot have intended that a squatter makes an application on the day his belief ceases to be reasonable. Such a construction would render the provision virtually useless and, indeed, Mr Adams acknowledges this by conceding that any de minimis period should be disregarded.*
>
> *53. I take the view that paragraph 5(4)(c) should be construed as meaning any 10 year period and not one that must end on or close to the date of an application to the Court or the Land Registry. This was, of course, the view taken in Crook v Zurich Assurance Ltd (in which the issue was argued at*

some length) and other Tribunal decisions such as Davies v John Wood Property plc, Port of London Authority v Mendoza and McLeod v Brown & Jones. Whilst I accept that these decisions are not binding on me, I do find them persuasive. Further, the any 10 years construction can be read from paragraph 5(4)(c) itself and, perhaps incidentally, is consistent with the wording of paragraph 1(1) where 'the period of ten years ending on the date of the application' also appears. The de minimis argument offers a solution that is not needed and throws up all the unsatisfactory and unwelcome difficulties and uncertainties of working out whether an application is made promptly in any particular case; something which this Tribunal sees this in practice and the Law Commission acknowledges in proposing a one year window for applications to be made. I also note that Dr Charles Harpum, who played a major role in the drafting of the Land Registration Act 2002, says that paragraph 5(4) was intended to allow an adverse possessor to rely on the facts "on the ground" until a dispute was inevitable since "no sane person wishes to initiate a boundary dispute". It is, after all, the arising of a land dispute between neighbours that should prompt action by an adverse possessor, not a change in the adverse possessor's belief ."

40. Although this is not entirely clear, I take the Judge to have made a finding, in Paragraph 54, that the period of the Respondents' reasonable belief could be traced back to, and had existed since their purchase of Valley View in 2004. Although this is also not entirely clear, I also take the Judge, in his analysis of whether the Respondents had demonstrated the required period of adverse possession, to have found that the Respondents' period of adverse possession of the Disputed Land could be traced back to, and had existed since their purchase of Valley View in 2004.

41. The Judge then continued to consider what the position would have been if he had been wrong in his construction of the Reasonable Belief Condition, and the period of reasonable belief had to exist for the period of ten years ending on the Application Date. This required the Judge to make a finding as to when the reasonable belief of the Respondents in their ownership of the Disputed Land came to an end. For this purpose the Judge returned to the evidence, at Paragraphs 56-61. The ultimate finding of the Judge on this question was set out in Paragraph 61, in the following terms:

> *"61. On the above analysis, it seems to me more likely than not that by February 2018 the Ridleys knew of the discrepancy and so did not have a subjective belief that they were the registered proprietors of the Disputed Land. Similarly, their objective belief cannot have been reasonable. If the Ridleys had to make their application to the Land Registry promptly or within a reasonable period of time, then I find that they did not as it took them almost two years to do so with no explanation for the delay."*

42. As can be seen from Paragraph 61, the Judge accepted that if, contrary to his construction of paragraph 5(4)(c), the period of reasonable belief had to endure for the period of ten years ending on the Application Date then the Respondents had a period of grace, following the period of their reasonable belief coming to an end, within which to make the Application, provided that they acted promptly. Given his finding that the reasonable belief of the Respondents came to an end in February 2018, and given the absence of explanation for the delay of almost two years thereafter in the making of the Application, the Judge decided

that the Respondents had not acted promptly in making the Application. As such, and if the Judge had accepted the Appellant's case on the construction of the Reasonable Belief Condition, the Respondents would not have been able to satisfy the Reasonable Belief Condition.

43. Finally, the Judge considered what the position would have been if (i) contrary to his construction of the Reasonable Belief Condition, the period of reasonable belief had to endure for the period of ten years ending on the Application Date and (ii) contrary to his findings on the evidence, he had found that the Respondents' reasonable belief in their ownership of the Disputed Land only came to an end in October 2019. On that hypothesis the Judge decided that the Respondents would have made the Application promptly, and thus would have satisfied the Reasonable Belief Condition.

44. These final parts of the Decision were, as I have said, considering hypothetical situations. On the Judge's construction of the Reasonable Belief Condition, all that the Respondents had to establish was that the period of their reasonable belief endured for any period of ten years during the period of their adverse possession of the Disputed Land. On the Judge's findings this was established. Accordingly, the Judge determined the Application in favour of the Respondents and directed the Chief Land Registrar to give effect to the Application and register the Respondents as the new proprietors of the Disputed Land.

The appeal and the contingent cross appeal

45. As I have said, the Appellant appeals with the permission of the Judge. There are two grounds of appeal, as follows:

> *"1. The learned Judge failed to follow a binding Court of Appeal authority, Zarb v Parry [2012] 1 WLR 1240; alternatively failed to give adequate weight to the Court of Appeal's acceptance in that case (and a subsequent case) of the construction advanced by the Appellant.*
> *2. The learned Judge erred in law in construing Land Registration Act 2002 Schedule 6 paragraph 5(4) as requiring an applicant for adverse possession to show merely a reasonable belief that the land belonged to him for any 10 years of the period of adverse possession, rather than requiring the applicant to show that the reasonable belief persisted until the date of the application (ignoring 'de minimis' periods)."*

46. In considering these grounds of appeal I find it convenient to divide them into three grounds of appeal, by splitting out the first ground of appeal into two grounds. The first of those grounds is whether the Judge failed to follow binding authority in *Zarb* (**"Ground 1"**). The second of those grounds is whether the Judge failed to give adequate weight to the acceptance by the Court of Appeal, in *Zarb* and *IAM*, of the construction of paragraph 5(4)(c) contended for by the Appellant (**"Ground 2"**). The third ground of appeal is the Appellant's existing second ground of appeal, which is that the Judge went wrong in his construction of the Third Condition (**"Ground 3"**). In my analysis of the Appellant's grounds of appeal I will use my threefold classification of the grounds of appeal identified in this paragraph.

47. Turning to the cross appeal which, as I have said, is described as a contingent cross appeal, the grounds in support of the cross appeal are as follows:

"3. If the Upper Tribunal concludes that the correct construction of paragraph 5(4) is that an applicant's reasonable belief that the application land belongs to them must persist until the date of their application (ignoring de minimis periods):

a. the learned Judge was wrong to find that the Respondents' reasonable belief ceased in February 2018 because:

(i) he impermissibly imputed to the Respondents the subjective belief of Mr Hodgson; and/or

(ii) his conclusion that the Respondents' reasonable belief that the application land belonged to them ceased in February 2018 was unsupported by the evidence;

and

b. the period between the cessation of the Respondents' reasonable belief that they owned the application land (October 2019) and the date of their application (10 December 2019) was de minimis."

48. Permission has not been granted for the cross appeal. The question of whether permission to appeal was required for the cross appeal was raised in correspondence with the Upper Tribunal, following the Respondents filing a respondent's notice with the *"contingent cross appeal"* incorporated therein. The Appellant's solicitors objected to the cross appeal on the basis that no application for permission for the cross appeal had been made to the FTT, and on the basis that the Upper Tribunal should not grant such permission.

49. In response to this objection, the Deputy Chamber President issued the following directions on 26th July 2023:

*"1. The respondents must confirm by **4 August 2023** whether they wish to rely on the contingent grounds of appeal in support of a contention that the Tribunal should make a different order from the order made by the FTT (and not simply as alternative grounds on which the order should be upheld, and the appeal dismissed).*

2. If the respondents do wish to rely on the contingent grounds for that purpose, they must first apply to the FTT for permission to appeal before renewing their application for permission to the Tribunal (if permission is refused by the FTT). If so, they should specify the order they will invite the Tribunal to make if those grounds are successful.

*3. If the respondents wish to rely on the contingent grounds only as alternative grounds on which the order should be upheld, and the appeal dismissed, they can properly be included in a respondent's notice without the need for permission to appeal because they involve no challenge to the FTT's order and therefore no cross appeal. In that event, the parties should liaise and jointly confirm to the Tribunal by **18 August 2023** whether the hearing of the appeal will require more than the single day currently allocated to it.*

4. The parties may apply for further directions if required."

50. The directions given by the Deputy Chamber President sought clarity on whether the contingent cross appeal was a true cross appeal, seeking a different order to that made by the Judge, or the equivalent of a respondent's notice, seeking to uphold the order of the Judge on different grounds to those relied upon by the Judge. If the contingent cross appeal

fell into the second of these categories, the Deputy Chamber President confirmed that the contingent grounds of cross appeal could properly be included in the respondent's notice filed by the Respondents, and did not require permission to appeal.

51. Following these directions, the Respondents' solicitors wrote to the Upper Tribunal on 1st August 2023, with the following confirmation:

> *"We refer to paragraph 1 of the Tribunal's Order dated 26 July and confirm on behalf of the Respondents that they do not wish to rely upon the contingent grounds of appeal in support of a contention that the Tribunal should make a different Order from the Order made by the First-tier Tribunal. Rather, the Respondents rely upon the contingent grounds of appeal as alternative grounds upon which the Order should be upheld and the appeal dismissed."*

52. As can be seen, the provision of this confirmation, pursuant to the directions given by the Deputy Chamber President, meant that permission was not required for the contingent cross appeal. This did however assume that the Respondents would only be relying upon the cross appeal to uphold the order made by the Judge, on different grounds to those relied upon by the Judge. As matters have turned out, there is an issue between the parties as to whether the cross appeal does, in fact, require permission to appeal. This issue arises for my decision if the appeal is successful. In the meantime, and subject to my decision on the appeal, it will be appreciated that, in referring to the contingent cross appeal as the cross appeal, I am not prejudging the issue of the true nature of the contingent cross appeal.

Ground 1 – analysis and conclusion

(i) **Ground 1 - *Zarb***

53. Given that the status of the decision of the Court of Appeal in *Zarb* is central to Ground 1, it is convenient to start by summarising the decision. In this section of my analysis, references to the decision in *Zarb* and to matters decided in *Zarb* are made without prejudice to the question, to which I shall come, of what is included in the ratio of *Zarb*; that is to say what in *Zarb* constitutes binding authority.

54. *Zarb* was another case involving a boundary dispute. The claimants (Mr and Mrs Zarb) and the defendants (Mr and Mrs Parry) owned adjoining land. The dispute was over a strip of land on the southern boundary of the defendants' property. The claimants' case was that the true boundary, in accordance with the paper title to the claimants' property, ran some 12 feet to the north of a hedge which the defendants and their predecessors in title had taken to be their southern boundary. There had for some years been a dispute over the correct location of this southern boundary. Attempts to resolve that dispute failed. On 29th July 2007 a confrontation occurred when the defendants discovered the claimants attempting to fence off the disputed strip by installing fence posts on what the defendants regarded as their lawn. After about 20 minutes the claimants left the disputed strip. In 2009 the claimants commenced an action for a declaration that the boundaries were as they contended. Title to each of the properties was registered. In their defence the defendants relied upon Section 98, which provides as follows:

> *"(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.

(2) A judgment for possession of land ceases to be enforceable at the end of the period of two years beginning with the date of the judgment if the proceedings in which the judgment is given were commenced against a person who was at that time entitled to make an application under paragraph 1 of Schedule 6.

(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.

(4) A judgment for possession of land ceases to be enforceable at the end of the period of two years beginning with the date of the judgment if, at the end of that period, the person against whom the judgment was given is entitled to make an application under paragraph 6 of Schedule 6 to be registered as the proprietor of an estate in the land.

(5) Where in any proceedings a court determines that—

(a) a person is entitled to a defence under this section, or

(b) a judgment for possession has ceased to be enforceable against a person by virtue of subsection (4),

the court must order the registrar to register him as the proprietor of the estate in relation to which he is entitled to make an application under Schedule 6.

(6) The defences under this section are additional to any other defences a person may have.

(7) Rules may make provision to prohibit the recovery of rent due under a rentcharge from a person who has been in adverse possession of the rentcharge."

55. The defendants were therefore relying upon a defence of adverse possession. It will be noted that, by Section 98(1), the defendants were required to demonstrate (i) that, on the day immediately preceding the day on which the claimants brought their action, the defendants would have been entitled to make an application under paragraph 1, and (ii) that if such an application had been made on that day, the condition in paragraph 5(4) would have been satisfied. The reference to the condition in paragraph 5(4) refers to the sub-conditions in sub-paragraphs (a) to (d), including what I am referring to as the Reasonable Belief Condition.

56. The judge at first instance dismissed the action. The judge found that, by reference to the paper title, the southern boundary was in the location contended for by the claimants, with the consequence that the hedge was on the claimants' land. He also found however that the defendants and their predecessors in title (Mr and Mrs Ceen) had been in adverse possession of the disputed strip for over ten years, and that this adverse possession had not been interrupted by the claimants' attempts to fence off the disputed strip in July 2007. The claimants appealed to the Court of Appeal.

57. There were three issues in the appeal. The first issue was whether the judge had been wrong to reject the argument that the possession of the disputed strip by the defendants' predecessors in title (the Ceens) had been with the consent of the claimants' predecessor in title (Mr Little), so that possession could not be adverse. The second issue was whether the judge had been correct to hold that the adverse possession of the disputed strip by the defendants had not been interrupted by the claimants' attempt to fence off the disputed strip in 2007, so as to start time running again. The third issue was whether the defendants satisfied paragraph 5(4)(c); that is to say the Reasonable Belief Condition. Success on any one of these issues would have been sufficient to defeat the defence of adverse possession, with the consequence that the claimants would have been entitled to a declaration of their ownership of the disputed strip. Accordingly, all three issues had to be dealt with by the Court of Appeal.

