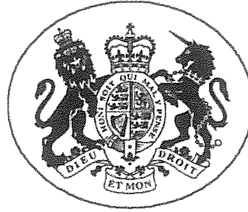


[2019] UKFTT 0628 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO 2018/0520

BETWEEN

1. **DAVID LIONEL MAYHEW**
2. **VIRGINIA ANN MAYHEW**

Applicants

and

ALEXANDRA GRACE O'CONNOR

Respondent

Property address: Land lying to the north-west of Isington Road, Isington, Alton GU34 4PJ
Title number: SH46508

Before: Judge Hargreaves

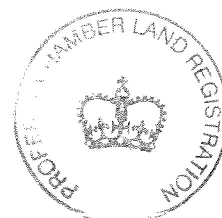
ORDER

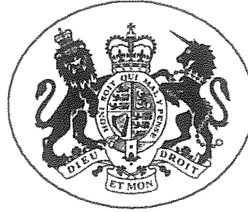
The Chief Land Registrar is directed to cancel the application for adverse possession made in Form ADV1 dated 30th March 2017.

BY ORDER OF THE TRIBUNAL

Sara Hargreaves

DATED 3rd September 2019





[2019] UKFTT 0628 (PC)

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Applicants

and

ALEXANDRA GRACE O'CONNOR

Respondent

Property address: Land lying to the north-west of Isington Road, Isington, Alton GU34 4PJ
Title number: SH46508

Before: Judge Hargreaves
Sitting at Alfred Place
26th and 27th June 2019

Applicant representation: Paul Letman instructed by Forsters LLP, London
Respondent representation: Gary Cowen instructed by Mercers, Henley-on-Thames

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DECISION

Keywords – adverse possession of registered land – ADV1 and NAP - third condition – LRA 2002 Schedule 6 paragraph 5(4) – whether the Applicants could have the required reasonable belief for at least 10 years of the relevant period since 1991 – query what that period was -

facts of a 1991 land deal and construction of a conveyance important to question of reasonable belief

Cases cited

Powell v MacFarlane (1977) 38 P&CR 452

Pye v Graham [2002] UKHL 30

Beaulane Properties v Palmer [2006] Ch 79

Smith v Waterman [2003] EWHC 1266 (Ch)

Zarb v Parry [2011] EWCA Civ 1306

Davies v John Wood Properties (16 February 2010) REF/2008/0528

IAM Group v Chowdrey [2012] EWCA Civ 505

Crew v London & Continental Holdings Ltd (6 April 2016) REF/2015/0284

London & Continental Holdings v Crew UT/2016/0111

SS Global v Sava [2007 EWHC 2087 (Ch)

Tomlinson v Foster [2014] UKFTT 1008 (PC)

King v Suffolk CC [2017] UKFTT 0006 (PC)

Adverse Possession, 2nd ed., Stephen Jourdan QC and Oliver Radley-Gardner

Megarry & Wade: The Law of Real Property, 9th ed., Stuart Bridge, Elizabeth Cooke, Martin Dixon

Law Commission Consultation Paper No 227: Updating the Land Registration Act 2002 paragraphs 17.36-47

1. For the following reasons I direct the Chief Land Registrar to cancel the Applicants' application in Form ADV1 for registration of title by adverse possession of the small piece of land currently allocated provisional title no. SH46508. That area is outlined in blue as ABCD at 15/71 but has been restricted by the Applicants to the area A1BC to the point short of D were it not for a fence, excluding a very overgrown area which is occupied by a cess pit belonging to Bridge Cottage (15/72). This was a pragmatic exclusion but has had little impact on the application as a whole.

2. References are to the tab and page number in the trial bundle except where otherwise indicated.

3. As a site visit on 25th June demonstrated, it is almost impossible to discern the disputed land on site. In reality it is no more than a corner of a larger field farmed as part of the Applicants' Mill Farm. The only physical boundary is the very well established hedge and fence marking the rear garden (roughly northern) boundary of the Respondent's property, Bridge Cottage and its cesspit. If the disputed area is roughly rectangular, two sides are not delineated by any physical structure. The disputed area is not accessible from Bridge Cottage, and never has been in the context of the relevant chronology of this case. It is easy to understand the Applicants' case that it has been part of their farming programme for many years, but that is not the core of the dispute (or the key to the answer) though Mr Cowen certainly challenged whether the Applicants could demonstrate sufficient factual possession. Mr Letman took a series of photographs at the site visit and with the addition of two aerial photographs, they are numbered P1-8 in a separate clip, and there are further photographs at 60/239-249 which form part of an HMLR survey starting at 60/233, with a useful description of the land by the surveyor at 60/234-5. As part of a field, the disputed land is insignificant, and even more so when considered as part of Mill Farm: it fulfils no particularly important function (ie it is not critical to the farming operation). Its real significance probably lies in its value as a back garden to Bridge Cottage: the cottage is very close indeed to the hedge to the north marking off the garden from the field, so that a rear extension would be unlikely to be able to be built unless the Respondent retains the disputed land.

4. The Respondent is related to the family which sold Mill Farm or parts of it to the Applicants in 1991. In fact, her brother was directly concerned with some of the relevant incidents and though I think he was present in court for much of the hearing, he never filed a witness statement or gave evidence, though there were occasions on which that would be extremely useful, particularly since he is older than the Respondent, who was not involved in the 1991 transactions which are at the root of the application.

5. The relevant agreed chronology of events is as follows. On 15th October 1977 the landlords of Bridge Cottage, Messrs Holmes and Pike, granted a tenancy to a Mr T.D. Robinson (10/51). There never was a Mr Robinson, and the evidence of Jean Robinson is that the tenancy was hers, as she was married to a Mr Harris until they

divorced in 1994. She vacated Bridge Cottage in early 2017 and is in bad health, and therefore did not, for reasons I accept (as did Mr Cowen having read her third witness statement detailing her state of health) give oral evidence. Her statements in support of the Applicants are at tab 57: her firm evidence is that the disputed land was never demised as part of Bridge Cottage. That makes sense in the context of the farming history of the field: the overwhelming evidence is that the land was part of a farmed field. The issue about the disputed land evolved after Mrs Robinson moved out and the Respondent decided to plan what to do with Bridge Cottage which on any view is now in need of refurbishment (her initial plan to demolish it being refused by the local planning authority).

