Reasonable belief in adverse possession

IN BRIEF

- In claiming title by adverse possession of registered land upon the ground of an uncertain boundary, a party must reasonably believe that they own the disputed land for ten years.
- As a result of two decisions of the Court of Appeal, it has previously been unclear whether any ten years could be relied upon, or if the ten years had to be immediately before the application to the Land Registry.
- The recent decision of the First-tier Tribunal in *Crook v Zurich* has decisively resolved the point by holding that any ten years' belief is sufficient.

Any ten years will do: Richard Oughton hails the return of clarity & common sense to claims for adverse possession

The Land Registration Act 2002 (LRA 2002) prospectively restricted the acquisition of title by adverse possession to registered land, save in three specific cases, although in each of these cases, the period of adverse possession is reduced from twelve to ten years. The only important case is para 5(4) of Sch 6, LRA 2002 which applies where (emphasis added):

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 [the subject of a 'fixed boundaries' determination];
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 belonged to him';
d. the estate to which the application relates was registered more than one year prior to the date of the application.

It is with the requirements of sub-paragraph (c) that difficulties have arisen. As a matter of language this sub-paragraph is capable of two interpretations: it could mean that the reasonable belief must have existed for any ten years, whether or not it was held immediately before the date of the application to the Land Registry (the 'any ten years' construction), or it could mean that the reasonable belief had to exist immediately before the date of the Land Registry (the 'immediately before' construction).

The 'immediately before' construction will be impossible to satisfy in almost all situations, in that an applicant must realise that he does not own the disputed land before he finds it necessary to apply to the Land Registry.

The Court of Appeal creates a problem

In *Zarb v Parry* [2011] EWCA Civ 1306, [2011] All ER (D) 100 (Nov) Arden LJ appeared to adopt the 'immediately before' construction, before attempting to mitigate the consequences of this conclusion by holding that the applicant need not act immediately, but only had to act 'promptly'.

In *IAM Group plc v Chowdrey* [2012] EWCA Civ 505, [2012] All ER (D) 167 (Apr), the Court of Appeal assumed that *Zarb v Parry* was correct, but found in favour of the adverse possessor upon the basis of a benevolent finding as to 'reasonable belief'.

The two Court of Appeal cases left the law in a considerable degree of uncertainty. The exact status of Arden LJ's judgement in *Zarb v Parry* was unclear and the application of the concept of 'promptly' gave rise to considerable debate, the only guidance being the views of authors of articles in the *Estates Gazette* and generally inappropriate analogies from the concept of 'promptness' in completely different areas of law.

Hopefully, certainty in this area of the law has been given by the recent decision of Judge Ann McAllister sitting in the Land Registration division of the First-tier Tribunal (Property Chamber) in the case of *Crook v Zurich Assurance Ltd* REF/2019/1066. Judge McAllister is highly experienced in adverse possession claims, having been the first instance judge in *Baxter v Mannion* [2010] EWHC 573 (Ch) and *Dowse and another v City of Bradford Metropolitan District Council* [2020] UKUT 202 (LC), [2020] All ER (D) 112 (Jul).

The facts of *Crook v Zurich*

Crook v Zurich Assurance Ltd concerned adjoining units on a large industrial estate outside Warrington. At all times both units were surrounded by very secure industrial metal fences. However, the fencing on Zurich's land cut off a portion of land (the disputed land) which was physically incorporated into the land purchased by Mr and Mrs Crook, there being no fence, barrier or other demarcation between the disputed land and the rest of the Crooks' land. The fences were in position before either Zurich or the Crooks purchased and the circumstances in which the fences were erected were unknown. The disputed land comprised approximately 190 square metres, and was about a third or a quarter of the size of the remainder of the Crooks' land.

Zurich purchased its land on 1 February 2005 and the Crooks purchased their land on 7 September 2006. Immediately after purchase the Crooks let or licensed their land—including the disputed land—to a series of occupiers for purposes including a haulage depot and the storage of vehicles. In 2016 Vodafone placed a telecommunications mast on the disputed land. Vodafone required a formal lease of the disputed land and their solicitors drew the attention of Mr and Mrs Crook to the fact that the disputed land was within Zurich's registered title in February 2017.

The Crooks duly applied to the Land Registry to be registered as proprietors of the disputed land. Zurich objected and the matter was referred to the First-tier Tribunal.