58. The appeal was heard by Lord Neuberger MR (as he then was), Arden LJ (as she then was) and Jackson LJ. The Court of Appeal heard from counsel for the claimants (the appellants in the Court of Appeal) on all three issues, but required the defendants' counsel only to address them on the second issue. The Court of Appeal dismissed the appeal. The leading judgment was given by Arden LJ. Lord Neuberger gave a shorter judgment, agreeing with the dismissal of the appeal but expressing his reasons for that result in his own words. Jackson LJ agreed with both judgments. In relation to the second issue Jackson LJ preferred the approach of Arden LJ, so far as there was any difference of emphasis between Arden LJ and Lord Neuberger.

59. Arden LJ commenced her judgment with a summary of the factual background to the appeal. At [12] to [19] Arden LJ then provided a summary of the relevant provisions of the 2002 Act. At [12] Arden LJ introduced this summary in the following terms:

> *"12 The 2002 Act introduced a new legal scheme for acquiring title to registered land by adverse possession. I will confine myself to its essential features for present purposes. For the first time the adverse possessor was to be able to obtain registration by an application to the Land Registry, which is then notified to the paper title owner. The new scheme seeks to establish a fair balance between the interests of the paper title owner and those of the adverse possessor. To protect the paper title owner, the adverse possessor must satisfy certain conditions and on this appeal I have to consider one of those conditions, the first time that it has been considered in this court."*

60. Arden LJ explained the operation of paragraph 5(4) in the following terms, at [16] and [17] (underlining added):

> *"16 Paragraph 5(4) thus deals with a situation mentioned in para 1 of this judgment, which is very commonly met, namely the situation where the physical boundary between two properties does not accord with the paper title. People often make mistakes when laying out a physical boundary to a new plot.*
> *17 Paragraph 5(4) sets out three sub-conditions. The relevant sub-condition on this appeal is sub-paragraph (c). This sub-condition is new. The adverse possessor has to show that he made a reasonable mistake in believing that he was the owner of the land of which possession is claimed. This seems to be a fair requirement for the law to impose before the paper title owner is deprived of his land, which may be very substantial in area and value, unlike the comparatively small area in this*

case. It reflects the fact that, by virtue of article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998, a fair balance must be shown to justify an interference by the state with a person's possessions. The 2002 Act was no doubt intended to be Convention-compliant in this respect. But the necessary effect of the way that paragraph 5(4) is expressed is to make the unreasonable belief of the adverse possessor in the last ten years of his possession prior to the application for registration a potentially disqualifying factor even though his belief started out as reasonable but became unreasonable as a result of circumstances after the completion by him and/or his predecessor in title of a ten-year period of possession. The consequence of that is that the paper title owner will have a last chance to recover the land if the adverse possessor did not have a reasonable belief during the last ten years. The moral is that, as soon as the adverse possessor learns facts which might make his belief in his own ownership unreasonable, he should take steps to secure registration as proprietor."

61. It will be noted that Arden LJ treated the period of ten years, during which the reasonable belief had to be shown, as the last ten years prior to the application for registration.

62. Arden LJ then proceeded to her consideration of the three issues raised on the appeal. It is not necessary to go into the detail of Arden LJ's analysis of the first and second issues. Arden LJ concluded that the appeal fell to be dismissed on both of these issues.

63. This left the third issue. Could the defendants satisfy the Reasonable Belief Condition? In the context of the third issue, a difficulty which arose was that the judge at first instance had made no finding as to whether the defendants had a reasonable belief that they owned the disputed strip or not. Arden LJ recorded the position, in the following terms, at [46] – [47]:

> *"46 The judge referred to paragraph 5(4) in para 19 of his judgment before setting out his conclusions on the Parrys' adverse possession claim. The judge made no finding as to whether the Parrys had a reasonable belief that they owned the strip or not. He did, however, find at para 16 that the Ceens used the strip because "they believed it was theirs and the boundary, the southern boundary, of the land they had acquired was marked by the middle of the hedge that was there to be seen and nowhere else". By implication, the judge was satisfied that the belief of the Ceens was reasonable. Reading his judgment as a whole, I take the view that, by implication, he must have found that the Parrys similarly had a reasonable belief. The question is whether this finding was against the weight of the evidence because of matters that occurred after the possession of the Ceens.*
> *47 While his order implies that he would have been prepared to find that the sub-condition in paragraph 5(4)(c) was satisfied, there is no finding to that effect and accordingly I have concluded that I should consider in detail whether that would have been the correct finding."*

64. Arden LJ thus considered for herself whether the Reasonable Belief Condition was satisfied. On the basis of the evidence to which Arden LJ made reference, she was satisfied that the required reasonable belief did exist. As her Ladyship concluded, at [51]:

> *"51 In my judgment, the belief of the Parrys was a reasonable one to hold. When they purchased Fleet House, the dispute was dormant as the Zarbs had not raised*

the dispute in response to Mrs Ceen's communications. The dispute remained dormant for the next five years as there were no communications challenging the southern boundary from the Zarbs until 2007. By that time, they and the Ceens had together been in possession of the land for well over ten years. The report of Mr Powell confirmed the Parrys' belief that the physical boundaries were correct. Mr Powell was a qualified surveyor and he gave reasons supporting his opinion. In those circumstances, the belief of the Parrys in my judgment continued to be reasonable. Mrs Collignon laid some emphasis on the fact that Mrs Parry was a barrister but she did not suggest that she would necessarily have had a detailed knowledge of this area of the law."

65. In her consideration of the third issue Arden LJ did not, in terms, refer to the period of ten years over which the reasonable belief had to be demonstrated. In a postscript to her judgment however Arden LJ explained what she perceived as difficulties created by the 2002 Act in the following terms, at [55] (underlining again added):

> *"55 The 2002 Act creates difficulties for proprietors with disputed boundaries. <u>If a person discovers that his boundary is in fact on his neighbour's land and that he has been in possession for ten years, he can if he acts promptly apply to the Land Registry to be registered as proprietor of any land outside his title</u>. The new provisions will, however, require the registrar to give notice of the application to the paper title owner of the land sought to be acquired. If the registered proprietor does not oppose the application, registration will follow. If the registered proprietor opposes the application, the adverse possessor may be unable to satisfy the third condition in paragraph 5 of Schedule 6 to the 2002 Act, and will fail to secure registration save in the exceptional case where he can show that another condition is satisfied."*

66. The reference to the need to act *"promptly"* must, as it seems to me, mean that Arden LJ was, consistent with her earlier analysis of paragraph 5(4), treating the period of ten years in paragraph 5(4)(c) as the last ten years of the period of possession prior to the application for registration.

67. Jackson LJ, as I have said, agreed with both judgments of his fellow members of the Court of Appeal. In his own shorter judgment Lord Neuberger dealt fairly shortly with the first issue, giving his own reasons as to why the appeal should be dismissed on the first issue. Lord Neuberger dealt at greater length with the second issue (interruption of possession), which he found more difficult to resolve than Arden LJ. Ultimately however Lord Neuberger, for his own reasons, concluded that the appeal on the second issue did fall to be dismissed. This left the third issue, which Lord Neuberger dealt with fairly shortly. It is easiest simply to quote Lord Neuberger's reasoning and conclusion on this point, at [77] – [81]:

> *"77 That leaves the Zarbs' third point, which is that, during the last couple of years while they enjoyed possession, the Parrys cannot reasonably have believed that they owned the strip: see paragraph 5(4)(c) of Schedule 6 to the 2002 Act. This argument was presented on the basis that the Parrys received a letter in October 2007 from the Zarbs' solicitors which made it clear that the Zarbs were the paper title owners of the strip, and how they made that proposition out.*

78 That does not seem to have been a point which was much canvassed below: certainly, the judge seems to have given it scant attention in his judgment, although Ms Collignon realistically accepts that he implicitly rejected it.

79 It is clear that the Parrys and their predecessors believed that they owned the strip, so the issue is whether that belief was reasonable after October 2007, and the judge, who was the primary fact-finder, albeit implicitly (as I have just mentioned), concluded that that belief was reasonable.

80 Further, it is clear that a fellow of the Royal Institution of Chartered Surveyors, Mr Powell, who fully investigated the dispute well after the October 2007 letter, concluded that the strip was owned by the Parrys, and he was not called as a witness. In my view, in the absence of any other evidence to assist the Zarbs, that fact, coupled with the judge's finding, renders it impossible to maintain on this appeal that the belief of the Parrys to the same effect was unreasonable. Mr Powell is experienced in neighbours_ dispute cases, and the fact that he may have exceeded the scope of his instructions when expressing his view as to the location of the paper title boundary (a point it is unnecessary to decide) is irrelevant: he thought it was part of his instructions, and he reached a clear and sensible conclusion, and one which he presumably thought minimised discontent and disruption. Between the provision of Mr Powell's report and the issue of these proceedings, it was not suggested that there was any further evidence, which would have been relevant on the issue of the reasonableness of the Parrys' belief.

81 For these reasons, which substantially reflect those more fully expressed by Arden LJ, I would dismiss the Zarbs' appeal."

68. It will be noted that Lord Neuberger, at [79], identified the key issue as being whether the defendants' belief in their ownership of the disputed strip remained reasonable after October 2007, when the defendants received a letter from the claimants' solicitors which explained that the claimants had the paper title to the disputed strip. In this context it should be noted that the judge at first instance in *Zarb* found that the period of adverse possession of the disputed strip commenced with the defendants' predecessors in title (Mr and Mrs Ceen) who acquired, in 1992, the relevant part of what became the defendants' property: see the judgment of Arden LJ at [23]. On this basis it seems reasonable to assume that Lord Neuberger was treating the period of ten years during which the required reasonable belief had to exist as the same period of ten years identified by Arden LJ; that is to say the last ten years of the period of possession prior to the application for registration. If Lord Neuberger had thought that any period of ten years during the period of adverse possession would suffice for this purpose, the inquiry would have been a different one. On that hypothesis the inquiry would have been as to whether a period of ten years of reasonable belief existed, between 1992 and 2009, on the part of the Ceens and then the defendants. On the same hypothesis, if the period of reasonable belief existed prior to 2007, but came to an end in 2007, this would not have been fatal to the claimants' case on the third issue.

69. On the basis of the above summary of the decision of the Court of Appeal in *Zarb*, the following points seem clear to me:

    (1) In her judgment Arden LJ treated the period of ten years referred to in paragraph 5(4)(c), during which the reasonable belief had to exist, as the period of ten years ending on the date of the application for registration. It is true that these were not quite the words used by Arden LJ, in her analysis of the relevant provisions of the 2002 Act, at [17]. Arden LJ referred to *"the last ten years of his possession prior to the application for registration"*. It seems to me however that this must have been

intended as a reference to the period of ten years ending on the date of the application for registration.

(2) Lord Neuberger proceeded with his analysis of the third issue in the appeal, that is to say whether the Reasonable Belief Condition was satisfied, on the same basis.

(3) Jackson LJ agreed with this approach.

70. The question which then arises is whether this approach (using a deliberately neutral phrase) to the question of whether the Reasonable Belief Condition was satisfied in *Zarb* constitutes part of the ratio of *Zarb*, and thus binding authority. This brings me to the next stage of my analysis of Ground 1.

(ii) Ground 1 - Is *Zarb* binding authority?

71. In *R (Kadhim) v Brent London Borough Council Housing Benefit Review Board* [2001] 1 QB 955, at [16], Buxton LJ, giving the judgment of the Court of Appeal, approved the following statement of what constitutes the ratio decidendi of a case:

> *"16 Cases as such do not bind; their rationes decidendi do. While there has been much academic discussion of the proper way of determining the ratio of a case, we find the clearest and most persuasive guidance, at least in a case such as the present where one is dealing with a single judgment, to be that of Professor Cross in Cross & Harris, Precedent in English Law, 4th ed (1991), p 72: "The ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him."*

72. It is helpful to go into the decision in *Kadhim* in some further detail. The case came before the Court of Appeal pursuant to a challenge, by way of judicial review, to the decision of a housing benefit review board. The applicant in the case was denied housing benefit by the relevant local authority on the basis that he was residing with a close relative (his brother) and was thus not entitled to housing benefit by virtue of regulation 7(1) of the Housing Benefit (General) Regulations 1987. On a review of the decision of the local authority the housing benefit review board decided that because the applicant was sharing a kitchen and a living room with his brother, he fell to be treated, by virtue of regulation 3(4) of the same Regulations, as residing with his brother. The applicant challenged the decision of the board, seeking a declaration in the following terms:

> *"A finding that the claimant shares accommodation with his landlord (within the meaning of regulation 3(4) of the Housing Benefit (General) Regulations 1987) is a necessary but not a sufficient condition for the finding that he resides with that landlord."*

73. At first instance Munby J took the view, as a matter of construction, that regulation 3(4) was not exhaustive in relation to the question of whether one party was residing with another. As a matter of construction regulation 3(4) did not, in the view of Munby J, impose a statutory rule that where persons shared any accommodation other than bathroom, lavatory or communal areas they necessarily resided with each other for the purposes of regulation 7(1). Regulation 3(4) imposed a necessary, but not a sufficient, condition for a finding of residence. The question of residence also had to be considered however, by reference to ordinary meaning. On this basis, the applicant was not necessarily residing with his brother,

within the meaning of regulation 3(4) simply because they shared accommodation, namely a kitchen and living room, which extended beyond bathroom, lavatory and communal areas.

74. The problem which confronted Munby J was that there was a decision of the Court of Appeal, in *Thamesdown Borough Council v Goonery* (unreported – 13th February 1995: Court of Appeal (Civil Division) Transcript No 147 of 1995), in which regulation 3(4) had been considered. *Goonery* was another case concerned with housing benefit. In very brief summary what had happened in that case was that Mr Goonery, who was in receipt of housing benefit, had married the sister of his landlord. This marriage brought Mr Goonery within the scope of the close relative provisions in regulation 7. In terms of the sharing of accommodation in the relevant property, the relevant facts were that Mr Goonery shared use of the kitchen with his landlord, although paying an extra charge to the landlord for this facility. This therefore raised the question of whether Mr Goonery had been entitled to receive housing benefit.