6. The Applicants wanted to buy Isington Farm (now known as Mill Farm) when it came on the market in 1991, to expand their adjoining farming enterprise at Froyle Mill. They acquired the Farm by a transfer dated 28th November 1991 which is at 60/251. The terms are important, and it makes sense to deal with them at this stage, in order to put the parties' respective claims into context, including Mr Mayhew's evidence that the seller dictated terms. "The property" is defined by clause 1.9 by reference to the "parcels of land edged red on the attached plan marked A" (60/253). Plan A is reproduced in the trial bundle in A4 format (60/267), but it is still possible to see the Applicants' signatures on the plan and the omission of the disputed land. The original was produced at the hearing. A better version of the plan is at 60/271.

7. The Vendors covenanted by clause 8 (60/256) to observe and perform the covenants in Part II of the Fourth Schedule, paragraph 1.5 of which provides that the Vendors would "erect and forever maintain in good order and repair ... a stockproof fence along the boundary between the points marked "H" "I" "J" and "K" on the attached plan A either within two months from receipt of a written request from the Purchasers or prior to completion of a sale of the adjoining property retained by the Vendors [ie Bridge Cottage]." This was one of several fencing covenants, a point relied on by Mr Letman, who also stressed that the covenant affected a tiny corner of a purchase of around 250 acres, with an "invisible boundary". Mr Cowen tested both those ideas, which were designed to minimise the significance of the 1991 arrangement in the context of the third condition relied upon. In the event, the Applicants never required the Vendors to fence the disputed land and the Vendors themselves never erected the

fence either, possibly, though this is speculative, because there was no "sale" of Bridge Cottage as such.[1]

8. The immediate and practical reason why the disputed land was left unfenced was because the Applicants, on completion of the purchase, leased the adjoining field (and other land) to the north of the disputed land back to Christopher Holmes who was farming it at the time of the transfer. Part of the area was described as "the Hop Field". The lease was for 50 years, and it is clear from the plan at 60/271 (the same as the transfer plan) that the demise excluded the disputed land. So in reality, the Hop Field and the disputed land were farmed without physical separation as they had been prior to the November 1991 transactions. The arrangement came about because the Holmes were "adamant" against selling the Hop Field as they had a forward contract for the hops.[2] On 6th December 2002 Christopher Holmes wrote to the Applicants' son James "giving you notice that we wish to give up the tenancy of the hop garden at Isington" and this was agreed.[3] The lease was duly surrendered in October 2003 (60/290). According to David Mayhew, whose evidence was not challenged on this point, there had been a practical alteration of the legal arrangement whereby some years after 1991 (he thought the mid-1990s) the Applicants started farming the field to the north of Bridge Cottage and Christopher Holmes limited his activities to the Hop Field to the west, having given up the field of which the disputed land forms part: see paragraph 16 below. There was no real detail on when this happened but on any view it means the Applicants' contention that they had been in adverse possession of the disputed land since 1991 was incorrect. That date has to be shifted to the mid-1990s.

9. Not long after Christopher Holmes surrendered the tenancy in 2002, there was a series of transactions relating to the trusts on which Bridge Cottage was held, which resulted in a conveyance of Bridge Cottage to the Respondent on 31st October 2003. The transaction clearly includes the disputed land, with what looks rather like another version of the 1991 plans: see 74/426. Again, that did not affect Jean Robinson's occupation on her evidence. The Respondent had pleaded at paragraph 13 of her statement of case (30/129) that prior to 31st October 2003 Bridge Cottage was "held

[1] There was no evidence on this point, but I surmise that an open market sale of Bridge Cottage would benefit from incorporating the disputed land physically

[2] The Applicants' agent's file note dated 5th August 1981 found during the trial and not in the bundle

[3] Letter dated 6th December 2002, not in the bundle

under a trust where the interest of the beneficiaries under the trust was not an interest in possession". That would have had an impact on whether time could run in the Applicants' favour prior to 31st October 2003 pursuant to paragraph 12, Schedule 6, LRA 2002, but by the time he settled his skeleton argument Mr Cowen made it clear that he was no longer pursuing that point.

10. Mr Letman points out that taking the various family assignments into account (and without going into detail the relevant documents are at tabs 71/72/73) from 1997-2003 Christopher Holmes owned four fifths of the beneficial interest in Bridge Cottage and submits that if he thought the disputed land belonged to him (ie Bridge Cottage) he would have done something about it. But he was – at least on the documents - the agricultural tenant until 2002 of the adjacent Hop Field and treating it as one parcel, so I do not see how the submission has any force. It is arguable, to the contrary, that it would be surprising if he had done anything about it. It is also arguable that in legal terms he had nothing to do: the Applicants had not required him to fence off the disputed parcel and Bridge Cottage had not been "sold" as such.

11. The Respondent was registered as proprietor of Bridge Cottage on 1st September 2005 (76/439) and it is quite clear from the file plan that the title includes the disputed land.

12. Apart from evidence relating to the disputed land generally, there are a few other dates worth flagging up at this stage. In 2004 the Applicants gave consent to laying a mains electricity cable partly under the disputed land to provide an electricity supply to an O2 mast.[4] In 2010 the Applicants routed a further cable in roughly the same location for a supply of electricity to the farm. This involved removing an electricity pole located in the garden of Bridge Cottage for which the Respondent was asked to and did consent. See also the Applicants' explanation and plan at 4/16-17.

13. As I indicated earlier, matters prompting this application came to a head in early 2017 after Mrs Robinson left Bridge Cottage. It makes sense at this stage to find as a fact at the outset that taking her statements into account, together with the other written and oral evidence before me, there is no evidence whatsoever that the disputed land was ever demised as part of the tenancy of Bridge Cottage, and the Applicants succeed on this point (issue 2). That deprives Mr Cowen of the point he pleaded in paragraph 14

of the Respondent's statement of case (30/132) which is that time could not run in favour of the Applicants until Mrs Robinson's tenancy ended, and it disposes of one of the agreed issues (issue number 2 on the list of issues). But it would be against not only the facts but also the scheme of the 1991 transactions to find that the disputed land had been let to her in 1977, and although 14 years after the demise, these are relevant. The disputed land was quite clearly part of the large area including the Hop Field, alternatively the Applicants could have required it to be fenced off on notice, which also suggests that the tenant could not have been occupying it, as does the fact that it was intended to be fenced off after a sale of Bridge Cottage. Whilst I accept Mr Cowen's pleaded point that non-occupation by the tenant does not prove that it was not demised, in this case the facts and the documents point on the balance of probabilities to the conclusion that the disputed land was not demised to Mrs Robinson, lack of access being a relevant factor (contrast her evidence as to access to the cesspit location).

