Precedent before Principle: Adverse Possession, 'Reasonable Belief' & Statutory Interpretation of Schedule 6 paragraph 5(4) of the Land Registration Act 2002

Chris Bevan*

There are few areas of the adverse possession regime under the Land Registration Act 2002 still requiring clarification. One outstanding and live issue, however, is Schedule 6 paragraph 5(4)(c). Megarry & Wade note this as one aspect that, 'remains the subject of uncertainty.'[1] Paragraph 5(4)(c) was precisely the provision under scrutiny in the recent decision in *Brown v Ridley* [2024][2] heard by the Upper Tribunal (Lands Chamber). *Brown v Ridley* offers further and important clarification, if not the final word, on how we are to understand Schedule 6 paragraph 5(4)(c) of the LRA 2002 and on what President of the Lands Chamber, Edwin Johnson J, presiding, described as, 'a short but interesting' point of statutory construction. The central question for the Upper Tribunal was what was meant by the phrase 'at least ten years of the period of adverse possession ending on the date of the application' under paragraph 5(4)(c). Paragraph 5(4)(c) was discussed by the Court of Appeal in *Zarb v Parry* [2011][3] and in *IAM Group Plc v Chowdrey* [2012][4] but how would the Upper Tribunal respond when called upon to revisit the issue and urged to depart from the approach of the Court of Appeal? The analysis here proceeds in 4 parts. The first part explores Schedule 6 paragraph 5(4)(c) and its interpretation in the Court of Appeal in *Zarb* and *IAM*. The second part turns its focus to *Brown v Ridley* itself examining the issues in the case, the judgments in the First Tier Tribunal and on appeal to the Upper Tribunal, and the President of the Lands Chamber's view on the correct construction of paragraph 5(4)(c). Finally, with the case potentially headed for appeal to the Supreme Court, reflections are offered on the approach, this author argues, the Supreme Court should be persuaded to adopt should it come to determine construction of this important provision on adverse possession.

The Statutory Provision in the Spotlight: Schedule 6 para 5(4)(c) of the Land Registration Act 2002

Schedule 6 paragraph 5 of the Land Registration Act 2002 ('LRA 2002') sets out the framework by which a person (adverse possessor) with at least 10 years' adverse possession of another person's registered estate is entitled to apply to be registered as proprietor of that land. Under the Schedule 6 procedure, an adverse possessor's application will succeed, and the adverse possessor will be registered as proprietor where either (1) the registered proprietor fails to serve a counter notice; or (2) where a counter notice is served but the adverse possessor satisfies one of three 'conditions' laid down in Schedule 6 paragraph 5.[5] For present purposes, it is the third condition under scrutiny. In the interests of clarity, the full provision of Schedule 6 paragraph 5(4) which provides for this 'third condition' is presented here with the contentious sub-paragraph set in bold for emphasis. It provides as follows:

---

* Professor in Property Law, Durham Law School.

[1] *Megarry & Wade, The Law of Real Property* (Sweet & Maxwell, 9th Edition) at 7-098.

[2] *Brown v Ridley* [2024] UKUT 14 (LC).

[3] *Zarb v Parry* [2011] EWCA Civ 1306; [2012] 1 EGLR 1.

[4] *IAM Group Plc v Chowdrey* [2012] EWCA Civ 505; [2012] 2 P. & C.R. 13.

[5] See Schedule 6 paragraph 5(2) (first condition: entitlement to the land by proprietary estoppel); 5(3) (second condition: some other entitlement to land); and 5(4) (third condition: reasonable belief of ownership).

‘5(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.’ [**my emphasis added**]

We know that, under paragraph 5(4)(c), the applicant (adverse possessor) or precedessor in title must have held a ‘reasonable belief’ that the land in dispute belonged to him for at least ten years. That much is clear. It is also clear that, based as it is on ‘reasonable belief’ (sometimes referred to as ‘mistaken belief’), the adverse possessor by definition will, at some stage during their adverse possession, come to realise that their belief of ownership was mistaken. The point of controversy, then, and the issue examined in *Brown v Ridley* [2024], concerned statutory interpretation and calculation of the ten year period necessary under this provision, given the language of the statute, in particular, the phrase ‘ending on the date of the application.’ This inquiry can condensed into a relatively straightforward question: when precisely does that minimum 10-year period need to have been accrued?