75. In the Court of Appeal Mr Goonery appeared in person. The judgment of the Court of Appeal in *Goonery* was given by Leggatt LJ. He took the view that the case was resolved by reference to regulation 3(4). On the evidence Mr Goonery shared the use of a kitchen with his landlord. As such, Mr Goonery resided with his landlord because they shared accommodation, namely a kitchen, going beyond a bathroom, lavatory and communal areas. No further inquiry into the question of residence was required.

76. In *Kadhim* Munby J took the view that Leggatt LJ's statement of the effect of regulation 3(4) formed part of the ratio of *Goonery*, and was therefore binding upon him. As such, Munby J regarded himself as bound to refuse the declaration sought, notwithstanding his own views on the correct construction of regulation 3(4). Munby J did however grant permission to appeal, on the basis that he viewed the point as one of considerable importance.

77. The problem which the decision in *Goonery* created, in *Kadhim*, was summarised by Buxton LJ in the following terms, at [15]:

> *"15 In our view, as in the view of Munby J, it is therefore inescapable that this court in Goonery's case decided that Mr Goonery resided with Mr Carver because, and simply because, he shared a kitchen with him. The court reached that conclusion because it thought that the issue of residence was determined by the terms of regulation 3(4); and that the terms of that regulation defined the meaning of residence for the purpose of entitlement to housing benefit. If those two latter findings or assumptions are part of the court's ratio, and there is no means of excluding them from the normal rules of binding authority, then they bind us, as they bound Munby J, to decide this case in the sense adopted by the board. To determine whether that is so it is necessary to review some fundamental principles of the system of precedent."*

78. In his judgment Buxton LJ then went on, at [16], to approve the statement of Professor Cross as to what constitutes the ratio of a case. I have set out [16] above. Applying that statement, or test, Buxton LJ was in no doubt that the understanding of the Court of Appeal in *Goonery*, as to the effect of regulation 3(4), formed part of the ratio of their decision:

"17 Judged by that test, there is no doubt that the assumptions in Goonery's case that the issue was to be decided solely by reference to regulation 3(4); and that because Mr Goonery shared the kitchen with Mr Carver he resided with him; were impliedly, and possibly also expressly, treated by the court as a necessary step in reaching its conclusion. Indeed, those assumptions were not merely a necessary step in the reasoning, but assumptions that determined the conclusion or took up the whole of the reasoning process. Although it is perhaps otiose to do so in this case, Professor Cross's test can be most easily applied by positing the negative of the rule of law under consideration. If the court in Goonery's case had proceeded on the basis that regulation 3(4) was not determinative (which, as indicated in paragraph 11 above, is the preferred view both of Munby J and of ourselves), then the result of the case might not have been different, but court's conclusion, in the sense of its finding that the sharing of the kitchen decided the matter, certainly would have been. Therefore, unless the present case can be treated as an exception to the general rule of precedent, we are bound to follow the same approach as did this court in Goonery's case."

79. Buxton LJ then went on to consider whether an exception to the general rule of precedent could be found in relation to *Goonery*. He first considered whether the case could be considered to have been decided per incuriam or, avoiding the Latin expression, whether the case fell within that category of case, identified in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, where the ratio of a decision of a court is not binding because the court made its decision in ignorance of a statute or a rule of law or a previous relevant decision. As Buxton LJ noted, this exception to the rule of precedent was a narrow one, and could not be said to apply to *Goonery*.

80. This left the argument, advanced by the applicant's counsel in *Kadhim*, that the ratio or part of the ratio of a case was not binding if it was assumed to be correct without the benefit of argument. After considering this argument Buxton LJ reached the following conclusion, at [33]:

"33 We therefore conclude, not without some hesitation, that there is a principle stated in general terms that a subsequent court is not bound by a proposition of law assumed by an earlier court that was not the subject of argument before or consideration by that court. Since there is no direct Court of Appeal authority to that general effect we should indicate why we think the principle to be justified."

81. Buxton LJ emphasized however the limited nature of this principle, at [38]:

"38 Like all exceptions to, and modifications of, the strict rule of precedent, this rule must only be applied in the most obvious of cases, and limited with great care. The basis of it is that the proposition in question must have been assumed, and not have been the subject of decision. That condition will almost always only be fulfilled when the point has not been expressly raised before the court and there has been no argument upon it: as Russell LJ went to some lengths in National Enterprises Ltd v Racal Communications Ltd to demonstrate had occurred in the previous case Davies Middleton & Davies Ltd v Cardiff Corpn 6z LGR 134. And there may of course be cases, perhaps many cases, where a point has not been the subject of argument, but scrutiny of the judgment indicates that the court's acceptance of the point went beyond mere assumption. Very little is likely to be

required to draw that latter conclusion: because a later court will start from the position, encouraged by judicial comity, that its predecessor did indeed address all the matters essential for its decision."

82. So far as the actual decision in *Kadhim* was concerned, Buxton LJ concluded that the principle which he had identified at [33] did apply to the relevant part of the decision in *Goonery*. As such, the Court of Appeal were free to make their own decision on regulation 3(4), which was that it did not impose an exhaustive statutory test of residence. The Court of Appeal therefore allowed the appeal and granted the declaration sought by the applicant.

83. I have spent some time on *Kadhim* because it seems to me to provide the appropriate guidance in determining whether *Zarb* constitutes binding authority on the identity of the ten year period in paragraph 5(4)(c). Indeed both Ms Tozer and Mr Goldberg addressed me on the basis that the appropriate guidance was to be found in *Kadhim*.

84. Returning to the Decision, the Judge took the view that he was not bound by *Zarb*. The judge dealt with this question at Paragraph 52, where he said this:

> *"52. The wording of paragraph 5(4)(c) is ambiguous as is evidenced by the debate that it has engendered and there is no clear authority on its construction. In both Zarb v Parry and IAM Group plc v Chowdrey it was found that the reasonable belief continued until the date of the proceedings and construction was not argued. I am, therefore, not bound by either of them. What is clear to me is that Parliament cannot have intended that a squatter makes an application on the day his belief ceases to be reasonable. Such a construction would render the provision virtually useless and, indeed, Mr Adams acknowledges this by conceding that any de minimis period should be disregarded."*

85. Although this is not apparent from Paragraph 52, the Appellant's skeleton argument for the appeal drew my attention to the fact that it was conceded in the FTT, by counsel for the Appellant, that what was said about the identity of the ten year period in *Zarb* was obiter. So far as was necessary, the Appellant sought permission to depart from this concession at the hearing of the appeal. For the Respondents Mr Goldberg referred me to the decision of the Court of Appeal in *Singh v Dass* [2019] EWCA Civ 360 and, in particular, to the identification by Haddon-Cave LJ, in his judgment at [15] – [18], of the principles which apply where a party seeks to raise a new point on appeal:

> *"15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.*
> *16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.*
> *17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (Mullarkey v Broad [2009] EWCA Civ 2 at [30] and [49]).*
> *18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has*

not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (R (on the application of Humphreys) v Parking and Traffic Appeals Service [2017] EWCA Civ 24; [2017] R.T.R. 22 at [29]).”

86. Mr Goldberg accepted that I could be satisfied that the Appellant's argument that *Zarb* constituted binding authority did not offend against the first and second principles stated in [16] and [17], or against the principles identified at (a) and (b) in [18]. In relation to the principle stated at (c), in [18], Mr Goldberg's position was that he was putting down a marker on costs. What I understood this to mean was that Mr Goldberg was not objecting to the Appellant being allowed to raise his new argument, but was reserving the Respondents' right to make appropriate submissions on costs, at the point where the costs of the appeal and cross appeal come to be considered, by reference to the principle stated at (c) in [18]. Mr Goldberg's position seemed to me to be both sensible and realistic. Applying the principles stated by Haddon-Cave LJ I am satisfied that the present case is one where it is appropriate to permit the Appellant to withdraw his previous concession and raise the new argument that *Zarb* constitutes binding authority on the issue of the identity of the ten year period referred to in paragraph 5(4)(c). I state this decision subject to any questions of costs raised by the withdrawal of the concession and the raising of the new argument. In that context I agree with Mr Goldberg that any such questions of costs can and should be left until the outcome of the appeal and cross appeal are known, and the costs of the appeal and cross appeal come to be addressed.

87. With this preliminary point dealt with, I return to Paragraph 52. In considering the reasoning and conclusion of the Judge in Paragraph 52 it is, obviously, important to record that the reasoning and conclusion in this Paragraph took place in the context of a concession that the relevant part of the decision in *Zarb* was obiter. Now however that the concession has been withdrawn, I do not think that the reasoning or conclusion of the Judge in Paragraph 52 can stand. I say this for the following reasons.

88. So far as I can see, from the report of *Zarb* in the Weekly Law Reports, the issue of the identity of the ten year period in paragraph 5(4)(c) was not argued in *Zarb*. There is no record of any argument on this issue either in the judgment of Arden LJ or in the judgment of Lord Neuberger. I also note, from the judgment of Arden LJ at [21], that counsel for the defendants (the Parrys) was only called upon to address the Court of Appeal on the second issue; which was the issue of whether the judge had been correct to hold that the adverse possession of the disputed strip had not been interrupted by the incident in July 2007. Counsel for the defendants would not therefore have had the opportunity to address the Court of Appeal on the third issue of whether the Reasonable Belief Condition was satisfied. There would, I assume, have been a skeleton argument filed by counsel for the defendants for the hearing of the appeal, which would have addressed the third issue. I do not know however what that skeleton argument said about the third issue or, more specifically, whether that skeleton argument said anything about the issue of the identity of the ten year period during which the reasonable belief in ownership had to exist. There is no record in the report of *Zarb* of what submission, if any, counsel for the claimants (the Zarbs) made on the identity of the ten year period. So far as the position at first instance was concerned, it is not clear whether the issue of the identity of the ten year period was raised or dealt with by the judge. By reference to the judgment of Arden LJ, at [46], it looks as though this issue did not feature before the judge.

89. The absence of argument on this issue does not however mean that the approach of the Court of Appeal to this issue in *Zarb* cannot form part of the ratio of their decision. The test of what constitutes parts of the ratio of a decision in a case is that stated by Buxton LJ in *Kadhim*. The ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching their conclusion, having regard to the line of reasoning they have adopted.

90. In her summary of the operation of the adverse possession regime in the 2002 Act, Arden LJ stated in terms, at [17], that the period of ten years referred to in paragraph 5(4)(c) was the last ten years of possession prior to the application for registration. As I have said, and while Arden LJ did not use the language of paragraph 5(4)(c), the statement made by Arden LJ must have been intended as a reference to the period of ten years ending on the date of the application for registration, as opposed to any period of ten years within the relevant period of adverse possession. Arden LJ effectively repeated this analysis of the operation of paragraph 5(4)(c), in the postscript to her judgment, at [55].

91. In making her actual decision on the third issue in *Zarb* it seems to me that Arden LJ must have approached the decision-making exercise on the basis that she was concerned only with the final ten years of the period of adverse possession, ending on the date which, by virtue of Section 98(1), qualified as the date of the application for the purposes of Schedule 6. As I have already noted, in my earlier summary of the judgment given by Lord Neuberger in *Zarb*, the period of adverse possession which the claimants were able to demonstrate went back to 1992. If therefore any period of ten years of reasonable belief, as from 1992, would have sufficed to satisfy the Reasonable Belief Condition, the coming to an end of the period of reasonable belief, as a result of correspondence in October 2007, was not necessarily fatal to the satisfaction of the Reasonable Belief Condition. Beyond this, it seems perverse to think that Arden LJ would not have had in mind her own construction of paragraph 5(4)(c), when she came to the third issue.

92. Jackson LJ agreed with the judgment of Arden LJ. Lord Neuberger, as I have already noted, approached the third issue in *Zarb* on the same basis as Arden LJ, subject only to the point that Lord Neuberger did not, at least in terms, identify the period of ten years in paragraph 5(4)(c) as the period of ten years ending on the date of the application for registration.

93. On this basis, and as in *Kadhim*, it seems to me that Arden LJ in *Zarb*, with the agreement of Lord Neuberger and Jackson LJ, proceeded on the basis that the period of ten years in paragraph 5(4)(c), during which the reasonable belief in ownership had to exist, was the period of ten years ending on the date of the relevant application for registration, and treated this construction of paragraph 5(4)(c) as a necessary step in reaching her conclusion that the defendants could satisfy the Reasonable Belief Condition. As such, it seems to me that Arden LJ's identification of the period of ten years during which the required reasonable belief had to exist forms part of the ratio of *Zarb*.

94. Mr Goldberg took me through the decision in *Zarb* with considerable care and in considerable detail. His essential argument, on the basis of his analysis of the decision, was that the issue of the identification of the ten year period in paragraph 5(4)(c) was not raised as an issue within the third issue considered in *Zarb*. As he pointed out, principally by reference to [49] in the judgment of Arden LJ, the third issue was concerned, and only concerned with whether the reasonable belief of the defendants in their ownership of the disputed strip was brought to an end when they received the letter dated 16th October 2007

from the claimants' solicitors explaining and asserting the claimants' title to the disputed strip. The problem with this argument seems to me to be this. I do not think that the argument is capable of going far enough to avoid Arden LJ's identification of the ten year period in paragraph 5(4)(c) becoming part of the ratio of the decision in *Zarb*. As *Kadhim* demonstrates, the fact that a certain construction of a legislative provision is assumed by a court to be correct does not necessarily prevent that construction from forming part of the ratio of the decision. If anything, *Zarb* may be said to be a stronger case than *Kadhim* in this context, given that Arden LJ stated in terms her construction of paragraph 5(4)(c), and then proceeded, at least implicitly, to apply that construction when she came to the third issue.