14. The meeting between the Respondent and James Mayhew took place in February 2017 (no date). On 3rd April 2017 the Applicants submitted their ADV1 application (1/1-13) and the ST1 is dated 30th March 2017. The Applicants relied on the second and third conditions under paragraph 5, Schedule 6. The Respondent returned Form NAP dated 20th September 2017 requiring the registrar to deal with the application under Schedule 6, and objecting to the application for the reasons set out in panel 6: see generally 10/39, particularly 10/41. The Respondent made it clear from the outset that she was relying on the construction of the 1991 transfer in support of a defence based on reasonable belief. So not only do the Applicants have to establish adverse possession for the requisite 10 year period, but they also have to establish the requirements of the third condition.

15. The issues I have to decide were agreed between counsel as follows:-

Issue 1: Whether or not the Applicants were in adverse possession of the disputed land in respect of which the current application is pursued for a period of at least 10 years since November 1991. See paragraph 1(1) and paragraph 5(4)(c), Schedule 6, LRA 2002.

(Issue 2: the tenancy issue: decided as above.)

[4] The relevant drawing was produced at the hearing, not in the bundle.

Issue 3: Whether (subjectively) the Applicants believed for a period of at least 10 years of the period since [November] 1991 that they have been in adverse possession of the said land that it belonged to them.

Issue 4: Whether (objectively) the Applicants in all the circumstances reasonably held their belief as found under Issue 3 that the disputed land belonged to them.

Issues 3 and 4 engage paragraph 5(4)(c) of Schedule 6, LRA 2002. It is common ground that the requirements of sub-paragraphs (a)(b)(d) of paragraph 5(4) are met, so what is in issue, and the test to be considered when evaluating the evidence is the requirement that "(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".

The Applicants' evidence

16. The principal witness for the Applicants was David Mayhew. His witness statement is at 59/208 and exhibit DLM1 at 60/215. Explaining the arrangements after November 1991, he describes with reference to a plan at 60/250 how the field to the north of Bridge Cottage was (and still is) actually split in two parts by a fence and a track, which do not appear on the transfer or lease plans.[5] Although both parts of the field were let to Christopher Holmes, Mr Mayhew's evidence was that Christopher Holmes occupied what the Applicants called the New Hop Field (to the west of the track/hedge) but not the part of the field to the east, ie that part to the north of Bridge Cottage including the disputed land, except at the most for a few years until the mid-1990s whereupon the Applicants farmed it for the "purposes of grazing cattle and sheep ever since". See paragraphs 20, 21, 23 at 59/211. In addition his written evidence describes maintaining hedges, fences, and obtaining the agreement of the Respondent in 2010 to removing the electricity pole for the garden of Bridge Cottage and relocating the supply underground (under the disputed land). This evidence is a fairly generalised account of what might be expected, though short on particular detail and times.

17. As to the background of the purchase, Mr Mayhew did not give specific evidence: see in particular paragraph 33 at 59/212: "I *assume* that I saw the plans prior to our purchase, but I *presumed* the boundary lines shown on the plans were consistent with the visible boundaries on the ground, including the hedge boundary round Bridge

[5] This is clear from the HMLR survey, see eg 15/71-2

Cottage." (My italics.) Having to deal with the effect of the fencing covenant he went on to say at paragraphs 34 – 35 that the covenant was "recently brought to my attention" but that "it is not immediately obvious from looking at Plan A where the points "H" "I" "J" and "K" are located on the ground ... it did not occur to me at the time that the [disputed land] was outside the existing boundary of Bridge Cottage. Certainly, I do not recall this being discussed or anyone pointing this out." That statement ignores the whole point of the fencing covenant: if the disputed land was within the obvious boundaries of Bridge Cottage then it would be unnecessary to have a fencing covenant in the first place. He continues at paragraph 36 to point out that "Further, at no point therefore since 1991 until very recently did anything happen in this regard that might even have alerted us to an issue over our ownership of the [disputed land]." The thrust of the last part of his statement is that everything that happened on the disputed land was entirely consistent "with a belief that my wife and I owned it". This case concerns the tension between that belief and the facts which underpin it.

18. Mr Cowen challenged every aspect of Mr Mayhew's evidence in his cross-examination, which he began by establishing Mr Mayhew's role as a legendary City banker, chairman of a well-known investment bank until 2011. The simple point, which I accept, is that David Mayhew is an intelligent high achiever who could be expected either to take an interest in the detail or to pay someone to do it for him. As Mr Mayhew said, he relied on lawyers, and would not be familiar with every detail, though if asked about the 1991 transaction in 1991 he would probably have had a good understanding of the deal. Between 1991-2017 he considered he would have had no recollection, but now he had read the papers, his memory had returned. But this recollection was flawed, as he admitted himself that he had no recollection of granting the lease to Christopher Holmes but "must have done". The Applicants instructed Pemberton Greenish at the time of purchase, whom he described as "prestigious", and used "a lot" but did not recall any particular discussions or advice, particularly since he delegated some of the negotiation to his land agent Adrian Fuller.[6] He also accepted that, for example, his memory had become more detailed since 2017, as the original ADV1 and ST1 had omitted reference to a request to the Respondent about removing

[6] The report on title is no longer available

the electricity pole from the garden of Bridge Cottage in 2010 (see 60/295), but further details were supplied in response to an HMLR requisition subsequently (4/16).

19. His recollection was indeed not perfect, as was demonstrated when he had to be reminded that the leaseback transaction occurred on the same day as completion of the purchase, two deals which he regarded as distinct. At the time of the purchase the Applicants had lived in Froyle since 1979, and while he was familiar with the general lay-out of the farm, Mr Mayhew said he was not "familiar with particular fields". He did not recall walking round the land to be purchased, but would have taken oral advice from his agent (Mr Fuller). He confirmed that he had signed the original plan A at p253 but had no recollection of signing it. He accepted that the point of signing the attached plans in 1991 would have been to indicate assent: "I would have looked briefly and signed it". He could not identify the handwriting on the annotations on the plans at p253 or p271 but "had no argument" with their contents. He was frank in accepting that "I can't say I recollected or noted [the plans] until 2017". Cross-examined by Mr Cowen on the detail of the various plans Mr Mayhew did not challenge them or the detail: "I accept what I signed ... You can assume I would have been aware". At the same time he stated that it was "highly likely that I never went into the field" because it was going to be let. He signed the plans on advice but basically conceded that "Dare I say it, I wasn't alert [to the detail] until 2017 from the day I signed it."