Only two credible interpretations of paragraph 5(4)(c) are possible.[6] Under a first interpretation (referred to here as the ‘narrow’ or ‘restrictive’ construction) paragraph 5(4)(c) requires an adverse possessor to demonstrate reasonable belief in ownership for a minimum of ten years lasting up until (or ending only a very short time before) the date of the application for registration. Alternatively, on a second interpretation (referred to here as the ‘broad’ construction) the paragraph requires an adverse possessor to point to reasonable belief in ownership for *any* period of ten years minimum within the wider period of adverse possession. Any suggestion that paragraph 5(4)(c) should be read to require a mistaken belief in ownership to endure *at the moment of* the application is surely unarguable as the adverse possessor will only have become aware of the need to make an application for registration after realisation of their mistaken or unfounded belief of ownership. In these circumstances, to expect evidence of that reasonable belief at the moment of application would ‘deny the provision any use.’[7] No claimant adverse possessor could satisfy this. The result is that paragraph 5(4)(c) falls to be construed according to just one of the two outlined interpretations. But which interpretation should be adopted? Fortunately, this question has already been ventilated (at least indirectly) by the Court of Appeal in *Zarb v Parry* [2011] and in *IAM Group plc v Chowdrey* [2012]. These judgments warrant examination before moving to explore how the matter was approached in *Brown*.

The decisions of the Court of Appeal in *Zarb* and *IAM*: ten years means ten years ending shortly before the application date

[6] For discussion of the possible interpretations, see P. Milne, ‘Mistaken belief and adverse possession – mistaken interpretation? IAM Group plc v Chowdrey’ [2012] *Conveyancer and Property Lawyer* 343.

[7] Law Com No. 380 *Updating the Land Registration Act 2002* (2018) at [17.47]; this point was also acknowledged in *McLeod v Brown and Jones* [2014] EWLand RA 2013_0833.

Zarb was a case concerning a boundary dispute in which Mr and Mrs Parry relied upon adverse possession as a defence under section 98 of the LRA 2002. Section 98(1) required the Parrys to demonstrate, *inter alia*, that on the date immediately preceding the day the claimants brought their action, the Parrys would have been entitled to make an application under Paragraph 5(1) and that the 'reasonable belief' condition in paragraph 5(4) would have been satisfied. The matter reached the Court of Appeal where Arden LJ offered a summary of the background to the LRA 2002's adverse possession regime.[8] Of immediate relevance, Arden LJ noted:

'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 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.'[9]

Arden LJ did not, therefore, address directly the construction of the 'ten year' rule but clearly in her judgment did treat the 'ten year period' referenced in paragraph 5(4)(c) as meaning the last ten years *prior* to the application to be registered as proprietor. This was further bolstered later in her judgment where discussing some of the 'difficulties for proprietors with disputed boundaries' created by the 2002 Act, Arden LJ explained:

'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.' [Emphasis added][10]

This reference to acting 'promptly' is consistent with her Ladyship's earlier interpretation of paragraph 5(4)(c) as requiring ten years of possession *prior* to the application and it is fair to conclude that Arden LJ regarded 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.[11] Lord Neuberger's analysis in *Zarb* of the 'reasonable belief' question proceeded on the same as Arden LJ and Jackson LJ also agreed.

Zarb therefore promoted the first, narrow construction of paragraph 5(4)(c), noted above, that requires an adverse possessor's reasonable and mistaken belief of ownership (of a minimum of ten years) to end no more than a short time before the date of the application. This view has also been supported by academic commentary[12] and cited with approval by Judge Michell in *Crew v London & Continental (Holdings) Limited* [2017].[13]

---

[8] *Zarb* at [12]-[19].
[9] *Zarb* per Arden LJ at [17].
[10] *Zarb* per Arden LJ at [55].
[11] Edwin Johnson J in *Brown* at [69].
[12] For example, S. Tozer and K. Lees, '"Reasonable relief" in adverse possession' (2015) 1521 *Estates Gazette* 77.
[13] *Crew v London & Continental (Holdings) Limited* [2017] UKFTT 0047 (PC) per Judge Michell at [30].

IAM was another case involving neighbouring properties, Number 26 and 26a Rye Lane.[14] The proprietor of No.26 issued possession proceedings against the registered proprietor of No.26a. The 'disputed land' was part of the first and second floors of No.26. The proprietor of No.26a had been in exclusive possession for 20 years when proceedings were initiated in 2010. By the time the matter reached the Court of Appeal, the only question before it was whether the Judge at first instance had been correct to find that the adverse possessor's belief as to ownership over the disputed land had been 'reasonable' for the purposes of Schedule 6 paragraph 5(4). Crucially, Etherton LJ in his judgment (with whom Ryder J and Thorpe LJ agreed) made no reference to the question of the construction of the 'ten year period' under paragraph 5(4)(c). There is, in fact, no evidence that the issue was ever considered or argued before the Court of Appeal. How, then, is *IAM* in any way pertinent to the lingering uncertainty of the interpretation of the provision? Well, in so far as *IAM* is relevant it is only because Etherton LJ made explicit reference to *Zarb* in his judgment raising the inference (and perhaps nothing more) that he was following the broad approach of Arden LJ in that case. Added to this is the fact that the judge in the lower court in *IAM* had plainly adopted the Arden LJ interpretation of Schedule 6(5) and Etherton LJ neither addressed nor challenged this.[15] To the extent that *IAM* is helpful at all in clarifying the interpretation of paragraph 5(4)(c), then, it is in its inferred support for the Arden LJ construction in *Zarb*.