95. Mr Goldberg also referred me to decision of the FTT in *Crook v Zurich Assurance Limited* [2023] UKFTT 00230 (PC). In this case the FTT considered the issue of the identification of the period of ten years in paragraph 5(4)(c), and concluded that it could refer to any period of ten years within the period of adverse possession. In reaching this conclusion the FTT cited two other decisions of the FTT and an earlier decision of a Deputy Adjudicator where the same conclusion on the construction of paragraph 5(4)(c) had been expressed. I did not find the decision in *Crook* to be helpful on Ground 1. In paragraph 54 of the decision in *Crook* the FTT simply stated that the interpretation of paragraph 5(4)(c) had not been argued in *Zarb* and the decision did not turn on this point because the reasonable belief was established to the date of the possession proceedings. On this basis the FTT appears to have assumed that *Zarb* did not constitute binding authority on the construction of paragraph 5(4)(c). It is not clear to what extent there was argument in *Crook* over the status of *Zarb* as precedent. There is no record of *Kadhim* having been cited to the FTT in *Crook*. Nor is there any analysis of the status of *Zarb* in the decision in *Crook*. The decision in *Crook* could not, in any event, constitute anything more than persuasive authority on the status of *Zarb* as precedent. It seems to me however, on examination of the decision, that *Crook* does not constitute any persuasive authority on the status of *Zarb*.

96. Mr Goldberg also referred me to the commentary on this question in Megarry & Wade, The Law of Real Property (Ninth Edition), at 7-098, which reads as follows:

> *"One aspect of the third condition remains the subject of uncertainty. It is not known whether the 10 years of reasonable belief must continue until immediately before the date of the application. Clearly a requirement that S submit her application on the very day her belief ceases, or ceases to be reasonable, is impracticable and cannot have been the intention of Parliament. The wording of the statute leaves it unclear as to whether any period of ten years within the period of adverse possession will suffice, or whether a reasonable period may elapse between the ending of the belief or of its reasonableness provided that the squatter acts promptly.[565] The Law Commission has recommended the introduction of a fixed period of 12 months' grace for the making of the application after the point when S no longer has a reasonable belief that she owns the land.[566]"*

97. Mr Goldberg submitted, on the basis of this commentary, that the law on this point was unclear, as opposed to being governed by authority. I cannot see however that this commentary assists Mr Goldberg in relation to Ground 1. The question is whether *Zarb* constitutes binding authority on this particular point. The commentary in Megarry & Wade does not, at least in terms, address the question of the status of *Zarb*. There is a footnote to

the commentary (footnote 565) which states that *Zarb* favours *"the latter interpretation"*, but there is no express consideration of the question raised by Ground 1.

98. I therefore conclude that Arden LJ's identification of the period of ten years, in paragraph 5(4)(c), during which the required reasonable belief had to exist, forms part of the ratio of *Zarb*. In these circumstances *Zarb* constitutes binding authority on this question, unless this part of the ratio in *Zarb* is otherwise disqualified from constituting binding precedent. As Buxton LJ explained in *Kadhim* however the means of escape from the ratio of a previous decision of the Court of Appeal are very limited. It is clear that *Zarb* was not a decision reached per incuriam or a decision falling into any of the other categories of case identified in *Young v Bristol Aeroplane*.

99. This leaves the principle, the existence of which is confirmed by *Kadhim*, that a ratio or part thereof is not binding if it was assumed to be correct without the benefit of argument to that effect. This is however a strictly limited principle; see Buxton LJ in *Kadhim* at [38]. For ease of reference, I repeat Buxton LJ's identification of the limits of this exception, at [38]:

> *"38 Like all exceptions to, and modifications of, the strict rule of precedent, this rule must only be applied in the most obvious of cases, and limited with great care. The basis of it is that the proposition in question must have been assumed, and not have been the subject of decision. That condition will almost always only be fulfilled when the point has not been expressly raised before the court and there has been no argument upon it: as Russell LJ went to some lengths in National Enterprises Ltd v Racal Communications Ltd to demonstrate had occurred in the previous case Davies Middleton & Davies Ltd v Cardiff Corpn 62 LGR 134. And there may of course be cases, perhaps many cases, where a point has not been the subject of argument, but scrutiny of the judgment indicates that the court's acceptance of the point went beyond mere assumption. Very little is likely to be required to draw that latter conclusion: because a later court will start from the position, encouraged by judicial comity, that its predecessor did indeed address all the matters essential for its decision."*

100. Mr Goldberg submitted that this principle was capable of applying to Arden LJ's construction of paragraph 5(4)(c) if, contrary to his primary submission, this construction formed part of the ratio of *Zarb*. I cannot however accept this submission. It seems quite clear to me, looking at what Buxton LJ said at [38], that the excepting principle is nowhere near wide enough to extend to what I have decided is part of the ratio of *Zarb*. I refer to my earlier discussion of whether Arden LJ's construction of paragraph 5(4)(c) formed part of the ratio of *Zarb*. The short point is that the acceptance of this construction by the Court of Appeal in *Zarb* went well beyond assumption in relation to a point not expressly raised. As I have explained, Arden LJ set out in terms her identification of the ten year period referred to in paragraph 5(4)(c). The case was quite clearly not one of mere assumption.

101. Accordingly, I conclude that the Respondents cannot rely on the exception to the rule of precedent stated by the Court of Appeal in *Kadhim*. Given my earlier conclusion on the ratio of *Zarb*, the consequence is that *Zarb* constitutes binding authority on the identification of the ten year period in paragraph 5(4)(c). *Zarb* constitutes binding authority that this period of ten years, during which the required reasonable belief in ownership must exist, is the period of ten years ending on the date of the application for registration.

(iii) Ground 1 - Is *IAM* binding authority?

102. Given my decision on the status of *Zarb*, it is not strictly necessary to answer the question of whether *IAM* constitutes binding authority on the identity of the ten year period. *Zarb* constitutes binding authority on this question. For the sake of completeness I will however consider, as briefly as possible, the status of *IAM*.

103. *IAM* was concerned with two adjacent properties known, respectively, as Numbers 26 and 26a Rye Lane. A deed entered into between the owners of the two properties in 1928 showed the boundary between the two properties as a clear and straight vertical boundary. Although this is not entirely clear from the report of the case which I have seen, it appears that this boundary was not a fence boundary but comprised, or at least included the boundary between the buildings on each property, which were joined to each other, either as semi-detached buildings or as part of a terrace of buildings. In March 1993 the defendant in the action (Mr Chowdery) became the registered freehold proprietor of Number 26a, having previously been the tenant of this property. During his tenancy the defendant had had exclusive possession of rooms on the first and second floors of Number 26, which were only accessible from Number 26a and had not been used by the owners of Number 26 for very many years. Following his purchase of the freehold of Number 26a the defendant remained in exclusive possession of the premises on the first and second floors of Number 26

104. In 2001 the claimant in the action (IAM Group plc) became the registered freehold proprietor of Number 26. Subsequently, in 2009 the claimant challenged the defendant's apparent ownership of the premises on the first and second floors of Number 26, referred to as the disputed property, on the basis that the claimant was the registered proprietor of the disputed property. On 16th August 2010 the claimant commenced an action for possession of the disputed property. The defendant contended, as had the defendants (the Parrys) in *Zarb*, that he had a defence under Section 98, on the basis that he had been in adverse possession of the disputed property since March 1993. In particular, the defendant's case was that he had reasonably believed that the disputed property belonged to him since his acquisition of the freehold interest in Number 26 in March 1993, so that he was able to satisfy the Reasonable Belief Condition. The judge at first instance accepted this case, holding that the defendant had believed at all times from March 1993 that the disputed property belonged to him, and that this belief had been a reasonable one.

105. The claimant appealed to the Court of Appeal on the basis that the judge should have inferred that the conveyancing solicitors who acted for the defendant on his acquisition of Number 26a in March 1993 should be taken to have known that the disputed property did not form part of Number 26a and did not form part of the property which the defendant was acquiring. This knowledge could, in turn, be attributed to the defendant, with the result that the defendant could not reasonably have believed, at any time since March 1993, that he owned the disputed property. The claimant also argued that the correspondence which the defendant received from the claimant's solicitors in 2009 and 2010 would have been sufficient to dispel any remaining misconceptions on the part of the defendant as to his ownership of the disputed property.

106. Judgment in the Court of Appeal was given by Etherton LJ (as he then was), with whom Ryder J and Thorpe LJ agreed. The issue before the Court of Appeal was whether the Reasonable Condition was satisfied. Etherton LJ identified the principal issue which the Court of Appeal had to determine at [18] in his judgment:

"18 The principal ground of the appeal is a short one. It is that the Judge ought to have inferred that the respondent's solicitors not only saw the 1993 transfer to the respondent and the copy entries in the Land Registry, but also conducted all necessary searches on the respondent's behalf. In the light of all of those documents, and assuming suitable enquiries, there was nothing to lead to a reasonable belief that the disputed property belonged to the respondent. Mr Evans points out that the plans at the Land Registry give no indication of a flying freehold covering the whole of the first floor of No.26 being comprised within the registered title of No.26a. He emphasises that the boundaries on the register plans show a vertical division of the boundary between the two properties. He says, moreover, that it is clear from the transfer itself that the transfer was of—and only of—the property comprised in the registered title of No.26a. He says that on the face of the register entries relating to both No.26 and No.26a there is reference to the 1928 Deed. Accordingly, Mr Evans says, not only is the inevitable inference that the solicitors acting for the respondent in 1993 would have seen and understood the Land Registry documents and the transfer as indicating only vertical boundaries between the two properties and the absence of any flying freehold owned by No.26a over No.26, but, if they had ever sought to investigate the point, it would have become perfectly clear from the 1928 Deed which they could have obtained from the Land Registry (and which in due course was in fact obtained from the Land Registry by the appellant) that any doubts on the point would have been resolved in favour of the Judge's ultimate conclusion, namely that there was no flying freehold over No.26 within the title of No.26a."

107. Etherton LJ then identified the further issue raised by the appeal, on the question of reasonable knowledge, at [19]:

"19 Mr Evans further says that, if that was not enough, in 2009 and in 2010 there was correspondence from the appellant's solicitors to the respondent asserting that the respondent was not the owner of the first and second floors over the ground floor of No.26 but that the appellant was, and they enclosed copies of the relevant entries at the Land Registry. Mr Evans submits that, whatever misconception the respondent may have had up until that time about his ownership of the disputed property, he could not reasonably have continued to believe that he owned the disputed property after that time."

108. Etherton LJ first dealt with the principal argument advanced on behalf of the defendant; see the judgment at [25] – [28]. As Etherton LJ pointed out, the relevant question was what was known to the defendant, not what was or might have been known to his conveyancing solicitors in March 1993. On this basis, as Etherton LJ explained at [28], the principal argument in the appeal failed:

"28 On the basis of the facts found by the Judge there was nothing to put the respondent on notice in 1993 that he needed to raise with his solicitors whether his title to No.26a included the disputed property, of which he had enjoyed exclusive possession without challenge or question from the time he first acquired an interest in 1990 and the access to which obtained solely from No.26a. That, in my judgment, is the end to the ground of appeal based upon the respondent's inferred knowledge

derived from the assumed conduct of what would have been hypothetically competent solicitors."

109. Etherton LJ then proceeded, at [29] and [30], to deal with the claimant's further argument, based on the correspondence in 2009 and 2010:

> *"29 So far as concerns the letters from the appellant challenging the title of the respondent to the disputed property in 2009 and 2010, it is clear from Zarb v Parry that the mere fact that a paper title owner challenges the asserted ownership of land by the adverse possessor is not in every case sufficient to render unreasonable any continuing belief of ownership on the part of adverse possessor. On the facts in Zarb v Parry the adverse possessor satisfied the requirement of reasonable belief even though that the paper title owner had challenged the assertion of ownership by the adverse possessor.*
> *30 The question in each case is what, in all the circumstances, is the proper conclusion as to the reasonableness or otherwise of the continued belief as to ownership by the adverse possessor. In the present case, by the time of the letters from the appellants challenging the respondent's asserted title of the disputed property, the respondent had enjoyed unchallenged exclusive occupation for some 18 years. During that period the respondent's exclusive occupation of the disputed property had never been challenged or questioned by anyone who had any interest in No.26, and indeed the appellant's own tenants had seemingly acknowledged that the disputed land was not being used by them, and access was only obtained via No.26a. In the light of those facts the Judge was not only entitled but right to conclude that the letters from the appellants did not result in the continuing belief of the respondent that he owned the disputed property ceasing to be a reasonable one."*

110. The appeal in *IAM* was thus dismissed. It should be noted that the judgment of Etherton LJ makes no reference to the question of the correct identification of the period of ten years referred to in paragraph 5(4)(c). There is no other reference, in the report of this decision, to this question being considered or argued before the Court of Appeal. The broad issue in the appeal was whether the Reasonable Belief Condition was satisfied. The specific issues were however (i) whether the belief of the defendant had never been reasonable, by reason of what was said to have been the knowledge of the defendant's solicitors in 1993, and (ii) whether the belief of the defendant, if it existed as a reasonable belief prior to 2009, came to an end in 2009 when the defendant's ownership of the disputed property was challenged. In considering these specific issues Etherton LJ did not find it necessary to state what period of ten years he was considering. It looks as though this question was not argued, or at least was not the subject of dispute in the Court of Appeal. Etherton LJ did make reference to *Zarb* in his judgment, which raises the inference that he was following Arden LJ in taking the period of ten years to be the period of ten years ending on the date which, by virtue of Section 98(1), would have been the date on which the defendant was deemed to have made an application for registration as owner of the disputed property.

111. This inference is strengthened by the fact that, at first instance, the judge clearly took the period of ten years to be the period of ten years ending on the deemed application date; namely 15th August 2010, which was the day immediately before the day on which the claimant commenced its possession action. This is clear from Etherton LJ's judgment at [17], where he set out an extract from the judge's judgment. The extract is lengthy but I

need only set out the following two parts of this extract, both of which demonstrate the judge's identification of the period of ten years.