20. What Mr Cowen submitted in closing about this evidence is that he challenged Mr Mayhew three times about reasonable belief in ownership of the disputed land in 1991 based on documents he signed (specifically not on his memory). Based on the contents of those documents and his answers Mr Cowen submits that Mr Mayhew could not "believe" he owned the disputed land as required because he said as much in evidence. He relies on (i) his general evidence that he would have known about the deal in 1991 (ii) the statement "In 1991 I am sure that's what I agreed" (iii) the statement "I would have looked at the plan briefly and signed it". In other words, Mr Mayhew agreed with Mr Cowen that the plan shows the disputed land was not transferred in 1991. Mr Cowen summarised Mr Mayhew's evidence as "I can't remember but I would have known." I agree with Mr Cowen's analysis. That is central to the case on "belief", whether subjective or objective.

21. Mr Mayhew was caught on the horns of a dilemma between acknowledging the detail of the plans with his own recollection of the only physical boundary being the hedge to the rear of Bridge Cottage and somehow concluding that the physical and legal boundaries coincided. Cross-examined on the meaning of the fencing covenant (including the word "erect" to emphasise that there was no fence in 1991) which highlighted that the physical boundary was not the legal boundary, Mr Mayhew accepted the force of Mr Cowen's questions (that he must therefore have known that the disputed land was not part of the land being sold and that there was an invisible boundary between the points I-J) but adhered to what he said in paragraph 33 of his witness statement: "I presumed that the boundary lines shown on the plan were consistent with the visible boundaries on the ground, including the hedge boundary around Bridge Cottage". He acknowledged that Mr Cowen's line of cross-examination that this sentence could not have been what he thought in 1991 (because of the plan and the fencing covenant) was "perfectly reasonable" but he had no recollection otherwise. Although Mr Cowen pointed out that this was a shift in emphasis in paragraph 35 of his witness statement, on any view Mr Mayhew accepted that he was finding it difficult to remember what he thought the position then was. He had not looked at the plans again until 2017, nor had he discussed the disputed land with the vendors, who "set the terms" of the sale and leaseback but never, on the evidence before me, departed from the terms of the 1991 transaction. Considering what Mr Mayhew states in paragraph 35 of his witness statement (ie that it is hard to know where the disputed land actually is, no fencing being erected etc), I analyse his oral evidence as moving towards a recognition now that whatever the situation on the land, the plans provided a means of measuring H-I-J-K sufficient to implement the fencing covenant when required. Otherwise it is hard to see why his solicitors would have gone along with plan A.

22. Another point on timing of belief is as follows. In closing submissions Mr Cowen argued that paragraph 33 of Mr Mayhew's witness statement contains a problem in the sentence already quoted: "I presumed that the boundary lines shown on the plans were consistent with the visible boundaries on the ground." He submitted that in cross examination Mr Mayhew had denied that this meant "I remember that I presumed [etc]" (past tense), and that he agreed that he meant, having seen the 1991 plan

recently, "I presume now or have reconstructed a presumption I arrived at that the boundaries were those on the ground", (present tense).

23. So Mr Mayhew was grappling with an issue which he knew - intellectually – he must have known about because he had good advice and lawyers, but had simply not had cause to consider from 1991 until 2017. He had no recollection of what he knew in 1991, whether because he had forgotten or had not been interested in the detail. But he accepts that the plans show that the disputed land was not transferred to the Applicants so his presumption that the physical boundaries were what he saw as the legal boundary must be based on his current recreation of the facts, not his belief at the time. The issue was not of immediate relevance because of the leaseback and non-implementation of the fencing covenant, which he confirmed in re-examination, when he added that he had no relevant conversations with the vendors on the matter.

24. Questioned about the track, fence and hedge dividing the field leased back to Christopher Holmes (see p71-72), Mr Mayhew recalled that the track and fence were probably there in 1991 but that the Applicants had planted the hedge as part of the organic farming scheme of management, though in my judgment nothing turns on this, except to show that probably a few years after the leaseback the field including the disputed land was farmed by the Applicants. Mr Cowen did not seriously challenge Mr Mayhew's evidence that the Applicants grazed the field including the disputed land once possession of the field had been handed back by Christopher Holmes (apart from the area cultivating hops which he retained until 2002/3). Neither did he challenge Mr Mayhew's evidence about the 2004 electricity supply arrangement in 2004 with O2, or his evidence about removing the Respondent's electricity pole in 2010.

25. But Mr Mayhew was not in charge of the farm day to day. He had employees including Nicholas Shayler who worked for him since about 1998 and became his farm manager in the early 2000s (see tab 65). In addition his son James Mayhew worked on the farm for part of the relevant period and gave supporting evidence (tab 62). Mr Cowen cross-examined them about user at some length.

26. Mr Shaylor's statement is at 65/335. In starting at the farm in 1998 he was neither conversant with the 1991 transactions, nor with a time when Christopher Holmes

farmed the disputed land. His written evidence was relatively superficial so he was severely criticised by Mr Cowen for mentioning cutting the field for hay, spreading muck and fertiliser in his oral evidence but not being able to show where that was referred to in his statement. Mr Shaylor was in my judgment an honest witness who had simply not been well-proofed: as a farm manager it is not really his job to put witness statements together and I accept that he thought he had given all the relevant information he needed to. I consider Mr Cowen's allegation that he exaggerated to assist the Applicants to be exaggerated itself and unhelpful. If anything, his statement could and should have been more detailed without repeating facts already set out in other statements. It is plain from his evidence overall that so far as he was concerned any farming activity conducted in that field (to "no set formula") from 1998 included the disputed land, and he included the requirement of consent from the Respondent in relation to the 2010 electricity pole removal as part of the provision of a new supply to the round barn as part of his job. That is what I take from his evidence, so far as it goes: the disputed land was farmed as part of the field as a whole. To the extent that his oral evidence referred to activities beyond those referred to in his witness statement, I accept it. This includes cutting the whole of the field including the disputed land for hay in the "first" years of his employment, spreading muck, topping, harrowing, flat rolling.