The First Tier Tribunal decision in *Brown v Ridley*: ten years means *any* period of ten years within the wider period of adverse possession

In 2004, the Ridleys purchased and were registered as the proprietors of a property known as Valley View, The Promenade, in Consett, County Durham. In 2002, Mr Brown had purchased rough, uncultivated land to the west of The Promenade for the purposes of development and his land sat adjacent to the south-west boundary of Valley View. The land in dispute was a strip that ran along a section of the boundary between Mr Brown's land and that belonging to the Ridleys. The evidence before the tribunal was that the Ridleys had been in exclusive possession of the disputed land since 2004. In 2018, the Ridleys obtained planning permission to construct a new dwelling in part on the disputed strip of land. This dwelling – known as Moonrakers (presumably inspired by the 1979 James Bond film) – was completed in October 2020 with the south-west corner encroaching onto the disputed land. Mr Brown became aware of the construction work in late 2019, and after correspondence between the parties, the Ridleys made their application to be registered as proprietors of the disputed land by way of adverse possession under Schedule 6 of the LRA 2002. Mr Brown objected to the application on the basis that the Ridleys had not been in adverse possession for the requisite period and required the application to be dealt with under Schedule 6 paragraph 5. The matter was therefore referred to the First Tier Tribunal.

Before Judge Bastin in the FTT, it was the Respondents' case that they had been in adverse possession of the disputed land for well over the required 10-year period (since 2004); and that they only became aware of an issue of ownership in October 2019 when Mr Brown raised objections to the construction of Moonrakers. They argued that, in the face of this objection, they acted speedily in applying to be registered as proprietors of the land; their application being lodged within just two months. They therefore argued that 'the third condition' (paragraph 5(4)) was wholly satisfied. Mr Brown argued that the Ridleys had not been in

[14] On *IAM*, see P. Milne, 'Mistaken belief and adverse possession - mistaken interpretation? *IAM Group Plc v Chowdrey*' [2012] 4 *Conveyancer & Property Lawyer* 343.
[15] *IAM* per Etherton LJ at [17] citing HHJ Blunsdon from the Lambeth County Court.

adverse possession for the required 10 years; and disputed that they demonstrated the required intention to possess the disputed land. He further contended that, in a letter of November 2019, the Ridleys had acknowledged Mr Brown's title to the land thereby re-starting the adverse possession clock. Finally (and most importantly for present purposes), Mr Brown argued that any 'reasonable belief' that the Ridleys may have had that the disputed land belonged to them had come to an end either in February 2018 or, alternatively, in October 2019. Thus, the Ridleys could not show that they had a reasonable belief that the land belonged to them for the period of ten years ending on the date (i.e. prior) to the application as required under Schedule 6 paragraph 5(4)(c). The Ridleys also advanced a 'fallback'[16] argument in the event that the Judge found they did need to demonstrate 10 years adverse possession prior to the application. Under this argument, the Ridleys suggested there was a 'grace period' between the date when the reasonable belief came to an end and the application date to Land Registry. So long as the application for registration was made promptly on discovery that there was an issue over title to the disputed land, under this 'grace period,' an adverse possessor would not be disbarred for being registered as the proprietor of the disputed land. The Ridleys argued that they had indeed acted promptly on realising their mistaken belief (within two months) and thus should benefit from this grace period.

Judge Bastin found in favour of the Ridleys. On the central controversy of the construction of paragraph 5(4)(c), the Judge explained:

'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

[16] Described as such by Edwin Johnson J in the Upper Tribunal *Brown* at [38].

dispute between neighbours that should prompt action by an adverse possessor, not a change in the adverse possessor's belief.'[17]

The Judge went on to consider the (hypothetical) position if he was wrong on this construction of paragraph 5(4); finding that the Ridleys' reasonable relief most likely came to an end by February 2018 when they learned of the issue over ownership of the strip. Any belief in their own ownership of the land thereafter could not be deemed objectively 'reasonable.' On this basis, it appeared to take them almost two years (from February 2018 when they submitted their planning permission) to bring their application to Land Registry. Thus, if paragraph 5(4)(c) required that their reasonable relief as to ownership endure for the period of 10 years *prior* to their application, in light of the two year delay in making their application, they could not satisfy the provision. The Judge went on to note that, alternatively, if ten years of reasonable belief prior to the application was required but the Ridleys reasonable belief in their ownership only came to an end in October 2019, then, they would be taken as having made their application promptly and could, in this case, satisfy the requirements of paragraph 5(4). These findings were, of course, hypothetical only as the Judge clearly stated his view that Schedule 6 paragraph 5(4)(c) required that reasonable belief in ownership for *any* ten year period during the period of adverse possession would suffice. Judge Bastin therefore found for the Ridleys and directed the Chief Land Registrar to register the Ridleys as proprietors of the disputed land. With the permission of the Judge, Mr Brown appealed to the Upper Tribunal.

