Hilary Term
[2025] UKSC 7
On appeal from: [2024] UKUT 14 (LC)

JUDGMENT

Brown (Respondent) *v* Ridley and another (Appellants)

before

Lord Briggs
Lord Hamblen
Lord Stephens
Lady Rose
Lady Simler

JUDGMENT GIVEN ON
26 February 2025

Heard on 21 January 2025

Appellants
Simon Goldberg KC
Sam Healy
(Instructed by Ward Hadaway LLP (Newcastle))

Respondent
Stephanie Tozer KC
Brynmor Adams
(Instructed by DWF Law LLP (Liverpool))

LORD BRIGGS (with whom Lord Hamblen, Lord Stephens, Lady Rose and Lady Simler agree):

1. This leapfrog appeal from the Upper Tribunal (Lands Chamber) raises a single issue of construction of part of one of the conditions for obtaining registered title on the basis of adverse possession of registered land under the new regime established by the Land Registration Act 2002 ("the 2002 Act"). Schedule 6 to the 2002 Act ("Schedule 6") lays down the basis upon which, and the new conditions subject to which, adverse possession of registered land may be relied upon for the purpose of obtaining registered title, which together amounts to a much reduced role for adverse possession by comparison with that which prevailed under the combination of the Land Registration Act 1925 and the Limitation Act 1980.

2. In bare outline, a person ("S") may, by making an application to HM Land Registry, seek to be registered as the proprietor of registered land on the basis of ten years' adverse possession ending on the date of the application. S is short for squatter, but this does not imply that the person is squatting in the sense of knowingly trespassing. All it signifies is that S is in adverse possession of registered land without having registered title. If S's application is opposed by the existing registered owner ("O"), then S may only obtain registration as owner if S can satisfy one of three conditions, specified in paragraph 5 of Schedule 6. The third of those conditions (which for reasons which I will later explain I will call "the boundary condition"), specified in paragraph 5(4) of Schedule 6 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
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> (d) the estate to which the application relates was registered more than one year prior to the date of the application."
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> (I have italicised the words about which the issue of construction arises.)

3. The question of construction to be decided on this appeal arises because it is common ground that, as a matter of pure grammar, the italicised passage in paragraph 5(4)(c) of Schedule 6 can be read in two ways, which I will call constructions A and B. Under construction A, the period of reasonable belief must be a period of at least ten years ending on the date of the application. Under the more lenient construction B, the period of reasonable belief can be any period of at least ten years within the potentially longer period of adverse possession which ends on the date of the application. Put another way, a period between the ending of a ten year period of reasonable belief and the date of the application will be fatal to the ability of S to satisfy the boundary condition under construction A, whereas it will not be fatal under construction B.

4. As will shortly appear, the facts of this case demonstrate that the cessation of an otherwise qualifying period of reasonable belief before the making of the application for registration is by no means an unusual or unlikely situation. It may fairly be described as routine, or even typical. This is because the impetus which may lead S to seek to be registered as the owner of adjacent land which S formerly thought was already his (or hers) will often be the raising by his neighbour O of a dispute as to his ownership, backed up by evidence in support, which destroys S's belief that it belongs to him, or at least makes his continuing belief unreasonable. But it is virtually inconceivable that S could then prepare and make such an application on the very same day as O first articulated his claim.

5. To meet the objection that construction A would therefore render the boundary condition unavailable in typical cases of emerging boundary disputes, the proponents of construction A (specifically the respondent to this appeal) submit that the phrase "ending on the date of the application" accommodates (by ignoring it) a gap between the ending of reasonable belief and the making of the application of a sufficient but short period to prepare to make the application, under the de minimis principle.

6. The reason why this is a leapfrog appeal is because, in *Zarb v Parry* [2011] EWCA Civ 1306; [2012] 1 WLR 1240, the Court of Appeal assumed, albeit without argument on the point, that construction A was the correct interpretation of the boundary condition whereas, in the present case, both the First-tier Tribunal ("the FtT") and the Upper Tribunal ("the UT") considered that construction B was correct. But whereas the FtT considered that the relevant dicta in *Zarb* were obiter, the UT considered (after careful analysis) that they were part of the ratio, and therefore binding. The result was that, in the opinion of the UT (Edwin Johnson J, President of the Lands Chamber) a full argument of the merits of the two constructions before the Court of Appeal might be futile, because of the risk of another conclusion that the Court of Appeal was itself bound by *Zarb*, regardless of the merits. It will be necessary to say a little more about *Zarb* in due course but not, happily, about whether its enunciation of construction A was part of its ratio. It certainly made no difference to the outcome.