> *"This then leaves sub-paragraph (c) and the remaining attack is directed at whether the Defendant reasonably believed that throughout the period of 10 years ending on 15th August 2010 the disputed land belonged to him."*
>
> *"I am also satisfied that notwithstanding such correspondence as the Defendant may have seen from the Claimant's solicitors he continued reasonably to hold the belief for the whole of the material 10 years."*

112. It is not clear whether this identification was the subject of argument at first instance. It was not commented upon by Etherton LJ, presumably because identification of this period was not argued before the Court of Appeal. As I have said, my inference is that Etherton LJ simply proceeded on the basis that the ten year period was as identified by the judge, and as identified by Arden LJ in *Zarb*.

113. Where does this leave *IAM*, in terms of its status as binding authority on this question? Returning to *Kadhim*, and applying the identification of ratio established in that case, it seems to me this question is not an easy one to answer. The question is whether, in *IAM*, identification of the period of ten years in paragraph 5(4)(c) as ending on the deemed application date (15th August 2010), was impliedly treated by Etherton LJ as a necessary step in reaching his conclusion that the Reasonable Belief Condition was satisfied, having regard to his line of reasoning. It can be argued that the answer to this question is no. In his reasoning Etherton LJ made no reference to the identification of the ten year period, which is understandable if I am right in thinking that the point was not argued in the Court of Appeal.

114. The problem with this analysis, which reflects the equivalent point which I have already made in relation to *Zarb*, is that Etherton LJ did consider the effect of the correspondence in 2009 and 2010. If any period of ten years of reasonable belief would suffice to satisfy the Reasonable Belief Condition, what happened in 2009 and 2010 was strictly irrelevant. If the period of reasonable belief could be traced back to 1993, as Etherton LJ considered it could, the Reasonable Belief Condition would have been satisfied well before 2009, if any period of ten years would suffice. The question seems to me to be more difficult to answer in relation to *IAM* than it is in relation to *Zarb*, but ultimately I conclude that the ratio of *IAM* includes a decision that the period of ten years referred to in paragraph 5(4)(c) is the period of ten years ending on the relevant application date and not any period of ten years during the relevant period of adverse possession.

115. This leaves the question of whether what I have decided to be part of the ratio of *IAM* can be treated as non-binding by reason of the narrow principle identified by Buxton LJ in *Kadhim*. Again, this is not an easy question to answer. The basic question to be answered, in the context of the decision in *IAM*, is whether the Court of Appeal (specifically Etherton LJ, as the other members of the Court of Appeal agreed with his judgment) assumed the relevant proposition of law, namely that the ten year period in paragraph 5(4)(c) was the ten year period ending on the relevant application date, to be correct without argument before or consideration by the Court of Appeal. In answering that question one must bear in mind Buxton LJ's warning in *Kadhim*, at [38], that very little is likely to be required to draw the

conclusion that the acceptance of the relevant proposition of law by Etherton LJ went beyond mere assumption.

116. In my view *IAM* does belong in the category of cases, which I accept is likely to be a small one, where the excepting principle in *Kadhim* does apply. Reading the judgment of Etherton LJ, with which the other members of the Court of Appeal agreed, there is no trace of any argument over or consideration of the identification of the ten year period. It seems to me that the Court of Appeal in *IAM* simply proceeded on the assumption that this identification was correct, no doubt because they were following the lead given by the judge at first instance and what was said in *Zarb*. I cannot find anything in *IAM* to suggest that the approach of the Court of Appeal to this question went beyond mere assumption. It is true that Etherton LJ considered an issue, namely the effect of the correspondence in 2009 and 2010 which did not arise if any period of ten years would suffice to satisfy the Reasonable Belief Condition, but I am unable to conclude that this converted the acceptance by the Court of Appeal of the relevant proposition of law into something more than mere assumption.

117. I therefore conclude that, taken in isolation, *IAM* does not itself constitute binding authority on the question of the correct identification of the ten year period referred to in paragraph 5(4)(c). I state the conclusion in these terms because, given my decision on the status of *Zarb*, *IAM* can be described as a decision consistent with binding authority on the identification question, even if not itself binding authority.

(iv) Ground 1 – conclusion

118. The Judge treated himself as not bound by either *Zarb* or *IAM* on the question of the identification of the ten year period in paragraph 5(4)(c); see Paragraph 52. I have decided that *Zarb* does constitute binding authority on this question. The Judge's treatment of *Zarb* as non-binding authority on this question is understandable, given that this was conceded before him by the Appellant. The concession has however now been withdrawn, and it follows from my own analysis of Ground 1 that the Judge should have treated *Zarb* as binding authority on this question.

119. It seems to me that the Judge thereby made an error of law, which was a material error of law. If, as I have decided, *Zarb* constituted binding authority on the identification of the ten year period in paragraph 5(4)(c), it seems to me that the Judge should have followed *Zarb* and concluded that the ten year period during which the Respondents had to demonstrate their reasonable belief in their ownership of the Disputed Land was the period of ten years ending on the Application Date. Subject to the cross appeal this had the consequence, on the Judge's findings as to the period during which the Respondents' reasonable belief continued, that the Respondents had not satisfied the Reasonable Belief Condition, with the consequence that the Application fell to be dismissed.

120. Accordingly, I conclude that the appeal falls to be allowed on Ground 1. The consequences of this conclusion for the Decision depend however on the cross appeal. My decision on Ground 1 means that the cross appeal arises directly for decision. For the reasons given in the Decision the Judge directed the Chief Land Registrar to give effect to the Application. Whether that direction can stand depends upon the cross appeal. I will therefore defer consideration of the consequences for the direction given to the Chief Land Registrar (if any) of my decision to allow the appeal until after I have considered the cross appeal.

121. My conclusion on Ground 1 renders it strictly unnecessary to consider Grounds 2 and 3. In particular, it may be said that it is not appropriate for me to consider Ground 3 at all, given my decision that the question of construction raised by Ground 3 is the subject of binding Court of Appeal authority.

122. Mr Goldberg did however urge me to set out my views on Ground 3, whatever my decision on Grounds 1 and 2. I have decided, not without some hesitation, that I should, as briefly as I can, set out my views on Ground 3. I have taken this decision for the following reasons:
    (1) For reasons which I shall explain, as briefly as I can, I find myself, albeit with considerable diffidence, in disagreement with Arden LJ's construction of paragraph 5(4)(c). For what it is worth my view is that the period of ten years referred to in paragraph 5(4)(c) can be any period of ten years within the relevant period of adverse possession. As the question of construction has been fully argued before me, on the hypothesis that *Zarb* does not constitute binding authority, it seems to me right that the parties should know what my views are on the construction question.
    (2) If this case goes further, it may be of some assistance to an appeal court to see my own views on the question of construction raised by Ground 3.

123. I will also set out my views on Ground 2. I find it convenient however to deal first with my views on Ground 3, given that those views are, in my judgment, relevant to my consideration of Ground 2.

Ground 3 – analysis and conclusion

124. In considering Ground 3 I am proceeding on the hypothesis, contrary to my decision on Ground 1, that *Zarb* is not binding authority on the correct identification of the ten year period in paragraph 5(4)(c). I am proceeding on the hypothesis that the identification of this period is a question of construction of paragraph 5(4)(c), in respect of which *Zarb* is an authority, but not a binding authority. I am also proceeding on the hypothesis, which is subject to my views on Ground 2, that the position was not one where the Judge should have followed *Zarb* on the construction question, even if *Zarb* did not constitute binding authority.

125. The question raised by Ground 3 is a question of statutory construction. In terms of the principles which should guide me in this exercise, I refer to the judgment of Lord Hodge DPSC in *R (O) v Secretary of State for the Home Department: R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3 [2023] AC 255.

126. In his judgment, with which Lord Briggs, Lord Stephens and Lady Rose JJSC agreed, Lord Hodge DPSC addressed the process of statutory interpretation. Lord Hodge explained this statutory process in the following terms, at [29]:

> *"29 The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context." (R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] 2 AC 349, 396.) Words*

and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in Spath Holme, p 397: "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."

127. So far as the use of external aids to interpretation were concerned, Lord Hodge identified their role as a limited one. As he explained at [30]:

> *"30 External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole."*

128. Lord Hodge concluded his explanation of the process of statutory interpretation in the following terms, at [31]:

> *"31 Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in Spath Holme [2001] 2 AC 349, 396, in an important passage stated:*
>
> > *"The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House . . .Thus, when courts say*

that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."

129. Lord Hodge then went on, at [32], to refer to the use of ministerial statements as an aid to statutory construction. As he pointed out, this is only permissible where the three conditions in *Pepper v Hart* [1993] AC 593 (at page 640) are satisfied. In the present case there was no attempt to rely on ministerial statements.

130. Both Ms Tozer and Mr Goldberg referred me to Law Commission reports concerned with the 2002 Act. Both counsel referred me to the Law Commission Report No. 271 (Land Registration for the Twenty-First Century – A Conveyancing Revolution), published in 2001 as a joint publication by the Law Commission and the Land Registry. The Report contains a commentary accompanying what was then the Land Registration Bill, which would become the 2002 Act. Mr Goldberg also referred me to the Law Commission Report No. 380 (Updating the Land Registration Act 2002), published in 2018, which contains commentary on the 2002 Act, and specifically, at 17.47 and 17.48, a discussion of the identification of the ten year period in paragraph 5(4)(c) which favours the Respondents' argument that the period of ten years is any period of ten years within the relevant period of adverse possession.

131. So far as the first of these Reports is concerned, I accept the argument put by Ms Tozer that Report No. 271 is useful in identifying the mischief against which the 2002 Act was intended to be directed, and specifically in identifying what the legislature was seeking to achieve in the reform of the law of adverse possession in relation to registered land. The assistance I derive from this Report is however very limited, and very much in the background of the statutory construction exercise to be carried out in the present case. It is clear that the Report is only admissible as an aid to construction in the identification of the purpose of the adverse possession provisions in the 2002 Act and in the identification of the mischief at which these provisions were aimed; see Lord Hodge in *R (O) v Secretary of State for Home Department* and see *Black-Clawson International Ltd v Papierwerke Waldholf-Aschaffenburg* [1975] AC 591 at 614F, 629D and 637E. Beyond this, the commentary in the Report seems to me to be at too high a level of generality to be of any real assistance in the resolution of the specific construction issue presented by paragraph 5(4)(c).

132. So far as Report No. 380 is concerned, it was not clear to me that it was admissible at all as an aid to construction. I say this for two reasons. First, the Report postdates the 2002 Act. Accordingly, I am not clear what value, if any, it has as a guide to the purpose of adverse possession reforms made by the 2002 Act or the mischief at which those reforms were aimed. Second, Mr Goldberg sought to rely on the Report for the views expressed on the meaning of paragraph 5(4)(c). As I read *Black-Clawson* and the extracts quoted above from the judgment of Lord Hodge in *R (O) v Secretary of State for Home Department*, Law Commission reports are not admissible as a guide to the meaning of particular phrases in a Bill or an Act, either as statements of the subjective intention of the Law Commission in the relevant phrase or as a commentary on the meaning of the relevant phrase.

133. Ms Tozer also referred me to various extracts from the commentary in Volume 96 of Halsbury's Laws of England (Fifth Edition), which set out various rules or principles of

statutory construction. These, so far as relevant, are best addressed in the course of the construction exercise itself, to which I now turn.

134. For ease of reference only, I repeat sub-paragraph (c) of paragraph 5(4), while keeping firmly in mind that sub-paragraph (c) must be construed in its statutory context and not in isolation:

> *"(c) for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him"*

135. As a matter of language this wording seems to me capable of each of the two constructions contended for by the parties. The real question seems to me to be what, in this sub-paragraph, the words *"ending on the date of the application"* refer to? Do they refer to the relevant period of adverse possession ending on the date of the relevant application, so that the period of ten years during which the reasonable belief in ownership must be demonstrated can be any period of ten years within *"the relevant period of adverse possession ending on the date of the application"*? Or do they refer directly to the period of ten years during which the reasonable belief in ownership must be demonstrated, so that this period must be the period of ten years *"ending on the date of the application"*? I accept that both of these readings are possible readings of the sub-paragraph.

136. A point which has some relevance in this context is that paragraph 1(1) sets the period of adverse possession which must be demonstrated before an application for registration can be made. It is clear that this period of adverse possession must be for the period of ten years ending on the date of the application. The period of adverse possession may be longer than ten years, but it must endure, without interruption, during the period of ten years ending on the date of the relevant application. Given this position, one might expect the use of a similar expression in paragraph 5(4)(c) to have the same meaning, as Mr Goldberg argued. On this basis, the period of adverse possession ending on the date of the application, referred to in sub-paragraph (c), is referring to the same period of adverse possession ending on the date of the application which is referred to in paragraph 1(1). In each case the period of adverse possession must be at least ten years, although it may be longer, and must end on the date of the application.

137. Seen in this light the opening words of paragraph 5(4)(c), namely *"for at least ten years"*, make sense. The period of at least ten years during which the reasonable belief must exist is a period of at least ten years *"of"*, (ie. falling within) the period of adverse possession ending on the date of the application. The minimum duration of this period of adverse possession is prescribed by paragraph 1(1), while the description of the period of adverse possession as ending on the date of the application is repeated from paragraph 1(1). This construction, which permits the period of ten years during which the reasonable belief must exist to be any period of ten years within the period of adverse possession, seems to me to fit better with the language and scheme of Schedule 6 than the alternative of requiring the ten year period of reasonable belief to end on the date of the relevant application.