The decision of the Upper Tribunal (Lands Chamber) in *Brown v Ridley*: *Zarb* doubted but followed

Before the Upper Tribunal, President of the Lands Chamber, Edwin Johnson J presiding, Mr Brown advanced two grounds of appeal. The President preferred, however, to analyse the appeal according to three grounds:

Ground One: whether the Judge had failed to follow binding Court of Appeal authority in *Zarb v Parry*

Ground Two: whether the Judge had failed to give adequate weight to the acceptance by the Court of Appeal in *Zarb* and *IAM v Choudrey* of the construction to paragraph 5(4)(c) as advocated by Mr Brown

Ground Three: whether the Judge had erred in his construction of paragraph 5(4) as requiring reasonable belief for any ten year period of the period of adverse possession rather than requiring proof of reasonable belief in the ten years prior to the application.[18]

The Ridleys cross-appealed[19] on the basis that, if Mr Brown's construction of paragraph 5(4)(c) was found to be correct, the Judge had been wrong to find the Ridleys' reasonable belief ceased in February 2018 and the period between the cessation of their reasonable belied (October 2019) and the date of their application (December 2019) was de minimis.

---

[17] *Brown v Ridley* [2023] in the First Tier Tribunal per Judge Bastin at [52-53].
[18] *Brown* at [45]-[46].
[19] Note, there was dispute as to whether the Ridleys required permission to have the cross-appeal heard by the Upper Tribunal: see [47-52] of the Upper Tribunal judgment.

On Ground One, Edwin Johnson J noted that the core question was whether the discussion in *Zarb* as to the reasonable belief condition and construction of the 'ten year' rule constituted part of the ratio and was thus binding authority.[20] Edwin Johnson J emphasised Buxton LJ's words in *R (Kadhim) v Brent London Borough Council Housing Benefit Review Board* [2001][21] on what constituted the ratio decidendi of a case. Buxton LJ quoted Cross & Harris, *Precedent in English Law* in underscoring that, '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.'[22]

After a lengthy examination of the decision and reasoning in *Kadhim* itself, Edwin Johnson J concluded that, in his view, Judge Bastin's reasoning in the lower tribunal (that *Zarb* was not binding on him), 'I do not think … can stand.'[23] While it was clear that the issue of the ten year period in paragraph 5(4)(c) was not argued directly in *Zarb*, 'the absence of argument on this issue does not however mean that the approach of the Court of Appeal to this issue … cannot form part of the ratio of the decision.'[24] Applying the Buxton LJ test of ratio from *Kadhim*, Arden LJ in *Zarb* in making her determination on the operation of the adverse possession regime under the 2002 Act, approached her judgment '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.'[25] Jackson LJ agreed with Arden LJ and Lord Neuberger approached the issue on the same basis. Edwin Johnson J therefore concluded that Arden LJ in *Zarb* had clearly proceeded on the basis that reasonable belief of ownership had to exist for the period of ten years ending on the date of the application (or shortly before). Edwin Johnson J noted that Arden LJ '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' and thus this interpretation, 'forms part of the ratio of *Zarb*.'[26]

It followed that *Zarb* was binding authority on the matter of construction of paragraph 5(4)(c) unless it might be disqualified from constituting binding authority in one of two very limited ways: either that the decision was per incuriam or fell into any of the categories listed in *Young v Bristol Aeroplane Co Ltd* [1944].[27] Neither of these exceptions applied here.[28] Edwin Johnson J also noted the principle but rejected the suggestion that a ratio or part thereof is regarded not as binding if it was merely assumed to be correct by a court without the benefit of argument. Again by reference to Buxton LJ in *Kadhim*, it was underscored that, as an exception or modification to the strict rule of precedent, this principle 'must only be applied in the most obvious cases, and limited with great care.'[29] Edwin Johnson J rejected that this might apply to Arden LJ's construction of paragraph 5(4)(c) holding that it was 'quite clear'[30] that the exception was 'nowhere near wide enough' to cover what he had held to be the ratio in *Zarb*. The acceptance of the construction of paragraph 5(4)(c) in *Zarb* 'went well beyond assumption

---

[20] *Brown* at [70]-[101] per Edwin Johnson J.
[21] *R (Kadhim) v Brent London Borough Council Housing Benefit Review Board* [2001] 1 QB 955
[22] R. Cross & J. W. Harris, *Precedent in English Law* (Clarendon, 1991, 4th Edn), 72.
[23] *Brown* in the Upper Tribunal at [87].
[24] *Brown* at [89].
[25] *Brown* at [91].
[26] *Brown* at [93].
[27] *Young v Bristol Aeroplane Co Ltd* [1944] KB 718.
[28] *Brown* at [98].
[29] *Kadhim* at [38] per Buxton LJ.
[30] *Brown* at [100].

in relation to a point not expressly raised.'[31] In summary, *Zarb* was binding on the matter of the identification of the ten year period under Schedule 6 para 5(4)(c).