27. The problem with superficiality was also reflected in James Mayhew's statement at tab 62. He is the Applicants' son. He was still at university in 1991 and worked on the farm from 1998/9 to about 2005 when he moved to Gloucestershire, since when his evidence is that he returned once or twice a week until 2017. He recalled carrying out fencing work round the boundaries of the disputed land and the cesspit. It has never been in issue that the relevant visible boundary fences have been maintained and repaired by the Applicants or their employees. He said the purpose was to keep stock out of the cesspit and in the field. Again, he referred to grazing cattle and sheep, supporting the other witness evidence. He met the Respondent in February 2017 at her request (no date) when she wanted to discuss the boundaries of the disputed land. He refused to let Christopher Holmes peg out the area because he did not have the right "title deeds" and left. He said the atmosphere was tense and the Respondent and her brother were arguing when he left. The latter appeared, on cross-examination to have been reported to him by other farm employees and to have occurred after he left, so

was unnecessary. Again, so far as it goes, James Mayhew's evidence as to farming supports the generality of Nick Shaylor's evidence, and he confirms that the question of the disputed land was never an issue for him until the Respondent contacted him in early 2017. Although confident of his family's position in relation to the disputed land, he was not involved in the 1991 transactions and there is no reason to find that he knew anything about it. His belief is not relevant for the purposes of the statute.

28. Mrs Mayhew also gave evidence. Her short statement is at 61/3012 and adds nothing of relevance to her husband's. The following was added in cross-examination. She was always focused on the farming and family and had little to do with the legal side of the acquisition. She signed many documents on her husband's request, including the 1991 transfer and plan, as to which, being "thrilled" with the acquisition, she took an interest, thought they were buying the field, but otherwise did not take any interest in "the detail" including the boundaries of the cottage: "I probably didn't look at the plan carefully". Apart from that, she had no direct input on the issues I have to decide. Her credibility was not challenged.

29. Given the reliance on various statutory provisions it is regrettable that no evidence was given on behalf of the Applicants as to what happened between the meeting between James Mayhew and the Respondent, and 3rd April 2017 when the ADV1 was signed. The ST1 is dated 30th March 2017. The application was received by HMLR on 5th April at the latest (2/14). There is no suggestion that the Respondent fenced off the disputed land or took steps to exclude the Applicants.

The Respondent's evidence

30. Her written evidence is at 67/365. It supports the conclusion I have already reached about the disputed land not being subject to the tenancy in favour of Jean Robinson (though is not the sole basis of my reasoning). She was not contacted in 2004 when the electricity cable was laid under the disputed land and gave permission to remove the electricity pole from the garden of Bridge Cottage in 2010, not realising that the supply for the cottage was to be routed underground. Be that as it may it was not until 2017 that she realised Bridge Cottage included the disputed land. She could give no direct evidence about the 1991 transactions (when she only fourteen or fifteen years old and her mother had just died) or the tenancy to Jean Robinson. She agreed with Mr

Letman that ownership of the disputed land had "got lost in translation years before" which is a good way of describing it, until her architect noticed the disputed land on the OCE plan. In cross examination she agreed with Mr Letman that if her brother had realised that the disputed land belonged to the family he would have raised it but not knowing her brother's position that evidence is of dubious evidential quality and I give it little or no weight accordingly. She also agreed with Mr Letman that when her brother relinquished the tenancy he "had no clue" that the family retained part of the field but again I have no idea why she believed that except that he was not one of the 1991 vendors. As she pointed out in reply to earlier additional questions from Mr Cowen, he had signed the 1991 lease but not the 1991 transfer. The 1991 lease reflects the 1991 plan and indicates that the disputed land belongs to Bridge Cottage. So these answers seem to me to be highly speculative and of dubious evidential value: I have no idea what Christopher Holmes knew or believed and was not given the opportunity to hear from him.

31. She denied that it was reasonable for the Applicants to believe that they owned the land, but this was a question in re-examination which is really an issue for me. It is clear that what little she did know about 1991-2002 must have come from conversations with her brother, who was not, as I have indicated, called. So the Respondent can be fairly characterised as an honest witness whose evidence has little direct impact on the case. She does not, for example, put up a contrary case about user of the disputed land, but through Mr Cowen challenges every aspect of the Applicants' case. The burden of proof is firmly on the Applicants and indulging in an alternative "what Christopher Holmes thought" exercise is arguably unnecessary window dressing. I make that point because Mr Letman sought to use the Respondent to bolster his case on reasonable belief, and I conclude that this method was not helpful.

Submissions: Issue 1: whether or not the Applicants were in adverse possession of the disputed land for a period of at least ten years since November 1991

32. Mr Letman for the Applicants relied on *Powell v Macfarlane* and *Pye v Graham*, see in particular paragraphs 40 and 41 of *Pye v Graham*. These lay down the well-established propositions that the Applicants have to establish (1) "a sufficient degree of physical custody and control ("factual possession")" and (2) "an intention to

exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess")". The thrust of his case is that, on the basis of the evidence, the Applicants to the exclusion of anyone else were in ordinary, unequivocal possession of the land with the requisite intention to possess. He also cited *Pye* paragraphs 42, 43, 61, 71, 75 and 80. Relying on *Beaulane* (which applied *Pye*), Mr Letman submitted that the facts of this case area at least similar to those on which the successful party succeeded, ie padlocking a gate and grazing horses, because the acts of possession are judged at least in part by the nature of the land in question. I agree with Mr Letman that in terms of possession time would run for the Applicants from the mid-1990s for the disputed land when there is no doubt that Christopher Holmes gave up farming on this part the land leased and the Applicants merely continued to farm the field as a whole, there being no evidence that it had been farmed otherwise by Christopher Holmes. I agree that the formal surrender in 2002 made no difference to this.

33. In terms of actual user Mr Letman relied on the oral and written evidence of his witnesses to invite me to find that the disputed land had been used for normal farming purposes, principally grazing, with all associated farming activities such as those mentioned by Mr Shaylor and James Mayhew including maintenance of fences associated with grazing. With user, in this case, he submitted that the requisite intention to possess was also established. On the face of it, without further investigation, Mr Letman has a strong case on both aspects of possession. There is certainly no alternative version proposed by the Respondent. But Mr Cowen, whilst accepting Mr Letman's submissions as correct on the approach to apply, challenged his case, particularly on intention to possess. Grazing is the heart of his challenge because he submitted that it was equivocal.