138. Ms Tozer argued that this reading of sub-paragraph (c) infringed the *"linguistic canon"* that requires every word of a statute to be given effect; see Halsbury's Laws, Volume 96, at paragraph 808. The relevant part of the commentary reads as follows:

"It is one of the linguistic canons applicable to the construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the act. Construction as a whole requires that, unless the contrary appears, every word in the Act should be given a meaning, the same word should be given the same meaning, and different words should be given different meanings."

139. I do not accept that the reading of paragraph 5(4)(c) which I have set out above infringes the linguistic canon explained in this commentary. Treating the period of adverse possession ending on the date of the application as being a reference to the same period of adverse possession in both paragraph 1(1) and paragraph 5(4)(c) seems to me to be consistent with the commentary in Halsbury's Laws. I can see that the words *"ending on the date of the application"* might, on the construction which I have set out above, have been omitted, but I do not think that this point carries weight in the construction. If the same period of adverse possession is being referred to, it makes sense to maintain the reference to *"ending on the date of the application"* in both references.

140. Pausing at this point, and concentrating solely upon the language of paragraph 5(4)(c), in its statutory context, the construction which I prefer is that the period of ten years during which the reasonable belief must exist can be any period of ten years within the relevant period of adverse possession.

141. What however seems to me to settle the construction issue in favour of the linguistic construction which I prefer is consideration of the consequences, for the operation of the adverse possession regime in Schedule 6, if the period of ten years during which the reasonable belief must exist is and can only be the period of ten years ending on the date of the relevant application for registration. Those consequences seem to me to create such serious difficulties for the operation of Schedule 6 that it is impossible to accept that Parliament intended those consequences.

142. On its face, the requirement for the reasonable belief to continue for the period of ten years ending on the date of the relevant application would appear to render the ability to make an application under paragraph 1 largely a dead letter. A person will, it is reasonable to assume, make an application for registration as owner of land which has been in their adverse possession at some time after the point when they realise that they do not have the registered title to the relevant land. As from that point of realisation, they are unlikely to be able to demonstrate that they still have the reasonable belief in their ownership of the relevant land. If however the reasonable belief must continue for the period of ten years ending *"on"* the date of the application, the reasonable belief must exist on the day when the application is made. On this hypothesis however, and for the reason which I have just given, it seems inevitable that the person in adverse possession will not be able to demonstrate the required reasonable belief when the application is made. The overall result is an absurd one. It is impossible to accept that Parliament intended the Reasonable Belief Condition to operate in this fashion.

143. The answer to this has been that the reference in sub-paragraph (c) to the period of ten years ending on the date of the application does not mean quite what it says. There is in fact a period of grace between the coming to an end of the period of reasonable belief and the

making of the application for registration. A delay in making the application, beyond the point where the reasonable belief ceases to exist, does not disqualify the person in adverse possession from satisfying the Reasonable Belief Condition, provided that the person in adverse possession acts promptly in making the application for registration.

144. I have serious difficulties in seeing how this is a satisfactory answer to the absurdity which I have identified above. I say this for two reasons.

145. First, I do not see how the language of paragraph 5(4)(c) lends itself to this construction. On this construction, the period of ten years during which the reasonable belief must exist is the period of ten years *"ending on the date of the application"*. There is no reference to any period of grace between the date when the period of reasonable belief comes to an end and the date of the application. I appreciate that, in *Zarb*, Arden LJ appeared to have in mind that such a period of grace is permissible. This is consistent with Arden LJ's reference to the need to act promptly in her judgment in *Zarb* at [55]. In this context however I note that Arden LJ, in her analysis of paragraph 5(4) at [17], referred to the period of ten years, during which the reasonable belief must exist, as *"the last ten years of his possession prior to the application for registration"*. This however is not the wording of sub-paragraph (c). There is no reference to *"prior"*. On the Appellant's construction of sub-paragraph (c), the period of ten years during which the reasonable belief must exist ends on, not prior to the date on which the application is made.

146. Ms Tozer sought to justify the existence of this period of grace on the basis that the de minimis principle applies. The full Latin tag is *"de minimis non curat lex"*, which means that the law does not concern itself with trifling matters; see Halsbury's Laws, Volume 96, at paragraph 759. This however is a principle which applies to trifling matters. As the editors of Halsbury's Laws explain, by way of example of the operation of this principle, the principle underlies the rule that the law generally disregards fractions of a day. I do not see that this principle can be invoked to mean that the reference in sub-paragraph (c) to the period of ten years ending on the date of the relevant application can be read as meaning that date or a date falling days, or weeks or months before that date. Indeed, in this context I have not been shown any authority for the proposition that the requirement for at least ten years of adverse possession ending on the date of the relevant application for registration, as referred to in paragraph 1(1), is similarly flexible, so that the period of adverse possession can end before the date of the application. To the contrary, it seems clear to me that Parliament intended, in paragraph 1(1), to impose a strict requirement that the period of adverse possession should continue for at least ten years, and should run up to the date of the application for registration. Indeed, I note that paragraph 1(2) makes specific provision for an application for registration to be made by a person whose adverse possession has been brought to an end by an earlier eviction, provided that the conditions in paragraph 1(2), which include a time limit of six months from the date of eviction for the making of the application, are satisfied.

147. Second, and if it is assumed that there is a period of grace, the obvious question which arises is how its length is to be determined. Is it limited to a period of days, or weeks, or months? I understood Ms Tozer's answer to this point to be that the period of grace is intended to operate where the person in adverse possession makes the application promptly. This however only serves to increase the uncertainty. What counts as prompt action? Ms Tozer referred me to CPR 13.3, which deals with applications to set aside or vary a default judgment. By CPR 13.3(2) one of the matters to which the court must have regard, in

considering such an application, is whether the person seeking to set aside the judgment acted promptly. I understood Ms Tozer's point to be that courts do have to determine, and are perfectly well able to determine what constitutes prompt action. I accept this point, but I do not consider it a satisfactory answer to the problem of uncertainty created by this reading of paragraph 5(4)(c). It is one thing for a provision, particularly a case management provision, to make express reference to the need to consider a factor of this kind. It is, in my view, quite another to read this kind of uncertainty into the operation of the Reasonable Belief Condition.

148. The problems with reading a period of grace into paragraph 5(4)(c), conditional upon prompt action, do not end there. In the postscript to her judgment in *Zarb*, Arden LJ recited all the familiar evils of boundary disputes, on which many other courts have also commented. At [59] Arden LJ stressed the importance, if a dispute emerges, of making every effort to resolve the dispute without litigation. Indeed, both before and after *Zarb*, the courts have continued to emphasize the importance of alternative dispute resolution, as a means of avoiding the cost, time, distress and entrenched positions of litigation. In the context of boundary disputes Mr Goldberg drew my attention to the decision of the Court of Appeal in *Wilkinson v Farmer* [2010] EWCA Civ 1148, which involved a right of way dispute between neighbours. In his judgment in that case, at [4], Mummery LJ, made the following notable statement on the importance of keeping neighbour disputes out of court:

> *"4. The whole exercise has been an uncomfortable experience of unsatisfactory aspects of the conduct and cost of neighbour disputes in the courts. Everybody agrees that, if at all possible, disagreements between neighbours about rights of way, boundaries or whatever should be settled without ever going near a court. In my view, professional advisers have a duty to warn their clients at an early stage about the downside of neighbour litigation, even for a successful party. If the case goes to court there is, as this case shows, some uncertainty about the ultimate outcome. The case does not always end with the trial. Appeals are possible. What is certain is that, at the end of the day, one of the parties will lose and will usually finish up fixed with an order to pay very considerable legal costs. That is not good for the losing party or for the prospect of harmonious relations between neighbours who continue to live next door to each other after the case is over. The cost and stress of a court case will often result in the further deterioration of already damaged relationships. The parties might be horrified to discover that the litigation has blighted their properties, as well as their lives."*

149. It is hard to see how the important and laudable objective of parties avoiding neighbour disputes going to court is advanced or respected, if the correct construction of paragraph 5(4)(c) is that the person in adverse possession must make the application for registration promptly after the period of their reasonable belief in their ownership of the relevant land has come to an end. As the case law on the Reasonable Belief Condition demonstrates, the point at which the period of reasonable belief is most likely to come to an end, even if this is not inevitable, is the point at which the registered proprietor challenges the person in adverse possession. Putting the matter another way, the point at which the period of reasonable belief is most likely to come to an end, even if this is not inevitable, is the point at which a boundary dispute arises with the registered proprietor of the land in dispute. If the Appellant is right in his construction of sub-paragraph (c), the person in adverse possession must then move promptly to the making of the application for registration. Any

such person would be ill-advised to engage in pre-litigation negotiations, because of the risk of being found not to have acted promptly.

150. This strikes me as a most unfortunate situation, which runs counter to the stress which has repeatedly been laid by the courts on the importance of pre-litigation negotiation and alternative dispute resolution. The fact that this situation arises in the context of what are, effectively, boundary disputes, only serves to highlight how undesirable this situation is.

151. Ms Tozer made the point that there is nothing to prevent the parties negotiating after the application for registration has been made. She pointed out that the Land Registry procedure allows for negotiation to take place. These are fair points, but I do not think that they deal satisfactorily with the problem of the person in adverse possession being effectively forced into making an application for registration once the relevant dispute breaks out. It seems to me that there is a significant difference between (i) conducting negotiations over a boundary dispute at the point where neither party has taken any formal action, beyond possibly instructing solicitors, and (ii) conducting negotiations after the formal action of an application for registration has been made. Once the application has been made, the parties are bound into a form of litigation. A dispute is generally easier to settle before the parties have got onto the escalator of litigation or, to put the matter more crudely, before the ante has been upped.

152. In addition to this, and given that no sensible person wishes to engage in a boundary dispute, one might think it unfair that a person in adverse possession, and in a position to demonstrate 10 years of reasonable belief in their ownership of the relevant land, should be at risk of losing their right to make an application for registration as a result of a natural reluctance, particularly in the early stages of a dispute, to move to the commencement of legal proceedings. One could, I suppose, read a further proviso into the period of grace which is assumed on the Appellant's construction of paragraph 5(4)(c), to the effect that there is no failure to act promptly where the parties engage in pre-litigation negotiations. This however only serves to introduce yet more uncertainty and difficulty into the workings of the Reasonable Belief Condition.

153. All of these problems with reading a period of grace into paragraph 5(4)(c) seem to me to point clearly to the conclusion that Parliament cannot have intended the Reasonable Belief Condition to operate in this way. I note that the Judge came to much the same conclusion at Paragraph 53. In my view he was right to do so.

154. For completeness I should mention that, in the context of Ground 3, Ms Tozer made the point that it was open to the registered proprietor of land to grant a licence to a person in adverse possession of that land, thereby interrupting the period of adverse possession. I understood Ms Tozer's point to be that there was nothing objectionable either in a person in adverse possession being required to act promptly, following the period of their reasonable belief coming to an end, or in assuming a short period of grace before the application had to be made, given that there were other circumstances in which prompt action by the person in adverse possession would be required. This in turn sparked a debate between Ms Tozer and Mr Goldberg on whether a registered proprietor could unilaterally end a period of adverse possession by the unilateral grant of a permission or licence to occupy to the person in adverse possession of the relevant land. In the context of this debate Ms Tozer drew my attention to the decision of the Court of Appeal in *BP Properties Ltd v Buckler* (1988) 55 P. & C.R. The case was concerned with a claim for possession of a farmhouse and garden by

BP Properties Ltd, the plaintiff in the action. Mr Buckler, the defendant to the action and the appellant in the Court of Appeal, defended the claim for possession. The appellant's case was that he was entitled to be registered as proprietor of the farmhouse and garden on the basis of adverse possession; being the adverse possession of himself and his late parents. The claim to title by adverse possession failed. The Court of Appeal decided that letters written some years previously to the appellant's mother, granting her permission to occupy the farmhouse and garden, had been sufficient, as from the grant of this permission, to prevent this occupation constituting adverse possession, notwithstanding that the appellant's mother had never expressly accepted or rejected the terms of these letters.

155. I did not find this particular excursion into the law of adverse possession helpful to my decision on Ground 3. It seems to me that the particular issue considered in *BP Properties* is too far removed from the matters which I have to consider to be of any assistance, even by way of analogy. In addition to this, it is clear that *BP Properties* is not authority for the proposition that a registered proprietor can, in any case, put an end to adverse possession by the unilateral grant of a permission or licence to occupy the relevant land. In his judgment (at page 346 of the report) Dillon LJ expressly left open the question of whether the result in the case would have been different if the appellant's mother had, on receipt of the letters, responded by saying that she did not accept the terms of the letters and claimed already to be the owner of the farmhouse and garden. I was not shown any further authority on this particular issue, but it seems to me clear, at least, that *BP Properties* does not provide clear and unqualified authority to support the point which Ms Tozer was seeking to make.

156. I was also shown two decisions of the FTT on the issue of the construction of paragraph 5(4)(c). The first was the decision in *Crook*, which I have already mentioned. In *Crook* the FTT took the view that the required period of reasonable belief could be any period of ten years within the relevant period of adverse possession; see paragraphs 44-65 of the judgment. The second decision was the decision of the FTT in *Hepworth v Powell* [2018] UKFTT 0058 (PC), where the FTT preferred the construction of sub-paragraph (c) contended for by the Appellant; namely that the reasonable belief must exist for the period of ten years ending on the date of the relevant application, subject to a period of grace provided that the person in adverse possession acts promptly; see paragraphs 67-73 of the decision in *Hepworth*. These decisions demonstrate that the question of construction is not settled at FTT level although, for what it is worth, I note that the judgment in *Crook* refers to other decisions of the FTT and a Deputy Adjudicator which support the Respondents' construction of sub-paragraph (c). These decisions are persuasive only, and I have not found it necessary to place any reliance upon them in reaching my own conclusions on the construction of sub-paragraph (c).