As a result of the conclusion reached on *Zarb*, it was not strictly necessary to consider whether the Court of Appeal decision in *IAM* was binding on the issue of calculation of the ten year period. Nevertheless, Edwin Johnson J addressed this briefly,[32] holding that, *IAM* did fall into the category of cases where the excepting principle in *Kadhim* applied. Reading Etherton LJ's leading judgment in *IAM*, there was 'no trace of any argument over or consideration of the identification of the ten year period.'[33] On this basis, the Court of Appeal did proceed in *IAM* on the assumption that this construction of the ten year rule was correct; most likely on the basis of what had been held by the judge at first instance and in *Zarb*. For this reason, *IAM* did not constitute binding authority on the correct construction of the ten year period under paragraph 5(4)(c) – even if it was a decision that could be described as 'consistent with binding authority' (*Zarb*) on the issue.[34]

Edwin Johnson J thus held that *Zarb* (but not *IAM*) was binding authority and, as such, under Schedule 6 paragraph 5(4)(c), reasonable belief of ownership must exist for the period of ten years ending on the date of the application for registration. In treating himself as not bound by *Zarb* or *IAM*, Judge Bastin in the FTT had therefore made an error of law. Ground 1 of the appeal therefore would be allowed.[35]

Edwin Johnson J could have stopped there. Consideration of grounds 2 and 3 of the appeal was not strictly necessary (and perhaps not appropriate) given the finding that *Zarb* was binding. However, the President was urged by counsel for the Ridleys, Mr Goldberg KC, to set out his views on the proper construction to be afforded to paragraph 5(4)(c). Edwin Johnson J explained his reasons for accepting this invitation; noting his 'disagreement'[36] with Arden LJ's construction of the paragraph; and that the issue had been fully argued before him by the parties and thus it was 'right' that the parties knew his view.[37] Moreover, and crucially, the President noted that if the case goes to appeal, his thoughts may 'be of some assistance to an appeal court.'[38]

Proceeding on the hypothesis that *Zarb* was not binding authority, Edwin Johnson J continued in his judgment by exploring in some detail the nature and process of statutory construction. In so doing, he drew extensively on dicta from 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];[39] explored the value and admissibility of Law Commission reports both pre- and post-dating entry into force of the LRA 2002 and extracts from Halsbury's Laws of England. In construing paragraph 5(4)(c) afresh, the President zoomed in on the words 'ending on the date of the application' as central to the interpretive exercise. Acknowledging that two readings of the provision were possible, Edwin Johnson J nevertheless noted that the wording 'for at least ten years' had to be read in the

---

[31] Ibid.
[32] *Brown* at [102]-[117].
[33] *Brown* at [116].
[34] *Brown* at [117].
[35] *Brown* at [120].
[36] *Brown* at [122].
[37] Ibid.
[38] Ibid.
[39] 3 [2023] AC 255; see *Brown* at [125]-[129].

context of the wider Schedule 6 scheme. In this light, it must be intended to mean that reasonable belief of ownership should 'exist for a period of at least ten years 'of' (i.e. falling within) the period of adverse possession ending on the date of the application.'[40] On this basis, the construction permitting 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 seemed to the Chamber President to 'fit better with the language and scheme of Schedule 6 than the alternative'[41] reading. Moving beyond the statutory language itself, the President argued that his view of the favoured construction (namely, any period of ten years within the relevant period of adverse possession) was confirmed by having regard to the practical consequences for the adverse possession regime of adopting the narrower (*Zarb*) construction. To adopt a construction that required ten years of reasonable belief prior to the application for registration would 'create such difficulties for the operation of Schedule 6 that it is impossible to accept that Parliament intended those consequences.'[42] Put differently, there are very practical reasons for construing paragraph 5(4)(c) as the President preferred. As explained, almost inevitably, a person only makes an application for registration as owner of land which has been in their adverse possession after they realise that they do not have the registered title to it. However, as soon as they are aware of this position, their reasonable belief in their ownership has ceased.[43] It would therefore be 'absurd,' impractical and perhaps impossible, for anyone to meet the condition in paragraph 5(4)(c) on a construction that required reasonable belief to end 'on' the date of their application. This would seem to expect people to apply for registration at the very moment that they make the discovery that the land does not belong to them.