The Facts

7. The issue of construction to be decided on this appeal is in no sense fact sensitive, at least to the facts of this case. They may therefore be summarised shortly. On 20 September 2002 the respondent Mr Brown was registered as proprietor of a substantial piece of rough, undeveloped land lying to the West of The Promenade, Consett, County Durham ("the Brown land"). On 8 July 2004 the appellants Mr and Mrs Ridley were registered as proprietors of land adjoining part of the Brown land to the North East of it, and also lying to the West of the Promenade, including a dwelling house known as Valley View.

8. The disputed land consists of a strip running from The Promenade in a North Westerly direction along the boundary between the garden of Valley View and the Brown land. It is (now) common ground that it formed part of the Brown land (as registered) but the FtT (Judge Bastin) found that, at least from 2004 until the Ridleys made their application for registration as owners of the disputed land on 20 December 2019, they were in adverse possession of it. They used it initially as part of the garden of Valley View and latterly as part of the site for the erection of a new house ("Moonrakers") into which they eventually moved. When they acquired it the apparent boundary between their garden and the Brown land was a picket fence and leylandii hedge, but that was removed preparatory to the erection of Moonrakers. The FtT also found that the Ridleys reasonably believed that they were the owners of the disputed land from 2004 until about February 2018, when the process of obtaining planning permission for the erection of Moonrakers revealed evidence which meant that such a belief could no longer reasonably have been held by them. There was thus a gap of about 21 months between the ending of their 14 year period of reasonable belief and the date of the making of their application.

The New Adverse Possession Regime

9. The context for the construction of the boundary condition in Schedule 6 is the whole of the re-modelled regime for obtaining title by adverse possession introduced by the 2002 Act, together with an understanding of its underlying purposes. At a relatively high level of generality the underlying purposes of the reforms implemented by the 2002 Act are not in dispute, and may be gathered from the consultation paper: *Land Registration for the 21st Century: A Consultative Document* (1998) (Law Com No. 254) and the report: *Land Registration for the 21st Century: A Conveyancing Revolution* (2001) (Law Com No. 271), in both cases issued by a joint working group ("JWG") of the Law Commission and HM Land Registry. The basic objective was to enhance the status of the register, so that:

> "the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land online, with the absolute minimum of additional enquiries and inspections." (See Law Com No. 271, para 1.5.)

That basic objective was to be achieved by a number of reforms, including the reduction in the number of overriding interests, making it easier for minor interests to be registered, the encouragement of voluntary registration and expanding the range of interests for which registration was to be compulsory.

10. The then existing regime for the automatic obtaining of title by adverse possession was perceived to be an impediment to the full realisation of that objective, both conceptually because possession as the basis of title (still applicable to unregistered land) was seen to be in conflict with the concept of title derived only from the register, and in practice because there was perceived to be a growing public perception that squatters' rights were too easily acquired against the holders of registered title. Nonetheless, although adverse possession has been altogether abolished in some common law jurisdictions undertaking reform of land registration, it was considered by the JWG to have some continuing advantages in England and Wales. These included the following:

> "(1) adverse possession is one facet of the law of limitation, the policy of which is to protect defendants from stale claims and to encourage claimants not to sleep on their rights; and
>
> (2) if possession and ownership become wholly out of kilter, it renders land unmarketable." (See Law Com No. 271, para 14.54.)

11. It is important at this stage to note that the JWG did not recommend, and Parliament did not enact, any significant change to what is sometimes called the general boundaries rule. It is now enshrined in section 60 of the 2002 Act, which provides that the boundary of a registered estate as shown for the purposes of the register is a general boundary, unless shown as having been determined in accordance with rules made under section 60, and that a general boundary does not determine the exact line of the boundary. Most Land Registry boundaries, both before and after the coming into force of the 2002 Act, are general boundaries. It follows that the 2002 reforms did not attempt to elevate the reliability of the register as the determinant of boundaries, as it did in relation to title. Nor did the 2002 Act change the meaning of adverse possession, which was simply lifted lock, stock and barrel from the old regime.