157. Returning to the wider points made by Ms Tozer on the statutory purposes behind the provisions of Schedule 6, I have already made reference to the Law Commission Report No. 271. I cannot see that the construction of paragraph 5(4)(c) which I prefer runs counter to any of the purposes identified in the Law Commission Report. By contrast I do not think that the new regime for the operation of adverse possession in relation to registered land, as introduced by the 2002 Act, was intended to produce consequences of the kind which result from the Appellant's construction of sub-paragraph (c).

158. Ms Tozer also referred me to the human rights position. She pointed out that the 2002 Act must be interpreted so as to give effect to any human rights which might be engaged, by virtue of Section 3 of the Human Rights Act 1998. As such, so she contended, the Judge

should have assumed that Parliament was intending to minimise interference with the right of the registered proprietor to the protection of their property pursuant to Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998. If the Judge had done this, so Ms Tozer's argument ran, he should have concluded that sub-paragraph (c) should be given a restricted reading, so that the reasonable belief had to exist for the period of ten years ending on the date of the application for registration, subject to the grace period referred to by Ms Tozer.

159. It is of course the case that the 2002 Act must be read in a manner compatible with human rights. I also accept that the impact of human rights was significant, in the framing of the new adverse possession regime in the 2002 Act. In this context it is convenient to repeat what Arden LJ said in *Zarb*, at [17] (but without my previous underlining):

> *"17 Paragraph 5(4) sets out three sub-conditions. The relevant sub-condition on this appeal is sub-paragraph (c). This sub-condition is new. The adverse possessor has to show that he made a reasonable mistake in believing that he was the owner of the land of which possession is claimed. This seems to be a fair requirement for the law to impose before the paper title owner is deprived of his land, which may be very substantial in area and value, unlike the comparatively small area in this case. It reflects the fact that, by virtue of article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998, a fair balance must be shown to justify an interference by the state with a person's possessions. The 2002 Act was no doubt intended to be Convention-compliant in this respect. But the necessary effect of the way that paragraph 5(4) is expressed is to make the unreasonable belief of the adverse possessor in the last ten years of his possession prior to the application for registration a potentially disqualifying factor even though his belief started out as reasonable but became unreasonable as a result of circumstances after the completion by him and/or his predecessor in title of a ten-year period of possession. The consequence of that is that the paper title owner will have a last chance to recover the land if the adverse possessor did not have a reasonable belief during the last ten years. The moral is that, as soon as the adverse possessor learns facts which might make his belief in his own ownership unreasonable, he should take steps to secure registration as proprietor."*

160. What I do not accept is that the Respondents' construction of sub-paragraph (c) does anything to infringe the human rights (specifically the property rights) of a registered proprietor of land. I cannot see that this construction upsets the balance between the rights of the person in adverse possession and the rights of the registered proprietor which is struck by the adverse possession regime in the 2002 Act. It seems to me that the requirement for a period of ten years of reasonable belief in their ownership of the relevant land, on the part of the person in adverse possession, remains *"a fair requirement for the law to impose"*, to use the language of Arden LJ, whether the period of ten years can be any period of ten years within the relevant period of adverse possession or only the period of ten years ending on the date of the application for registration. Put simply, I do not think that human rights provide the answer or assist in providing the answer to the question of construction raised by Ground 3.

161. Drawing together all of the above analysis my views on the issue of construction of paragraph 5(4)(c), for what they are worth and with due respect to the Court of Appeal in *Zarb*, can be summarised as follows:
    (1) The correct construction of paragraph 5(4)(c) is that the period of ten years during which the reasonable belief in ownership must exist can be any period of ten years within the relevant period of adverse possession.
    (2) The period of ten years during which the reasonable belief in ownership must exist is not confined to the period of ten years ending on the date of the relevant application for registration, assuming that the relevant period of adverse possession ending on the date of the relevant application is longer than ten years and provided that the period of reasonable belief falls within the relevant period of adverse possession.

162. If therefore Ground 3 had been a live ground of appeal, I would have dismissed the appeal on Ground 3.

Ground 2 – analysis and conclusion

163. I can deal very briefly with Ground 2. The hypothesis which governs Ground 2 is that *Zarb* is not binding authority on the construction of paragraph 5(4)(c). On this hypothesis I cannot see that the Judge went wrong in what he said in Paragraphs 52 and 53 or in his decision on the construction question. On this hypothesis I cannot see that the situation was one where the Judge, by declining to follow Arden LJ's construction of paragraph 5(4)(c), failed to give adequate weight to *Zarb*. If *Zarb* was not binding authority it seems to me that it was a matter for the Judge to decide what weight to give to *Zarb*. If the Judge found himself in disagreement with *Zarb*, as he did, it seems to me that the Judge was entitled to decide the construction issue for himself. I cannot see, on the hypothesis which governs Ground 2, that the Judge committed an error of law in making his own decision on the construction question.

164. If therefore Ground 2 had been a live ground of appeal, I would have dismissed the appeal on Ground 2.

The cross appeal

165. As I have explained above, my decision to allow the appeal on Ground 1 means that the cross appeal is no longer contingent. The cross appeal arises for decision. This includes the issue of the true nature of the cross appeal and, depending upon the outcome of that issue, the question of whether the cross appeal requires permission.

166. The subject matter of the cross appeal is a challenge to the Judge's findings as to when the reasonable belief of the Respondents in their ownership of the Disputed Land came to an end. The Judge addressed this question at the end of the Decision. The Judge addressed this question on the hypothesis, which now reflects the reality of the legal position, that the reasonable belief had to exist for the period of ten years (subject to the period of grace) ending on the Application Date. The Judge dealt with this question in Paragraphs 55 – 61. As the relevant part of the Decision is fairly short, I can set it out in full.

167. At Paragraph 56, the Judge stated his overall finding on this question:

"56. I am not satisfied that the Ridleys have established that they maintained their initially reasonable belief beyond the making of their application for planning permission in February 2018. On the one hand I have Mr Ridley and Mr Hodgson's evidence that the first time they realised there was an issue as to the paper and on the ground boundaries was about 23 October 2019 when Mr Hodgson produced the overlay plan at page 671 having obtained a copy of the title plan for Valley View from the Land Registry. On the other hand, the documentary evidence is, as Mr Adams submits, unsatisfactory for the reasons that follow."

168. The Judge then proceeded to set out his reasons for this overall finding, at Paragraphs 57 – 60:

"57. First, there is the last paragraph of panel 5 of the Ridleys' ST1 filed in support of their application to the Land Registry (see paragraph 27 above). As Mr Adams submitted, this possibly unguarded statement comes from the Ridleys themselves is backed by a Statement of Truth and may have been made at a time when they did not appreciate the legal test that they had to satisfy. I say this because nowhere else in the ST1 or the ADV1 are the requirements of the Third Condition addressed. Then there is the Ridleys' attempt to explain this in their solicitors' letter of 8 April 2020 in which it was written that the Ridleys had not checked their title deeds until after receipt of Mr Brown's first letter in November 2019 when in fact they had checked their title deeds in October 2019. Both of these could be unfortunate lapses and I would not rule against the Ridleys based upon them alone.

58. What gave me more concern was Mr Hodgson's attempt during cross-examination to explain his email to Mr Brown dated 25 October 2019 – see paragraph 24 above. What these representations to the council were and why they were necessary was not properly addressed. If Mr Hodgson's explanation really was, as I understood it to be, that the representations he was referring to was his certification on the planning application form that the Ridleys were the sole owners of the land, then I reject it. The making of representations goes well beyond certifying ownership on a planning application form.

59. There are also the early drawings at S10, S14 and S17 all dated prior to February 2018 and all showing a straight line boundary consistent with the title plan. More likely, it seems to me, is that Drawing 001 was based upon the title plan because (a) Mr Hodgson's email to Mr Ridley dated 21 October 2019 (page 646) describes 'Drawing 001' as 'site plan boundary in red line as per official land registry', and (b) Mr Hodgson's explanation that he meant to write 'Ordnance Survey' cannot be reconciled with the overlay plan that he emailed to Mr Ridley on 23 October 2019 in which the black zigzag line is taken from Ordnance Survey. Mr Hodgson's attempts to explain these were unconvincing and not helped by the fact that on a number of occasions he had to resort to referring to data or information that only he could see on his computer such as metadata in pdfs or emails that he had sent, none of which had been disclosed even though Mr Brown's solicitor had made quite an issue of disclosure. For example, the version of the location plan drawing

001 at page 473 dated 'Aug '17' showing a zigzag boundary. There was nothing before me to corroborate Mr Hodgson's claim that this was a later revision. There is also the fact that in October 2019 Mr Hodgson was telling Mr Brown one thing (that Moonrakers was being built within the straight-line Land Registry boundary – see plan on page 666) and Mr Ridley another (that the Ordnance Survey and topographical survey boundary lines did not match the Land Registry title plan boundary – see plan on 669).

60. Although Mr Ridley maintained in his oral evidence that it was only in October 2019 that he first learned of an issue with the boundary and that if he had learnt of this earlier, he would have applied for adverse possession, there was nothing other than Mr Hodgson's word to support this. What documentary evidence there is, suggests otherwise as I have indicated above."

169. The conclusion of the Judge, on the basis of this analysis of the evidence, was in the following terms, at Paragraph 61:

> *"61. On the above analysis, it seems to me more likely than not that by February 2018 the Ridleys knew of the discrepancy and so did not have a subjective belief that they were the registered proprietors of the Disputed Land. Similarly, their objective belief cannot have been reasonable. If the Ridleys had to make their application to the Land Registry promptly or within a reasonable period of time, then I find that they did not as it took them almost two years to do so with no explanation for the delay."*

170. The cross appeal, as I understand it, does not challenge the Judge's decision, at Paragraph 62, that if the period of reasonable belief came to an end by February 2018, the Application was not made promptly, within the period of grace which exists under paragraph 5(4)(c) on the construction of the sub-paragraph which I have decided is the subject of binding authority in *Zarb*. Equally, the cross appeal does not challenge the Judge's decision, on the same basis, that the Application was made promptly (within the period of grace) if the period of reasonable belief did not come to an end until October 2019. The Respondents' case in the cross appeal concentrates on the Judge's finding that the period of reasonable belief came to end by February 2018. The Respondents contend that there was no basis for the finding that Mr Ridley had, by February 2018. ceased to believe that the Respondents owned the Disputed Land.

171. The Respondents' argument in support of the cross appeal proceeded in the following manner:
    (1) At Paragraph 57 the Judge considered the evidence of the ST1 document and the subsequent letter from the Respondents' solicitors. The Judge concluded however that he would not rule against the Respondents on the basis of these documents alone. They could have been unfortunate lapses.
    (2) At Paragraph 58 the Judge referred to an email sent by Mr Hodgson to the Appellant, and to Mr Hodgson's explanation of this email.
    (3) At Paragraph 59 the Judge referred to drawings made by Mr Hodgson, and to Mr Hodgson's explanation of these drawings.
    (4) The Judge was however concerned with the knowledge of the Respondents, not Mr Hodgson. The documents considered in Paragraphs 58 and 59 concerned Mr

Hodgson's documents. The Judge made no findings as to Mr Ridley's knowledge of these documents. So far therefore as the knowledge of the Respondents was concerned, the only evidence on which the Judge could rely was the evidence referred to in Paragraph 57 which was insufficient on its own, as the Judge found, to support a finding adverse to the Respondents.

(5) Accordingly, the Judge had no basis on which he could find that the reasonable belief of the Respondents in their ownership of the Disputed Land had come to an end by February 2018.

172. In oral submissions Mr Goldberg accepted that if the Respondents' argument was successful, it would be necessary for this part of the case to be remitted to the FTT for new findings of fact to be made on the question of when the Respondents' reasonable belief in their ownership of the Disputed Land came to an end. This acceptance had implications for the question of whether permission is required for the cross appeal, as the cross appeal has been presented before me. I will however defer, for the moment, the question of whether permission is required for the cross appeal. I will first consider the substantive grounds of the cross appeal, leaving aside the question of whether permission is required, and then return to the question of whether permission is required.

173. As Etherton LJ explained in *IAM*, at [27], what the Court of Appeal were concerned with, in that case, was the knowledge of the defendant (Mr Chowdery). The Court of Appeal were not concerned with the imputation to the defendant of the knowledge of his agents, the solicitors who acted for him in 1993. Mr Goldberg accepted that the Judge gave himself a correct direction in law in this respect, in the first part of Paragraph 49:

> *"49. The Ridleys must establish that they themselves (not Mr Hodgson) actually believed (subjectively) that the Disputed Land belonged to them and that their belief was objectively reasonable – see paragraph 10(c) above."*

174. There are two other relevant points to make about the nature of the Reasonable Belief Condition, both of which are stated in *IAM*, in particular at [21] and [27]. First, there are two elements to the reasonable belief referred to in paragraph 5(4)(c). There is the subjective element. The person applying for registration on the basis of adverse possession must, during the period of ten years referred to in paragraph 5(4)(c), honestly and actually have believed that the disputed land was in his ownership. There is also the objective element. On an objective basis, the belief in ownership must, during the required period of ten years, have been a reasonable one for the applicant to have held. Second, the burden is upon the applicant to prove the existence of both of the required elements of the reasonable belief for the required period of ten years. It is clear that the Judge had these elements of the Reasonable Belief Condition well in mind; see the first part of Paragraph 49, as quoted above.

175. In his submissions in response to the cross appeal Mr Adams reminded me of the limitations on my ability to interfere with findings of fact made by the Judge or with the Judge's evaluation of the evidence which was before him. In particular, Mr Adams referred me to *Haringey LBC v Ahmed* [2017] EWCA Civ 1861 [2018] H.L.R. 9, where Hamblen LJ summarised these limitations in the following terms, at [29] – [31]:

> *"29 Mr Westgate QC, who appears on behalf of Ms Ahmed, as he did at trial, emphasises that an appellate court will only rarely interfere with findings of fact made by a trial judge, and that this applies both to findings of primary*

fact and to inferences to be drawn from them such as, he submits, the conclusion that there was an agency. In this regard he has referred us to the judgment of Lewison LJ in Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; [2014] F.S.R. 29 at [114]-[115].