34. Mr Cowen submitted that in relation to intention, *Pye* (eg at paragraph 76) makes it clear that "where the acts in relation to the land of a person claiming title by adverse possession are equivocal and are open to more than one interpretation ... those acts will be insufficient to establish the intention to possess." There must be "an intention to exclude the world at large": *Pye* at paragraph 77 citing *Powell v Macfarlane.*

35. He submitted that I should take a critical look at the Applicant's evidence, that evidentially it was too weak and insufficiently detailed for me to conclude that on a balance of probabilities the Applicants had done enough to make out factual possession. He referred to the challenges he made as to muck raking and invited me to find that Mr Shaylor was arguing the Applicants' case because they were his employers. I have already indicated that in my judgment it would be wrong to treat Mr Shaylor's evidence with scepticism: it could have been much better, but that was not his fault. Even if he was inserted as a witness to "bolster" the Applicants' case then they could have made a much better job of it than they did. I think Mr Shaylor's statement did lack relevant detail and I agree with much of Mr Cowen's criticisms as to how badly the Applicants presented their evidence but I do not find he was lying about the additional activities for the reasons I have given above. In other words, there is more than just grazing to consider in this case.

36. Mr Cowen's main challenge is that "grazing of land by itself ought not to be treated as an act of possession" because it is capable of being a profit, does not require exclusive possession, and therefore of itself does not justify a finding that the intention to possess is made out: *Jourdan QC* at 13-60-13-64, and 9-85-9-90. See also *Inglewood Investments v Baker* at paragraphs 18-20. *Jourdan QC* paragraphs 13-65 and following arguably qualify that negative approach, and at 9-91 *Jourdan QC* states "it is suggested that, in deciding whether the squatter's actions unequivocally manifest the intention to possess, it can be helpful to consider whether use of the disputed land is no more extensive than it would be if the person using it was entitled to an easement or profit". In this case of course the Applicants have exclusive possession of the surrounding land and its access.

37. Mr Cowen further submitted that the evidence as to maintenance of fencing was also equivocal (with the same consequences of grazing) because it was said to keep animals in rather than keep people out, citing *Smith v Waterman* at paragraphs 19-21, and 81 and *Sava* at paragraphs 64-66. True, but the position in this case is not as clear cut as that. Rather than equivocal, because any fencing maintenance was carried on in relation to the field as a whole, it was an activity referable to the farming activities on the field as a whole and has to be judged in that context. That might be a fine distinction: ie whether an activity is of evidential weight or equivocal. If the latter, it

could be said on the evidence before me that it was clearly referable to ownership of the field and general farm maintenance and therefore referable to ownership of the disputed land because it was treated by the Applicants as part of the whole.

38. As Mr Letman submitted in reply to Mr Cowen's submissions on the equivocal nature of grazing and fencing, and the impact on intention to possess, the overall requirement of *Pye v Graham* is to consider whether the occupier is using the land as an owner would. In other words, he contended this case was more than a mere grazing/fencing case because of the context in relation to the farm as a whole. He succeeds on that point because I reject Mr Cowen's submission that I should reject Mr Shaylor's additional evidence, because he was an honest witness.

39. The question for me is whether, taking into account all the activities on the disputed land as a whole, factual possession and the requisite intention to possess is made out. Factual possession is made out because it would be perverse to conclude otherwise where a small corner of a field is concerned and there is no dispute that the field as a whole including the disputed land has been farmed as part of a business since the mid-1990s. Mr Cowen's principal challenge was really based on the "equivocal" submissions, whether the intention to possess was "manifest". There are other factors in this case which are open to me to find on the evidence (apart from mere grazing or fencing) including (i) the grazing took place in a very small corner of a field which the Applicants were entitled to use as owners, (ii) the areas were and are indistinguishable, and (iii) the Applicants were the only ones with access to the area as a whole.[7] It would be impossible to draw an imaginary line and attribute grazing on the larger field to a profit in one corner. Furthermore (iv) they routed electricity cables under the disputed land in 2004 and 2010 for their own commercial use, not referable to a grazing profit, and I doubt that these are of such limited evidential weight as Mr Cowen argued, not being otherwise regular activities and clearly manifesting possession.[8] Therefore with the additional facts I have found in relation to Mr Shaylor's evidence, I conclude that this case is distinguishable from the mere

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[7] Mr Cowen submits that being part of a larger area is irrelevant and does not assist the Applicants: I consider there is an issue of scale which requires me to put his submissions on grazing into a size context. Considered that way, the grazing as a profit argument is much reduced in force and becomes, in this case, more artificial and limits the consideration of the evidence as a whole, which I am entitled to do.

"grazing" and "fencing" authorities on which Mr Cowen relies. Contrary to Mr Cowen's submissions I consider that an observer, watching the field over an extended period of time, would have had sufficient evidence to conclude that the Applicant's user was not merely referable to a grazing profit but to an intention to possess. On the balance of probabilities, I find the Applicants make out their case on issue 1 save as to their starting date which is the mid-1990s not November 1991, the difference not being relevant in this case as to the outcome. They treated the disputed land as indistinct from the rest of the field. But the real substance of this case lies in issues 3 and 4 in any event.

40. Issue 2: the Applicants also succeed on the land not being subject to the tenancy: see paragraph 13 above.

Issue 3: whether (subjectively) the Applicants believed for a period of at least 10 years of the period since 1991 that they have been in adverse possession of the disputed land that it belonged to them

41. This relates to the Applicants' need to fulfil the requirements of the third condition, paragraph 5(4), Schedule 6 LRA 2002.[9] An important starting point is that the Applicants' case was put firmly on the basis that they held the relevant belief from 1991-2017. See for example David Mayhew's statement at paragraphs 23 and 26 at 59/211, statement of case paragraph 20 at 15/114. In the light of Mr Cowen's cross examination of David Mayhew (see paragraphs 16-23 above), Mr Letman shifted that position in closing submissions to argue that if the Applicants did not believe the disputed land belonged to them in 1991, they did from 2004 at the latest (when they installed the cables for the O2 mast) so would fulfil the ten year requirement. At that point Mr Letman submits that he must have moved from "any uncertainty to a concrete belief that he owned the land at that point" and that it is open to me to infer that is the case, relying (for example) on the cabling in 2010. Other than that, he based his case on subjective belief on the evidence given as to the farming activities, ie if the Applicants were farming the disputed land, it demonstrates belief that it belonged to

[8] I conclude on the balance of the evidence that the request of the Respondent in 2010 was about the removal of the pole from her garden and had nothing to do with requesting her permission to route electricity under the disputed land or her land as she herself pointed out.
[9] Sub-paragraphs (a)(b)(d) are satisfied by the Applicants

them. One problem with this "shifting" theory is that it was based on no particular fact or evidence: rather, it is based on a drifting into a belief based on passage of time and it reflected how the Applicants' case was forced to shift during the hearing, after Mr Cowen's cross-examination of Mr Mayhew in particular. I agree with Mr Cowen that this analysis does not operate to assist the Applicants in this case.