12. The new scheme for adverse possession in relation to registered land has the following main elements, mainly contained in Schedule 6. First, adverse possession is no longer capable of giving rise, of itself, to any title to land. This is achieved by the cancellation of the effect upon registered land of sections 15–17 of the Limitation Act 1980, by section 96 of the 2002 Act. This is because, under the new regime, the passage of time during which the squatter is in adverse possession without the owner taking steps to evict him does not of itself bar the title of the registered proprietor.

13. Secondly, paragraph 1(1) of Schedule 6 introduces a wholly new, but heavily qualified, right to apply for registration as proprietor of a registered estate to someone ("S" again, which is short for squatter, but has no pejorative overtone) who can demonstrate ten years' adverse possession ending "on the date of the application". This radically cuts down the old regime, since there was under that regime no need then for S to show adverse possession down to the date of any application or claim. Any 12 years would have been enough, unless of course a later squatter had barred S's title.

14. Thirdly, paragraph 1(2) of Schedule 6 gives the same qualified right to apply for registered title to a squatter who has been evicted, (otherwise than by a court judgment), provided that his adverse possession lasted until eviction, and his application was made within six months thereafter. This in effect gives the person evicted a period of six months' grace to make the application, provided that S can show that he could have applied under para 1(1) of Schedule 6 on the date when he was in fact evicted.

15. Fourthly, (and consistently with the exclusion from para 1(2) of eviction by court order) section 98 of the 2002 Act provides a defence to an action for possession of land to a person who could have made an application under para 1(1) of Schedule 6 on the day immediately preceding that on which the proceedings were issued, and who satisfied the para 5(4) boundary condition on that date. Supplementary provisions enable that defensive process to be repeated if the claimant does not enforce a possession order for two years.

16. Pausing there, and leaving on one side the relevant qualifications (described in Schedule 6 as conditions) a person with the benefit of ten years' adverse possession may make use of it in three ways. First, by applying for registration while still in adverse possession. Second, by waiting until evicted and then applying for registration within six months. Third, by simply using the ten years' accumulated adverse possession as part of a defence to O's claim for possession.

17. The fifth and for present purposes most important change to the old regime is that adverse possession is no longer of itself a sufficient basis, either for S obtaining registration in the face of O's opposition or for defending possession proceedings. S must also satisfy one of the three alternative conditions: see Schedule 6, paras 2, 3(1)

and 5(1). This case is concerned with the third (boundary) condition, but it is worth briefly noting the first two. The first, which may conveniently be labelled the equity condition, is that S has some equitable right based on estoppel not to be dispossessed and the circumstances are such that S ought to be registered as proprietor. The second is that S is "for some other reason" entitled to be registered as proprietor. Upon enquiry by the court, we were told that an example of some other reason might be if S was a contracting purchaser in possession who had paid the purchase price in full. Bearing in mind that this "other reason" is only an adjunct to ten years adverse possession this seems rather unlikely, but time did not permit further exploration. Suffice it to say that the second condition appears to accommodate any other basis in law for an entitlement to registration.

18. The third condition therefore seems to be the only one of the three in which the ten years of adverse possession down to the date of the application (or the eviction or the possession claim, as the case may be) is acknowledged as the real and effective basis for the application to be registered. But the right is then qualified in three ways. The first two (in sub-paras (a) and (b) of paragraph 5(4)) are closely linked. The first, that the land subject to the application is adjacent to land belonging to the applicant, is what confines adverse possession under this condition effectively to actual or potential boundary disputes: see *Dowse v Bradford MBC* [2020] UKUT 202 (LC); [2021] 1 P & CR 8, paras 42-48, for the restricted concept of "adjacent". The second, that the boundary is only a general boundary, is what acknowledges the potential for dispute, and that the extent (if any) of any separation between possessory title and registered title is not something which can conclusively be resolved by inspection of the register.

19. The third qualification, namely the required period of reasonable belief, appears on its face to be designed to address the concern that the obtaining of registered title as the result of adverse possession should not be available to those squatters who know that they are in possession without any right to do so: i.e. who know that they are trespassing. The effect of the requirement that the belief be reasonable rather than just genuine adds an element of objectivity to the enquiry, which makes an assertion of reasonable belief by S more easily tested by reference to objectively ascertainable facts and documents. This affords some added protection to O, and is likely to avoid rewarding a squatter whose belief that he is not trespassing is not objectively justifiable, even if genuine.