30 In the recent Court of Appeal case of Grizzly Business Ltd v Stena Drilling Ltd [2017] EWCA Civ 94 the legal position was summarised as follows:

> *"39. The parties were broadly agreed upon the relevant law in the light of the recent Supreme Court decisions of Henderson v Foxworth Investments Ltd [2014] UKSC 41; [2014] 1 W.L.R. 2600 and McGraddie v McGraddie [2013] UKSC 58; [2013] 1 W.L.R. 2477 the latter of which cited with approval Hamilton v Allied Domecq Plc [2006] S.C. 221 at [85]. In the latter case it was said:*
>
> > *'If findings of fact are unsupported by the evidence and are critical to the decision of the case, it may be incumbent on the appellate court to reverse the decision made at first instance.'*
>
> *In Henderson the Supreme Court (at [62]) also said:*
>
> > *'It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.'*
>
> *We have also had regard to the last three reasons why appellate courts are warned not to interfere with findings of fact unless compelled to do so as enumerated by Lewison LJ in Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5:*
>
> > *'(iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
> >
> > *(v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
> >
> > *(vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.'*
>
> *40. There will be (and have been) rare cases where an appellate court is compelled to set aside findings of fact made by an experienced trial judge but we are far from convinced that that is the case here. None of the challenged findings can be said to be unsupported by the evidence and the decision is certainly not one that no reasonable judge could have reached…."*

31 In summary, such interference will only be justified where a critical finding of fact is unsupported by the evidence or where the decision is one which no reasonable judge could have reached."

176. I should also mention *Re Sprintroom Ltd* [2019] EWCA Civ 932 [2019] B.C.C. 1031 where the Court of Appeal (McCombe LJ and Leggatt and Rose LJJ, as they then were), in their judgment at [76], set out the nature of the task to be undertaken by an appeal court, in dealing with a challenge to an evaluative decision of a first instance judge:

> ***"76.*** *So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's*

treatment of the question to be decided, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion"."

177. Mr Adams cited further authorities to me on the question of my ability to interfere with findings of fact or evaluative decisions made by the Judge, which I have also taken into account. In terms of express reference, it seems to me to be sufficient to refer to the above two authorities.

178. With the above guidance in mind, I turn to the Judge's review of the evidence which he received and heard on the question of the Respondents' reasonable belief, at Paragraphs 57 – 60.

179. I cannot see anything in this review or in the Judge's evaluation of the evidence which would permit me to interfere with the Judge's conclusion as to when the reasonable belief of the Respondents in their ownership of the Disputed Land came to an end. I say this for the following reasons.

180. It is clear that the Judge kept well in mind the correct direction which he had given to himself in Paragraph 49, as quoted above. It is clear that the Judge kept in mind that the burden was upon the Respondents to demonstrate that their reasonable belief in their ownership of the Disputed Land existed for the period of ten years ending on the Application Date (subject to the grace period) which the Judge was taking as the correct period for the purposes of this part of the Decision. It is clear that the Judge kept in mind that there were two elements of this reasonable belief which the Respondents had to demonstrate; namely the subjective element and the objective element. In particular, it is clear that the Judge understood and respected the need to separate the knowledge of Mr Hodgson, as agent of the Respondents, from the knowledge of the Respondents; see in particular Paragraph 60.

181. Turning to the individual paragraphs of this section of the Decision, I can see no flaw in the analysis of the Judge. The documentary evidence in Paragraph 57 was clearly unhelpful to the Respondents' case. The Judge did not regard this evidence as sufficient, in itself, to find against the Respondents, but this did not mean that this evidence fell out of account. It fell to be taken into account with the other relevant evidence.

182. So far as the email of 25th October 2019 was concerned, as referred to in Paragraph 58, I cannot see why the Judge was not entitled to take this email into account. It was plainly significant, for the reasons given by the Judge. It was an email sent by Mr Hodgson, but that did not mean that the email could not throw light on the state of Mr Ridley's belief, both on a subjective and an objective basis. The same applies to the drawings referred to by the Judge in Paragraph 59. I do not see why these drawings could not be treated as throwing light on the state of Mr Ridley's belief, again both on a subjective and an objective basis.

183. Paragraph 60 also seems to me to be very significant in this context. The Judge heard oral evidence from Mr Ridley, who was cross examined. In his oral evidence Mr Ridley maintained that it was only in October 2019 that he first learned of an issue with the boundary. It is clear that the documentary evidence referred to by the Judge undermined Mr Ridley's evidence. It is also clear that the evidence given by Mr Hodgson, in the view of the Judge, not only failed to support this case but also undermined this case. As the Judge

noted, there was only Mr Hodgson's word to support Mr Ridley's claim and, as the Judge had made clear, he did not find that word convincing.

184. The question of whether the Judge should have accepted Mr Ridley's claim that it was only in October 2019 that he first learned of an issue with the boundary was pre-eminently a matter for the Judge. The Judge read and heard all the evidence. In particular, the Judge heard the evidence of Mr Ridley and Mr Hodgson, and the testing of that evidence in cross examination. The Judge did not accept Mr Ridley's claim that it was only in October 2019 that he learnt of the boundary dispute. I can see no error in the Judge's approach to this question. It is also clear that there was ample evidence to support the Judge's decision not to accept this claim.

185. I also accept the point made by Mr Adams that the burden is upon the Respondents, in the cross appeal, to identify why the Judge went wrong, in Paragraph 61, in the conclusions which he reached on the subjective element of the test of reasonable belief and on the objective element of the test of reasonable belief. As Mr Adams pointed out, the case made in support of the cross appeal did not appear to address the Judge's findings on the objective element of the test. In oral submissions, in reply to Mr Adams, Mr Goldberg sought to argue that the Judge's findings on the objective element of the test could not stand, if the Judge went wrong in his findings on the subjective element of the test. To my mind however these submissions did not address the central problem confronting the Respondents in this context, which was that the evidence reviewed by the Judge provided ample support for his finding that the objective element of the test had ceased to be met by February 2018, independent of the position on subjective belief.

186. In summary, I cannot see any basis on which the Judge's conclusions on the evidence, in Paragraph 61, can be challenged. I can see nothing wrong with the Judge's approach to the evidential questions concerning reasonable belief which he had to address. The Judge directed himself correctly as to what he had to decide, in terms of the issue of reasonable belief. Applying the test in *Re Sprintroom*, there was no gap in the Judge's logic, or lack of consistency, or a failure to take account of some material factor, which undermined the cogency of the Judge's conclusions. Equally, it seems to me that there was ample evidence to support the conclusions reached by the Judge. The conclusions were certainly not conclusions which no reasonable judge could have reached.

187. This concludes my analysis of the substantive grounds of the cross appeal. On the basis of this analysis my conclusion is that the cross appeal fails on its substantive grounds. There is however also the question which I deferred; namely whether permission is required for the cross appeal, as it has been presented. I now return to that question. Although the question may be said to be academic, given the failure of the cross appeal on its substantive grounds, I consider that I should decide this question.

188. I can deal with the question fairly shortly. As I have explained earlier in this decision, in the directions given by the Deputy Chamber President on 26th July 2023, the Respondents were required to confirm whether they wished to rely on the contingent grounds of appeal in support of a contention that the Upper Tribunal should make a different order to the order made by the FTT (and not simply as alternative grounds on which the order should be upheld and the appeal dismissed). By their solicitors' letter dated 1st August 2023 the Respondents confirmed that they did not wish to rely upon the contingent grounds of appeal in support of a contention that the Upper Tribunal should make a different order

from the order made by the FTT. Rather, the Respondents relied upon the contingent grounds of appeal as alternative grounds upon which the order of the FTT should be upheld and the appeal dismissed.

189. As I have already noted, in the course of his oral submissions Mr Goldberg accepted that if the Respondents' arguments in support of the cross appeal were successful, it would be necessary for this part of the case to be remitted to the FTT for new findings of fact to be made. In response, and by a short written submission following the hearing, the Appellant contended that the Respondents did require permission for the cross appeal. The point made on behalf of the Appellant was that the Respondents, by seeking a remission, were no longer simply seeking to uphold the decision of the FTT on different grounds, but were seeking an order setting aside the decision of the FTT and for the reconsideration of the case by the FTT. This went beyond what was permitted by the directions given by the Deputy Chamber President, and required permission to appeal, which had neither been sought nor obtained.

190. I do not think that the Appellant is right on the question of whether permission to appeal is required. My reasons for saying this are as follows.

191. It seems to me that it is essential, on this question, to concentrate on what it is the Respondents are seeking to achieve, and in respect of what, by the cross appeal.

192. The objective which the Respondents are seeking to achieve, by the cross appeal, is the upholding of the direction/order to the Chief Land Registrar, made by the Judge, to give effect to the Application. In this context it seems to me to be important to distinguish between the Decision and the direction made by the Judge. This distinction is not as clear as it might be because the direction appears within the Decision, at Paragraph 63. So far as I am aware, there was no separate order of the Judge which was drawn up, containing the direction in Paragraph 63. I do not say this by way of criticism. It strikes me that a separate direction was not necessary, given the terms of Paragraph 63. Nevertheless, it seems to me that a distinction does need to be drawn between the direction in Paragraph 63, which constitutes the direction (or order) made by the Judge, and Paragraphs 1-62, which set out the reasons why the Judge made that direction.

193. I note that the Deputy Chamber President was careful to draw this distinction in his directions on the question of whether permission to appeal was required. For ease of reference, I repeat paragraphs 1-3 of those directions:

> *"1. The respondents must confirm by **4 August 2023** whether they wish to rely on the contingent grounds of appeal in support of a contention that the Tribunal should make a different order from the order made by the FTT (and not simply as alternative grounds on which the order should be upheld, and the appeal dismissed).*
>
> *2. If the respondents do wish to rely on the contingent grounds for that purpose, they must first apply to the FTT for permission to appeal before renewing their application for permission to the Tribunal (if permission is refused by the FTT). If so, they should specify the order they will invite the Tribunal to make if those grounds are successful.*

3. *If the respondents wish to rely on the contingent grounds only as alternative grounds on which the order should be upheld, and the appeal dismissed, they can properly be included in a respondent's notice without the need for permission to appeal because they involve no challenge to the FTT's order and therefore no cross appeal. In that event, the parties should liaise and jointly confirm to the Tribunal by* ***18 August 2023*** *whether the hearing of the appeal will require more than the single day currently allocated to it."*

194. I respectfully agree with the references made by the Deputy Chamber President to the order made by the FTT, and with the reasoning of the Deputy Chamber President in these directions. The distinction was thereby drawn between the order (or direction) made by the Judge, and the reasons in the Decision which resulted in that order. I do not think that it matters whether one classifies Paragraph 63 as containing a direction or an order. The matter is simply one of description. The point is that Paragraph 63 is the equivalent of an order made consequential upon a judgment.

195. With this distinction in mind, the correct analysis of the appeal and the cross appeal seems to me to be as follows. The appeal seeks to set aside the Judge's direction and substitute a different direction. As such, the appeal requires permission to appeal, which has been sought and obtained. The cross appeal seeks to uphold the direction made by the Judge. True it is that the cross appeal involves a challenge to part of the Decision, but the cross appeal does not seek to change the direction to the Chief Land Registrar. The cross appeal seeks to uphold the direction.

196. I can see the argument that this position no longer holds good, if what is sought by the cross appeal is a remission, as opposed to a finding on the facts (made by this Tribunal) which can support the Judge's direction. I have however come to the conclusion that seeking a remission does not alter the basic position. The basic position seems to me to remain that the cross appeal, now that it is now no longer a contingent cross appeal, seeks to uphold the direction made by the Judge, albeit by the longer route of remitting the case to the FTT and seeking new findings of fact capable of upholding the direction made by the Judge.

197. I therefore conclude that the confirmation given by the Appellant's solicitors in response to the directions given by the Deputy Chamber President, namely that the cross appeal was seeking to uphold the order made by the Judge, remains a valid confirmation. I consider that the confirmation still holds good, notwithstanding that a remission of the case is now sought by the cross appeal.

198. It follows from the analysis set out above that the cross appeal does not, in my view, require the grant of permission to appeal. In my view the cross appeal is not a true cross appeal, but rather a challenge to part of the Decision, which can properly be the subject of a respondent's notice. Accordingly, I do not think that the cross appeal is invalidated by the absence of such permission.

199. Drawing together all of the above analysis, and for the reasons which I have given, it seems to me that the cross appeal fails, and falls to be dismissed. For the avoidance of doubt the cross appeal falls to be dismissed on its substantive grounds. The cross appeal does not fall to be dismissed on the ground that permission to appeal was required and was not obtained. My conclusion is that permission to appeal was not required for the cross appeal.

The outcome of the appeal and the cross appeal

200. The outcome of the appeal and the cross appeal is as follows:
    (1) The appeal is allowed, on Ground 1.
    (2) The cross appeal is dismissed.

201. Given that the cross appeal is dismissed, my decision to allow the appeal on Ground 1 means that the Judge's direction to the Chief Land Registrar, to give effect to the Application, cannot stand. The Respondents failed to satisfy the Reasonable Belief Condition. As such, the Application should, on this basis, have been cancelled.

202. In these circumstances it seems to me that I must exercise my powers, under Section 12 of the Tribunals, Courts and Enforcement Act 2007, to set aside the Decision, and to re-make the Decision as a direction to the Chief Land Registrar to cancel the Application.

The Chamber President,
Mr Justice Edwin Johnson
23rd January 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.