Counsel for Mr Brown argued that the answer to this 'absurd' result would be to read into paragraph 5(4)(c) a 'period of grace' between the coming to an end of the reasonable belief and the making of the application for registration. The President rejected this argument for three key reasons. First, there was no basis in the wording of the provision for this construction.[44] Secondly, the principle of *de minimis non curat lex* by which the law does not concern itself with trifling matters had no application here and could not be invoked so as to permit interpretation of 'ending on the date of the application' to mean days, weeks or months before that date.[45] Moreover, if a period of grace were accepted, how would its duration be determined? Would it be limited to days, weeks, months? If it is to be linked to the notion of a 'prompt application' (as counsel for Mr Brown argued) being made by the applicant, what, precisely, would amount to 'promptness' for these purposes? This would serve to inject uncertainty into the operation of the reasonable belief condition.[46] If a person in adverse possession is required to make an application for registration promptly after their reasonable belief in their ownership comes to an end, this would run counter to the court's expressed emphasis on the need to avoid neighbourly disputes and litigation and embrace pre-litigation negotiations and alternative dispute resolution.[47] Why? Because this construction would mean the applicant would eschew pre-litigation negotiations for fear of risking being held to have

[40] *Brown* at [137].
[41] Ibid.
[42] *Brown* at [141].
[43] *Brown* at [142].
[44] *Brown* at [145].
[45] *Brown* at [146].
[46] *Brown* at [147].
[47] See comments by Arden LJ in *Zarb* at [59]; and Mummery LJ in *Wilkinson v Farmer* [2010] EWCA Civ 1148 at [4].

not acted sufficiently 'promptly.'[48] This would be a 'most unfortunate situation,'[49] and pointed clearly to the conclusion that Parliament could not have intended paragraph 5(4)(c) to operate in this manner. Edwin Johnson J also rejected counsel for Mr Brown's suggestion that the provision should be read restrictively to be human rights compliant and so as not to interfere disproportionately with the existing registered owner's right to property guaranteed by Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. The President rejected any notion that his preferred construction (and that argued for by the Ridleys) did anything to infringe the existing registered proprietor's right to property.[50] Had Ground Three been a live issue in the appeal, the President would therefore have dismissed it.[51]

Dealing swiftly with Ground Two, the President noted that, on the hypothesis that *Zarb* was not binding, he could not see that the Judge had erred in law in reaching his own view on the construction question.[52]

Given Mr Brown's appeal succeeded on Ground One, the Ridleys' cross appeal necessarily arose for decision.[53] The essence of the cross appeal was a challenge to Judge Bastin's finding that the Ridleys' reasonable belief of ownership had ceased by February 2018. It was the Ridleys' case that their reasonable belief ended in October 2019 and that they had acted promptly making their application for registration in December 2019.[54] After a close review of the Judge's approach, Edwin Johnson J could find nothing in the Judge's evaluation of reasonable belief that would permit interference with or challenge to the conclusion reached. There was no flaw in the Judge's analysis. There was 'no gap in the Judge's logic, or lack of consistency, or a failure to take account of some material factor' and there was 'ample evidence to support the conclusions reached by the Judge.[55] As a result, the cross appeal was dismissed.

Precedent before Principle: Looking Ahead to an Appeal

How, then, are we to assess the significance of the decision of the Upper Tribunal in *Brown*? On its face, *Brown* is simply a case that confirms an existing Court of Appeal authority. But, of course, *Brown* is much more than this. *Brown* is a powerful example of a case where precedent and principle collide and offers an example of how that collision might be managed. As a decision, *Brown* is a victory of precedent over principle. The President of the Lands Chamber was constrained to follow the binding authority of *Zarb*. This was, naturally, through necessity. Vitally, however, he did not feel so constrained as to prevent him from expressing his dissatisfaction at that judgment and, indeed, did not stop him going further still in suggesting that the construction engaged by the Court of Appeal was wrong and, if available to him, he would depart from it. For now, then, precedent has trumped principle but in so clearly expressing a counter view, the Chamber President has an evident eye on the appellate court and on persuading it to follow his lead in construcing paragraph 5(4)(c). Crucially, since the judgment, Edwin Johnson J has granted a 'leapfrog' certificate which enables the Ridleys to make an application directly to the Supreme Court for permission to appeal the Upper Tribunal

[48] *Brown* at [149].
[49] *Brown* at [150].
[50] *Brown* at [158]-[160].
[51] *Brown* at [162].
[52] *Brown* at [163].
[53] *Brown* at [165].
[54] *Brown* at [171].
[55] *Brown* at [186].

decision. Given the clear conflict between the Court of Appeal construction in *Zarb* and the President's preferred interpretation, this is not an unexpected step. This is a sure signal that, should the matter come before the Supreme Court, *Zarb* could well be displaced in favour of Edwin Johnson J's preferred reading of the provision.