20. The central question relates to the required period during which the reasonable belief must be held. It is worth asking whether any objective (i.e. purpose) of the boundary condition is better achieved by one construction rather than the other? Both constructions plainly require that the reasonable belief persist for at least ten years during the period of adverse possession. What if anything is added to the achievement of any recognisable purpose behind the boundary condition by a requirement that it should persist right up to the date of the application (or eviction or commencement of

possession proceedings)? And to what harm to the usefulness of the boundary condition would such a requirement give rise?

The Parties' Submissions

21. The main submissions of the respondent may be summarised in this way:

1) First, since the overall objective of the reform of adverse possession was to reduce its potentially adverse impact upon the conclusivity of the register as determinative of land ownership, any ambiguity between alternative constructions of an exception to the reduction of the impact of adverse possession should be resolved by adopting the narrower interpretation of the exception, i.e. construction A.

2) Secondly, a squatter who at no time before making the application for registration thinks he is a trespasser may fairly be said to be a more deserving applicant than one who continues adversely to possess the relevant land after discovering that his former reasonable belief in his ownership of it can no longer be maintained, and therefore knowing that he is trespassing.

3) Thirdly, the argument that, on construction A, the reasonable belief must persist until the very day of the application ignores the flexibility of the omnipresent de minimis principle, which could in an appropriate case, give S up to a month or two after being disabused of his reasonable belief before being ready to make his application, without falling foul of the condition. Alternatively, the same flexibility might be arrived at by an application of the *Soneji* principle, as explained by this court in *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Co Ltd* [2024] UKSC 27; [2024] 3 WLR 601.

4) The minimisation of disparities between registered title and possession on the ground, coupled with the need to encourage the use of registration, militates in favour of a requirement that applications for registration be promptly made.

5) In any event, construction A will not exclude those who apply for registration as a way of managing the risk that their continued reasonable belief as to ownership turns out to be wrong.

6) Construction B would cause real forensic difficulty for registered owners, who might face assertions of reasonable belief held in the distant past, both by S

and by S's predecessors, where it would be unlikely that documentary evidence would survive to enable it to be challenged.

7) Construction B potentially falls foul of the requirement for conformity with the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), in relation to a provision which was on any view expropriatory.

22. The appellants' submissions, closely allied with the reasoning of the judges in the FtT and the UT, may be summarised thus:

1) A close grammatical reading of the reasonable belief part of the boundary condition supports construction B, even though construction A is a possible alternative.

2) The essential problem with construction A, which requires the reasonable belief to persist until the very date of the application (or eviction or court proceedings), is that it would render it practically impossible in most cases for an applicant ever to be able to satisfy the boundary condition.

3) No attempt to have recourse to a de minimis principle comes near to addressing that problem. De minimis is about trivial matters which no one would think relevant, whereas the need for a period of grace to give time for a squatter, once disabused of his reasonable belief, to prepare and make an application is a matter of real substance.

4) There is no basis for implying a period of grace into the reasonable belief requirement, not least because such a period is expressly provided to cope with the effect of eviction upon the continuity of adverse possession. By contrast a period of grace is unnecessary (or perhaps built in) under construction B.

5) The supposed forensic difficulties of a ten year assertion of reasonable belief buried in past history are greatly exaggerated.

6) Since the old regime for adverse possession was human rights compatible, the new much reduced regime must be a fortiori compatible.

Analysis

23. Statutory construction requires the court to ascertain the objective intention of the legislature as manifested by the language which it has chosen to use, interpreted in the context of the legislation as a whole and with due regard to its underlying purposes so far as they can reliably be obtained from admissible material. In the present case the passage to be construed forms part of a condition for the availability of a right to registration based upon adverse possession, in the context of an intention to confine such rights more closely than before, but not wholly to remove them, in the light of their continuing benefits.