42. Mr Cowen submitted, contrary to Mr Letman's submission, that the Applicants did not have any subjective belief throughout the period at all. The relevant analysis of Mr Mayhew's evidence is at paragraphs 16-23 above, and I have set out there the detail of Mr Cowen's challenge to the Applicants' belief. To recap briefly, for the reasons given, the Applicants could not have had any subjective belief in 1991 that they owned the disputed land, because Mr Mayhew's own evidence is that he did not believe it. You cannot believe something which is contrary to a fact which you have accepted in cross examination but cannot recall: on that basis the belief cannot be made out. He had no specific memory. His evidence is based on a presumption that he has now reached. He was forced in cross examination to accept that his presumption that the legal boundaries were the physical boundaries round Bridge Cottage was contradicted by the fencing covenants and the plans. If that was the case in 1991 then Mr Cowen dealt with Mr Letman's alternative submission that the requisite belief became concrete at a later date by emphasising a point I have made above already: there was no evidence to support it. This point is expanded in dealing with Issue 4.

43. Mr Cowen also submitted that Mrs Mayhew failed to demonstrate that she had any belief and both Applicants are required to demonstrate this requirement: see *Tomlinson v Foster* p64 paragraphs 81 and 87.[10] As she accepted that she did not look at the plans in any detail, there are problems with Mrs Mayhew's evidence, as there is no evidence that she farmed the land or was engaged in managing it. She had no independent material belief in 1991 or subsequently. In *Tomlinson* the wife was the sole registered proprietor so her belief was critical (her husband was the active party). In this case of course both Applicants are registered proprietors and Mr Letman submitted that it is enough if one party such as Mrs Mayhew is content to adopt the

[10] In paragraph 81 the Judge finds of the Applicant proprietor: "Mrs T .. had no material intention whatsoever. She did not give the disputed land and its boundaries a second thought. She left everything to her husband." The same can be said of Mrs Mayhew in relation to this case.

position of the other. If that is the case then Mrs Mayhew does no better than Mr Mayhew. On either point, the Respondent succeeds on subjective belief.

44. As to belief, it is however necessary to make final conclusions in relation to Issue 4, in case I am wrong in my finding on Issue 3.

Issue 4: Whether (objectively) the Applicants in all the circumstances reasonably held their belief as found under Issue 3 that the disputed land belonged to them for the required period of time

45. There are two aspects to Issue 4: (i) reasonable belief (ii) the debate about whether the reasonable belief was held "for at least ten years of the period of adverse possession ending on the date of the application".

46. Assuming for the purposes of Issue 4 that the Applicants had the requisite subjective belief, was it reasonable? Mr Letman relied on the fact that Christopher Holmes did nothing to alert the Applicants to the correct ownership of the disputed land, relying on the Respondent's evidence that her brother never appreciated the disputed land was part of Bridge Cottage. I was not convinced by that piece of evidence to start with as I have no idea what it was based on, and the Respondent herself was hardly a model for someone who knew what she owned. Mr Letman hit on an idea in cross-examination and got the answer he wanted. But the reliance on Christopher Holmes' lack of interference seems to me to be unrealistic and speculative anyway as I have indicated above: he gave no evidence, and once he stopped farming the field whether in the mid-1990s or on surrender of the lease in 2002, seems to have had nothing to do with Bridge Cottage as it was transferred to the Respondent in 2003 anyway. Also Christopher Holmes was not a vendor in 1991 and did not sign that transfer. Reliance on the non-intervention of Christopher Holmes and the "lost in translation" argument (which is the other side of the drift argument referred to above) arguably underlines the weakness of the Applicants' position on this point (particularly bearing in mind they bear the burden of proof). I prefer Mr Cowen's submission which is that the reasonable belief to be proved must belong to the Applicants. Again, Mr Letman argued for reasonable belief from 2004 at the latest but apart from time drifting to 2004, it is hard to see how something which was not believed in in 1991 drifted into a reasonable belief by 2004. I am not excluding such possibilities as a matter of

principle, but expressing the conclusion in this case that I do not see how on the facts before me, such a submission is made out. The plain fact is that the question of belief was originally pinned by the Applicants to 1991 and I do not see how in their evidence or pleaded case that they were influenced by Christopher Holmes' non-intervention. There is no question of any reliance or detriment which might have contributed to an estoppel argument, for example (under the first condition). No-one stood in the field and pointed to the disputed land and agreed that the terms of the 1991 transfer should be ignored.

47. Mr Cowen submitted that on any view, the Applicants' alleged belief was not reasonably held. I agree with his analysis. All the matters he relied on above and in cross-examination can be deployed to undermine reasonableness. His main point in addition to the above was that if I accept his case that the Applicants knew what they were buying in 1991 (which I do) then the only thing that changed was that David Mayhew "forgot what happened". That is no basis for "reasonable belief". This is a good explanation for his evidence: there was no positive evidence, submitted Mr Cowen, that he believed he had acquired title some other way, so his whole case must be based on forgetting the detail of the 1991 transaction. This follows from the evidence that he must have known the details of the transaction in 1991. If so, the submission ran, it cannot be a reasonable belief if it is founded on forgetting the truth. Again, there may be situations where this would work, but in my judgment it does not in this case. As cited by Mr Cowen, in *King v Suffolk County Council* at paragraph 49 "[The Applicant] was well aware that the Council had paper title to the land. It is not enough to contend that [the Applicant] believed that the disputed land had become hers by adverse possession. If this were so, the provision in paragraph 5(4)(c) would become otiose." The belief has to be pinned to a date at the start of the ten year period, and the point is that it is a stand-alone requirement which cannot be "fed" by years of possession. In a nutshell Mr Cowen's point, which I accept, is that any reasonable bystander who saw the Applicants sign the 1991 transfer would conclude that they knew they had no title to the disputed land, and nothing happened to change that in the years following.