This potential appeal opens up the space to reflect briefly on how the Supreme Court might and, in the author's view, should approach the construction of paragraph 5(4)(c). First, though not entirely assured, there is a high probability that the Supreme Court will be heavily influenced by if not automatically persuaded to adopt Edwin Johnson J's favoured construction. In the author's view, Edwin Johnson J's construction is not just an appropriate, sensible and logical interpretation of the provision and therefore should be endorsed but is the only credible rendering of the statutory language. First, not only is it justified on the basis of a textual reading of the provision but, it aligns with the tenor of the wider adverse possession scheme under the LRA in Schedule 6, for example, as demonstrated by Schedule 6 paragraph 1.

Bolstering this position are the real-world consequences if the narrow *Zarb* interpretation is adopted. The restrictive reading would, put plainly, make paragraph 5(4)(c) largely unworkable. Such a narrow construction would, in most cases, appear to prevent most adverse possessors from relying on the paragraph. All reason would dictate that adverse possessors only turn to rely on the third condition in paragraph 5(4) once they have become disabused of their mistaken belief in ownership of the disputed land. Thus, it must follow axiomatically that their reasonable belief in ownership will have ceased before they apply for registration. How, then, is it possible to assert that the correct reading of paragraph 5(4)(c) is to require such reasonable belief to endure at the time of the application? Respectfully, this is not a credible construction and in so far as *Zarb* supports such an interpretation, it must be wrong. To adopt this narrow reading would therefore heavily undermine the practical working, logic and effectiveness of the adverse possession regime so carefully crafted under Schedule 6. It simply cannot be cogent to argue that Parliament intended a situation in which an application for registration would be expected to apply immediately (or very soon after) upon discovering that their reasonable belief in ownership was misplaced. This would reduce Schedule 6 paragraph 5(4) to a near-meaningless provision that almost no adverse possessor could ever satisfy. [56] One might also argue that, had this restrictive interpretation been the intention of Parliament, why would paragraph 5(4)(c) not simply have been drafted to reflect this more clearly such that it required, for example, evidence of reasonable belief in ownership 'for at least the last ten years of the period of adverse possession which forms the subject of the application.'

The narrower construction of paragraph 5(4)(c) therefore sets up what we might term 'a logic gap.' If one accepts this narrow construction, then, it follows that the only way this logic gap might be closed is to accept that paragraph 5(4)(c) 'does not mean quite what it says.'[57] In other words, to make this narrow construction work, one would have to read into the statute a 'grace period' by which an adverse possessor can be registered as proprietor of the land provided they acted promptly upon their reasonable belief in ownership coming to an end. This would appear to be supported by Arden LJ in *Zarb*. Yet, despite following *Zarb* as binding precedent, Edwin Johnson J doubted this 'grace period' argument. Rightly so in the author's view. As the President explained, there is no basis on which this 'grace period' might be 'read into' the

[56] See Patrick Milne's view, writing in the context of the decision in *IAM*, that the narrow construction 'cannot be the correct interpretation': P. Milne, 'Mistaken belief and adverse possession - mistaken interpretation? *IAM Group Plc v Chowdrey*' [2012] 4 *Conveyancer & Property Lawyer* 343, 344.
[57] *Brown* at [143].

statute. It occurs to the current author that if such a 'grace period' is indeed needed to be implied into the statute to render the narrow construction workable, then, perhaps this is further evidence against such a construction and, in fact, an admission of sorts, that the broader (*any* period of ten year) should be preferred. In summary, seeking to explain away the 'absurd'[58] result of adverse possessors needing to show reasonable belief at the time of the application by reading into the provisions an imagined 'grace period', with respect, is to interpose yet further unreality into the statute. Principle and pragmatism as well as a textual reading and appreciation for the practical workings of the Schedule 6 adverse possession scheme lend support for a construction be adopted that permits adverse possessors to demonstrate reasonable belief of ownership for *any* ten year period of the period of adverse possession. Not only is this Edwin Johnson J's view but it is the approach tacitly advanced in the work of the Law Commission and Land Registry in its Report No. 271 which led to the introduction of the LRA 2002 where the Commission noted:

'At some point prior to making the application to be registered, the squatter will have become aware that he or she is not in fact the owner of the land in issue. It is likely to be this realisation that prompts the application. It follows that the period of adverse possession that will be needed will, in practice, be more (even if only marginally) than 10 years.'[59]

This is supported by the authors of Jourdan and Radley-Gardner in their book, *Adverse Possession,* who in an early edition of their text, were unequivocal on the issue, asserting that, '[t]here is no requirement that the belief persists up to the date of the application.'[60]

It is argued that this must be the correct approach.