24. The reasonable belief requirement forms part of the boundary condition for reliance upon adverse possession as the basis for seeking registered title. Taken as a whole, the boundary condition read with the other two conditions is plainly designed to confine reliance upon adverse possession (where no other legal or equitable right is available to S) to the scenario where the register is at its weakest in answering questions about land ownership, namely issues as to boundaries. This is because general boundaries (which are the norm in registered title) do not seek to define boundaries precisely. Boundaries are an aspect of the definition of land ownership where the position on the ground may prevail over the line drawn on a plan, and where a long-continued status quo between neighbouring owners (in terms of what they each possess along the boundary) may be thought to deserve respect, bearing in mind the typical potential for disputes about boundaries to generate disproportionate cost, effort, dismay and hatred if litigated. Boundaries may therefore be said to be matters where adverse possession has the most useful continuing role to play, and where it impinges least upon the basic objectives of the 2002 reforms, as already described. It follows that the general intent to confine adverse possession is largely achieved by sub-paras (a) and (b) of para 5(4), which limit the use of adverse possession, unaccompanied by some other right, to cases about boundaries which are not defined by the register. There is therefore little force left in the submission that the reasonable belief condition needs also to be narrowly construed.

25. More to the point, I do not discern any real purpose which construction A would serve beyond construction B, other than an almost mechanical reduction of the avenue constituted by the boundary condition to one which is little more than illusory. Both constructions effectively exclude squatters who are seeking to possess land with a view to taking it from others by means of what they know is a trespass. Judge Bastin thought it obvious that the typical applicant wishing to satisfy the boundary condition would only contemplate an application for registration once disabused of a reasonable belief in his ownership, and could not possibly be expected to do so on the same day as he lost his reasonable belief, which is what construction A appears to require. Leaving aside the de minimis point, I agree with him.

26. An application for registration of title to adjacent land along an undefined (i.e. general) boundary is not something which can be put together in an afternoon. It needs professional advice, probably from a surveyor, evidence about the locus in quo and probably a plan of it, together with evidence about the nature of the necessary ten years' possession of it, which may well have to include evidence about the possession of predecessors. While a bare assertion of belief in ownership by the applicant may be briefly made, the same assertion may need to be made about one or more predecessors, and all the relevant persons' belief must be shown to have been reasonable by reference to objective evidence and criteria.

27. Beyond that, a prudent squatter is likely to require time to take legal advice about the merits, and to give the most anxious consideration to whether the costs of the exercise are proportionate to the benefits if successful, and whether the risks of long-term exacerbation of what may until then have been good neighbourly relations should sensibly be undertaken. Any sensible potential applicant (where there is already a neighbour dispute which has disabused him of his former belief as to ownership) will want to consider any available form of alternative dispute resolution. All this takes real rather than de minimis time.

28. It needs also to be borne in mind that the loss of the former reasonable belief as to ownership may come about from information provided by a third party, at a time when there appears to be no dispute with the relevant neighbour about the relevant boundary. In the present case the FtT judge found that the Ridleys had lost their reasonable belief in the course of making a planning application for permission to build Moonrakers, not from anything said or done by Mr Brown. The notion that Parliament should have intended that S should in that situation be expected immediately to start a process likely to lead to a dispute and litigation by making an application to register (which must be notified to the neighbour) seems most unlikely. But this is what construction A would require.

29. This is why I would reject the respondent's submission that it is an underlying purpose of this part of the 2002 Act that applications should be made promptly, if reliance is to be placed upon adverse possession under the boundary condition. As I have described, the structure of the adverse possession part of the 2002 Act expressly leaves S free to choose between applying for registration or waiting to see if he is evicted, or waiting to see whether his neighbour sues him for possession. Those are real choices to make in the real world, which Parliament must be assumed also to inhabit, and to have deliberately made available for good reason. By contrast Parliament has in other primary legislation, and in its approval of the Civil Procedure Rules, made clear its view that civil litigation should be regarded as a last resort, when other avenues for resolution of the dispute have failed. The respondent submitted, correctly, that not every application for registration need lead to litigation, since the 2002 Act contemplates that it may be unopposed, and that an applicant may seek to avoid hostile litigation after lodging an application for registration by negotiation or mediation. In written

submissions following the hearing the respondent relied upon recently obtained statistics from HM Land Registry suggesting that only a very small number of applications based upon adverse possession get referred to the FtT. But there will nonetheless be cases a sudden application for registration is regarded as a hostile step, and one which is instrumental in driving the neighbours towards litigation, even if it is then settled or mediated before reaching the tribunal.