The judge held that the Crooks had been in adverse possession for the requisite period of ten years. She further held that the disputed land was 'adjacent' to the Crooks' land within the restrictive approach of *Dowse v City of Bradford* upon the basis that the disputed land could properly be described as 'adjacent' to the applicants' land.

It was further held that the belief of the Crooks that they owned the disputed land was 'reasonable'. The judge rejected an argument that because Mr Crook had been shown a registered plan upon purchase, he should have realised that the disputed land was not within the land being purchased. The judge referred to the joint report of the Law Commission and the Land Registry (*Land Registration for the Twenty-First Century: A Conveyancing Revolution*) (Law Com No 271) that the typical case for the operation of para 5(4) was where the physical boundaries disagreed with the legal boundaries and stated that it was 'reasonable' for the Crooks to follow the boundary structures. Interestingly, Zurich's more sophisticated purchase in 2005 failed to detect that the disputed land had been fenced off from the rest of its land.

Judge McAllister gives certainty

It was accepted that the Crooks' belief that they owned the disputed land ceased to be reasonable when Vodafone's solicitors informed them that the disputed land was within Zurich's title in February 2017. The Crooks only applied to the Land Registry on 6 November 2018 and there was no correspondence between the parties before the application. This interval of 21 months raised starkly the question of the meaning of para 5(4)(c).

Judge McAllister began her consideration of the issue in the following terms:

> 'On the authorities, the position remains unclear. It is obvious that it cannot have been intended that the applicant submit his or her application on the day the belief ceases to be reasonable. This result is absurd and will rarely be satisfied' (at para [48]).

The judge went on to refer to the aforementioned joint report, which at para 14.44(2) clearly assumed that the 'any ten years' construction was correct.

The judge analysed *Zarb v Parry* as having assumed the 'immediately before' construction and the remarks of Arden LJ as having been made without argument. In particular, the joint report was not referred to and the only textbook cited, *Megarry & Wade,* put forward the 'any ten years' construction. The judge concluded that in neither *Zarb v Parry* nor *IAM Group PLC v Chowdrey* was the point argued, and in neither case was it necessary for the ultimate conclusion of the court.

The judge referred to three decisions of the First-tier Tribunal which favoured the 'any ten years' construction: namely *Davies v John Wood Property PLC* REF/2008/0528; *Port of London Authority v Mendoza* [2016] UKFTT 0087 (PC) (both Judge Michael Mark); and *McLeod v Brown and Jones* [2015] UKFTT (PC) (Judge Colin Green). Although both counsel cited extensively from the textbook and periodic literature on the point, the judge did not refer to such in her judgment.

The judge came to the conclusion that the 'any ten years' construction was correct. She gave several reasons for this conclusion:

- First, as a matter of language either construction of para 5(4)(c) was possible, and a construction which was absurd was to be rejected (at para [60]).
- Second, where there were successive adverse possessors, the 'any ten years' construction 'fits more easily' with the reference to 'successors in title' (at para [62]).
- Third, the concept of 'promptness' was 'bound to give rise to possible unfairness and undoubted uncertainty' (at para [63]). This was accepted by the Law Commission report *Updating the Land Registration Act 2002* (Law Com No 308).
- Finally, the judge considered policy issues. While the policy of LRA 2002 was to make it harder for title by adverse possession to be claimed, it was not necessarily good policy to require applicants to apply to the courts or the Land Registry in cases of disputed ownership where otherwise the matter would lie dormant (at para [64]). In making this point, the judge adopted the views of Dr Charles Harpum, the lead architect of LRA 2002, over other consultees of the Law Commission in its most recent report, who argued that a construction which encouraged keeping the registered title up to date by requiring applications by adverse possessors to be made in as many cases as possible was to be preferred.

The judge went on to find that if 'promptness' was the test, Mr and Mrs Crook had not so acted. She rejected an argument derived from the concept of *laches* based upon the lack of prejudice to Zurich (at para [66]).

The decision of Judge McAllister in *Crook v Zurich Assurance Ltd* should bring clarity to what was previously a very uncertain area of the law. The 'any ten years' construction is not only correct in terms of policy, but easy to apply. NLJ

Richard Oughton of Cobden House Chambers, Manchester and Octagon Legal, Norwich, acted for the successful party in *Crook v Zurich Assurance Ltd.* He would like to thank Mr & Mrs Crook for their willingness to take the calculated risk of litigating the point, and Jane Riley of Manchester Incorporated Law Library for research assistance.