48. The second part of issue 4 is (ii) the debate about whether the reasonable belief was held "for at least ten years of the period of adverse possession ending on the date of

the application". Strictly speaking I do not have to decide this point because I have decided that the Applicants have failed to demonstrate on the balance of probabilities that they had any qualifying "reasonable belief". But I will indicate what my view would have been had I come to the opposite conclusion, bearing in mind the detailed submissions made by counsel on the point.

49. Mr Cowen submits that any reasonable belief in ownership would have come to an end in February 2017 in any event, though it was unclear what precise information was imparted to the Applicants' son at the meeting. What seems to have happened is that the Applicants took advice and instructed solicitors to make an application, which was made, at the latest about two months after a February meeting, so probably less. The application was made on 4th April 2017. The ten years did not therefore end on the date of the application as required by paragraph 5(4)(c), Schedule 6, Mr Cowen argues. As Arden LJ stated in paragraph 17 of *Zarb v Parry* "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." See also Arden LJ at paragraphs 54-57.

50. This decision has of course been subjected to much practical and legal criticism, and is criticised as practically unworkable and also at odds with decisions such *Davies v John Wood Properties* (Deputy Adjudicator Michael Mark), as cited in Jourdan QC and Radley-Gardner's *Adverse Possession* at 22-86 which states: "There is no requirement that the belief persists up to the date of the application." However in their 2017 supplement at 22-86 the authors acknowledge that contrary to their view, "the Court of Appeal has twice assumed that the reasonable belief [for the purposes of the third condition at paragraph 5(4)] must be held up to the date of the application by the squatter", citing *Zarb* and *IAM* paragraphs 4 and 15. They go on to discuss the effect that the remarks in both cases are arguably obiter and that neither case "authoritatively settles" the point, as reasonable belief was established in both cases up to the date of the application, unlike this case. In paragraph 86A they list conflicting decisions of this Tribunal and its predecessor judges, Deputy Adjudicators, which I do not need to list, but they include *Crew v London & Continental (Holdings) Ltd* on which Mr

Letman relies, see paragraph 31 of the decision.[11] Various articles come to different conclusions on whether *Zarb* is right (eg Tozer and Lees, Estates Gazette 30th May 2015) or wrong (eg P. Milne [2012] Conveyancer 342)[12].

51. In the Law Commission Consultation Paper No 227 reference is made to three possible interpretations outlined by P. Milne:-

(i) The reasonable belief must be held for at least ten years and persist at the date of the application (based on a construction of paragraph 5(4)(c)).

(ii) The reasonable belief must be held for ten years at any time prior to the application, but need not persist on the date of the application (also based on a construction of paragraph 5(4)(c)).

(iii) The reasonable belief must be held for at least ten years and cannot end more than a short time before the date of the application (as per *Zarb*).

The authors propose to resolve the problem by providing (by future legislation) for a long stop of six months to make an application from the date on which reasonable belief ends. Further commentary is now to be found in the 9th edition of *Megarry & Wade* which summarises most of the above at 7-098/9 and concludes that the point remains at present "the subject of uncertainty".

52. Mr Letman's primary position was that the Applicants came within option (i) but if not, then would come within option (iii), arguing that after over twenty years, a period of grace of two months prior to making an application was reasonable.[13] Again, the Applicants' evidence was less than clear, there being nothing specific in either James Mayhew's evidence or David Mayhew's written evidence where he uses the words "recently" or "very recently" to describe the Respondent's challenge to his belief in ownership without indicating its effect (see paragraphs 36-38 at p213). The implication, and his evidence overall, is that nothing said by the Respondent challenged his belief but this is not something the Applicants address explicitly,

[11] Though Mr Letman fairly points out that Judge Edward Cousins sitting in the Upper Tribunal gave permission to appeal on this point (though the matter was settled before the appeal)

[12] See next paragraph

[13] Mr Letman submitted that the period was 27 years but that dates from 1991 and is therefore wrong, but he is still entitled to argue that the Applicants were in undisturbed practical possession for over twenty years before making their application and in within months of a first oral challenge

though box 8 of the ST1 suggests that his solicitors informed him that the disputed land was registered as part of the Respondent's title (1/8). The objective situation would therefore be as Mr Cowen described it.

53. It is regrettable that the factual gap was partly filled in closing submissions when Mr Cowen stated on instructions that the Respondent handed the OCE to James Mayhew in February 2017. He was not then in court to clarify and it was far too late to re-open the evidence. It was not clear from the oral or written evidence of the parties. There is also a notable absence of evidence of any communication between the parties or their solicitors prior to the application being made. Such evidence is desirable. Mr Cowen's submission was that therefore the reasonable belief would have ended (if contrary to his main submission it ever existed), and that by making an application when they did, the Applicants acted outside any period of grace allowed by any of the three options discussed. He did not, in his submissions, indicate a time when he thought the application should have been made, however, which goes some way to underlining the potential difficulty of this part of the exercise, though he suggested that the Tozer/Lees approach should be applied. That suggests up to 28 days would be acceptable, but up to 2 months "might well be too long, absent any special factors".

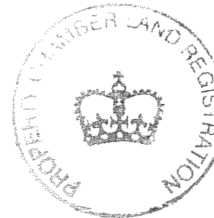
54. On the balance of probabilities, the Applicants must have investigated the situation after their son met the Respondent. They obviously instructed solicitors who made the application. Had I needed to, I would have found that had they succeeded on issue 4 they would have made their application in accordance with the requirements of paragraph 5(4)(c) because the time lapse was, in the circumstances, short.

Costs

55. The outcome of the application is therefore determined by the Applicants' failure to make out the conditions of paragraph 5(4)(c) and to establish "reasonable belief". The general rule is that the successful party is awarded costs and therefore I will provide some limited directions to provide for an application to be made. As the Respondent has succeeded, on the assumption that she wishes to apply for her costs, she should file and serve any application for costs with a schedule of the costs she is seeking no later than 5pm 18th September. The Applicants have until 5pm 2nd October to file and

serve a response. I will deal with costs (liability and amount) after that. Obviously if the parties can agree the question of costs between them, that would be acceptable.

BY ORDER OF THE TRIBUNAL



Sara Hargreaves

DATED 3rd September 2019