30. In the end the debate between counsel came down to the question whether construction A could be saved from its propensity to make the use of the boundary condition illusory, by the vigorous application of the de minimis principle. This principle is enshrined in the Latin tag de minimis non curat lex, which is often translated as meaning that the law is not concerned with trifles. Well-known authorities on the principle describe it as excluding matters which are trifling, insubstantial, inconsequential, immaterial, irrelevant or negligible: see e.g. *Chatterton v Cave* (1878) 3 App Cas 483, 490, 492, 499, and *Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10; [2015] AC 1229, para 50.

31. In my judgment the submission by Ms Tozer for the respondent that the de minimis principle could justify reading into construction A an additional month or two for the making of the application after the loss of reasonable belief suffers from insuperable obstacles. The first is conceptual. The need to read in such an extension of time or period of grace is an important matter of substance. It is the very converse of trivial, inconsequential or irrelevant.

32. The second is that the one or two months' minimum time which she reasonably accepted would probably be needed in a typical case to prepare an application for registration is by no means trivial or negligible, even if just measured in terms of time. By no stretch of the imagination does a period of one or two months answer the description of de minimis, even when measured as an add-on to a period of ten years.

33. The third is that it is by no means clear that the de minimis principle has ever been used as a means of conferring extra time to do something in excess of a statutory time limit. The best counsel could do was to point to an obiter dictum of Dyson LJ in *MD (Jamaica) v Secretary of State for the Home Department* [2010] EWCA Civ 213; [2010] Imm AR 526, para 27. That case was about the requirement under the Immigration Rules for a continued period of lawful residence, and the dictum was about whether (purely by way of example) a one day break in ten years' required continuity occasioned by making a visa application one day late, could be treated as de minimis. But a de minimis break in continuity is a very different thing from treating a clear time limit as not meaning what it says, by adding some extra time.

34. The fourth is that, if construction A is otherwise correct, the substance of the requirement is that S should apply while his reasonable belief remains extant. It is apparently laid down as a necessary state of mind in the applicant when making the application. If the reasonable belief expires even on the day before, then the application is not made while the required mind-set continues.

35. The fifth obstacle is that, when Parliament considered whether S needed a period of grace during which to make an application for registration, it said so, either expressly or by necessary implication. Thus, upon an eviction (which ends the period of adverse possession) S is given six months in which to make the application. On the issue of possession proceedings S as the defendant will be given time by the court to plead a defence of adverse possession and to verify it with evidence. By contrast, on construction A, no period of grace is provided at all. By contrast, on construction B, no such period is needed, because there is no requirement that the requisite period of reasonable belief persist until the making of the application. Time to make the application after the loss of reasonable belief is therefore built in.

36. As a late addition to the submission based upon the de minimis principle, the respondent relied on the *Soneji* principle, as recently explained and applied by this court in the *A1 Properties* case. But that is a principle of statutory construction designed to discover Parliament's intention as to the consequences of non-compliance with a statutory requirement. It does not serve to help understand what the requirement actually is. In short, the *Soneji* principle answers the question: does non-compliance render void the exercise of the right to which the requirement applies? That is not the issue which separates construction A from construction B, or which helps in any way to answer the question which is to be preferred.

37. The result is that there really is no answer to the problem that construction A makes the apparent right to obtain registered title based upon adverse possession under the boundary condition purely illusory in most typical cases, as the experienced specialist tribunals below both considered that it did. I do not consider that there are any apparent difficulties with construction B which carry anything like the same weight in the process of construction. The main one advanced by the respondent is that the ability of S to rely upon a period of reasonable belief which may be distant in time from the application for registration places O under unfair forensic disadvantages. The short answer to that is that since it is S rather than O who bears the burden of proof, the forensic disadvantages arising from the need to prove a historically remote period of reasonable belief fall mainly upon S, and may indeed encourage S to apply for registration soon after that belief ceases, rather than to wait and see whether eviction or possession proceedings will follow. Thus, construction B would contain a built-in incentive upon S to get the register aligned with the position on the ground while the evidence is still fresh (or at least as fresh as the need to go back at least ten years permits).

38. Last but by no means least, I consider that a careful examination of the words which Parliament has chosen to use tends, although not conclusively, to support construction B. As Lord Hodge DPSC said 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, para 29:

> "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."