The Law Commission in its recent work on Updating the Land Registration Act 2002 has expressed its preference for an interpretation of paragraph 5(4)(c) such that 'the reasonable belief cannot end more than a short time before the date of the application.'[61] The Commission argues this aligns with the intention underpinning Schedule 6 to 'bring finality to claims of adverse possession, and in particular, to resolve these types of boundary disputes.' The Commission asserts that once a person's reasonable belief comes to an end, 'ownership should be resolved quickly,' and 'bringing finality to the question of ownership is in the interests of all parties' and that 'it would not be in keeping with the policy underlying Schedule 6 to allow a claimant to sit indefinitely on a claim … after becoming aware that he or she was not in fact the proprietor of the land.'[62]

The Law Commission therefore recommends that if a person relies on Schedule 6 paragraph 5(4), they must apply within 12 months of their reasonable belief of ownership coming to an end.[63] Dr Harpum (chief architect of the Land Registration Act 2002) argued strongly against

---

[58] *Brown* at [142].
[59] Law Com. No.271 *Land Registration for the 21st Century* (2001) at [14.44].
[60] S. Jourdan and O. Radley-Gardner, *Adverse Possession,* 2nd Edn (Bloomsbury Professional, 2011) at [22-86].
[61] Law Com No. 380 *Updating the Land Registration Act 2002* (2018) at [17.47].
[62] Ibid at [17.48].
[63] Ibid (Law Commission Recommendation 40) at [17.61]; a recommendation provisionally accepted by the UK Government in 2019: *Law Commission review of the Land Registration Act 2002: government full response available at:* https://www.gov.uk/government/publications/land-registration-act-2002-government-response-to-the-law-commission-review/law-commission-review-of-the-land-registration-act-2002-government-full-response#recommendations

this approach in his response to the Commission's Consultation on updating the LRA.[64] Dr Harpum argued that the original provision was designed to allow adverse possessors to rely on the facts 'on the ground' until a neighbour dispute becomes unavoidable. Dr Harpum's view was that requiring a claimant to bring an application within a set period of time would lead to greater disputes and hamper litigation avoidance. Moreover, Dr Harpum argued adverse possessors may not be aware of the necessity to act promptly in applying for registration and would thus lose their entitlement to the land.[65] It is suggested that there is real force in Dr Harpum's observations here and that the suggested approach of the Law Commission would be out-of-step with the intentions underpinning the provision. Perhaps more troublingly, is the genuine risk this narrow construction may in fact proliferate the number of neighbour disputes that are litigated; incentivising as it would, swift recourse to the law, to Land Registry and to the courts. As Dr Harpum asks: 'Why is the LC (Law Commission) so keen to promote and encourage boundary disputes when everyone else is trying to stop them?'[66]

Against this position, the Law Commission argues that the broader (any period of ten years) interpretation would enable adverse possessors to 'leave the matter unresolved even after the claimant has reason to believe that the land does not in fact belong to him or her … at the risk of causing costs, delay and litigation at a later stage.'[67] This is a matter on which opinions will necessarily differ, however, it is argued here that a construction should be favoured that is faithful to the original purpose for which the provision was enacted; and, moreover, one that incentivises dialogue between the parties, pre-litigation negotiation and settlement as opposed to an interpretation that actively generates and encourages litigation more than it would discourage it. For this reason, it is contended that rather than seek to impose time limits on applicants as the Commission recommends or, more problematically, embrace an interpretation of paragraph 5(4)(c) that permits 'a short time' after the reasonable belief has ceased for the adverse possessor to apply for registration, the more coherent, logical and workable approach would be to adopt the broader (*any* period of ten years) construction of paragraph 5(4)(c) as favoured by the Upper Tribunal in *Brown*. This, it is suggested, is the approach that the Supreme Court should be urged to embrace if and when it comes to determining the issue.

Until the matter reaches the Supreme Court (assuming it does), in the meantime, the law remains that laid down in *Zarb*; its authority confirmed in *Brown*. This presents a serious challenge and erects a real barrier for those wishing to claim adverse possession under Schedule 6 paragraph 5(4)(c). Essentially, it means adverse possessors labouring under a mistaken belief of their ownership of disputed land must, on discovery of their mistake, act 'promptly' in applying for registration. After *Brown*, however, the narrow *Zarb* construction has very much been put on notice and would appear vulnerable to challenge. We watch this space to see what comes next. As the soundtrack from the 1979 James Bond film *Moonraker* declared, 'just like the moonraker goes in search of its dream of gold' so too, we look now to the Supreme Court in search of clarity and pragmatism in the construction of Schedule 6 paragraph 5(4)(c) of the LRA 2002.

---

[64] See Law Com. No. 380 at [17.54]; and C. Harpum, *Response to the Law Commission Consultation Paper No. 227 Updating the Land Registration Act 2002* available here: http://www.falcon-chambers.com/images/uploads/articles/Response_to_LC_CP_227_on_Land_Registration_(2).pdf; Law Com *Updating the Land Registration Act 2002 – A Consultation Paper* No. 227 at [17.41].

[65] Ibid.

[66] C. Harpum, *Response to the Law Commission Consultation Paper No. 227 Updating the Land Registration Act 2002* at [164].

[67] Law Com. No. 227, *Updating the Land Registration Act 2002 – A Consultation Paper* at [17.41].