Just looking at the key phrase: "for at least ten years of the period of adverse possession ending on the date of the application", the words "ending on the date of the application" naturally describe the end of a period i.e. the period just described as the period of adverse possession. This impression is reinforced by the fact that the phrase "period of adverse possession ending on the date of the application" in para 5(4)(c) closely follows and repeats the phrase in Schedule 6, para 1(1), "adverse possession…for the period of ten years ending on the date of the application"; i.e. the required period of adverse possession, not the length of time during which S must hold the requisite reasonable belief. Thus, even if there were not the strong factors favouring construction B which I have already described, based on the need, if possible, to avoid a construction which makes the statutory right illusory, I would construe para 5(4)(c) in accordance with construction B just on the ordinary meaning of the words.

Zarb v Parry

39. It is convenient at this stage to mention the decision of the Court of Appeal in the *Zarb* case, by which Edwin Johnson J regarded himself as bound. This court is not of course so bound, and it is unnecessary to decide whether it was even binding upon the tribunals below. Rather, the case merits attention in case it adds anything of force to the merits of construction A, which I (like the tribunals below) regard as much the less preferable, even taking full account of the de minimis principle. The case was mainly about the question whether an attempted but unsuccessful eviction had interrupted the defendants' adverse possession.

40. The reasonable belief requirement was mentioned in passing, in terms which suggest that Lady Arden, who gave one of the two significant judgments, assumed that construction A was correct, although no attempt was made to compare it with construction B. In the event, despite a lack of clear findings by the judge, the Court of Appeal concluded that the successful defendants entertained the necessary reasonable belief all the way until the paper title owner started proceedings, so that the potential difference in outcome between the two constructions did not arise on the facts.

41. The fact that Lady Arden's assumption about construction A appears to have been an instinctive and unchallenged response to reading the relevant statutory words does give pause for thought. Nonetheless the absence of any evaluative comparison between the two constructions, or even reasoning as to why construction A was assumed to be correct, leaves the decision with little persuasive force on the issue, apart from its status as possible precedent. It is sufficient for me to say, with respect, that whatever may have been the unexplained thinking which led to that assumption, it was wrong, for all the reasons already given.

Human Rights

42. In *JA Pye (Oxford) Ltd v United Kingdom* (2007) 46 EHRR 45, the Grand Chamber of the European Court of Human Rights held by a 10-7 majority that the pre-2002 regime for the barring of registered title by adverse possession, although expropriatory and engaging article 1 of the First Protocol to the ECHR ("A1P1"), fell within the wide margin of appreciation of the UK in striking the requisite balance under A1P1, being one of many systems in use by different member states for making available the acquisition or barring of title by adverse possession. In so concluding, the court took account of the enactment of the 2002 Act and its effect in preserving (in relation to unregistered land) rather than entirely abolishing adverse possession, thereby confirming the UK Government's continuing view in the public interest in the system of adverse possession.

43. The undoubted very large reduction in the scope for adverse possession to operate by way of expropriation of registered title to land, wrought by the 2002 Act, places a very large obstacle in the way of a submission that the adoption of construction B rather than A would be contrary to A1P1. Rather, the respondent submitted that any ambiguity between the two constructions should be resolved in favour of the construction which resulted in less expropriation rather than more.

44. I do not agree. While it is of course correct to say that construction A is likely in particular factual cases to prohibit rather than permit (as does construction B) the expropriation of O's registered title in favour of S, there is no principle of construction as rigid as the kind contended for. Rather the true question is whether the regime in the 2002 Act for the obtaining of title on the basis of adverse possession, construed in accordance with ordinary principles (which do require clear words for an expropriatory provision), would amount to an unlawful infringement of the rights conferred by the ECHR, bearing in mind the wide margin of appreciation available to the UK legislature. If it would do so, then the relevant provisions might have to be read down to bring the legislative scheme into conformity with the ECHR, provided that doing so does not go against the grain of the legislation. In the present case, as the appellants submitted, the large reduction in the scope of the rights created by adverse possession under the 2002 Act, compared with the old regime carefully assessed and found to be compliant in *Pye*,

means that it is unarguable that it falls outside the UK's margin of appreciation, whichever construction of the knowledge requirement in the boundary condition is adopted.

Conclusion

45. For those reasons I would allow the appeal from the UT and restore the decision of the FtT, to the effect that the appellants are entitled to be registered as proprietors of the disputed land.