REF/2018/0738

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN:

DL1 LIMITED

Applicant

and

MARK EDWARD DEW

Respondent

Property Addresses:

Land on west side of 126 Crofton Road, London SE5 8NA
Land on south side of Crofton Road

Title Numbers: TGL 465362 and LN 206714

Before Judge Ewan Paton

Sitting at the First-Tier Tribunal, 10 Alfred Place, London WC1E 7LR

On 16th January 2020 (site visit 15th January 2020)

For the Applicant: Mr. Greville Healey (counsel), instructed by Gregg Latchams, London
For the Respondent: Mr. Samuel Waritay (counsel), instructed by direct access

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DECISION

Introduction

1. This is an application made by the Applicant DL1 Limited on form DB under section 60 Land Registration Act 2002, as long ago as 15th December 2017, for a determination of the exact line of the boundary between its title TGL 465362 to land on the west side of Crofton Road, London, and the title of the Respondent Mr. Mark Dew to land in the adjoining title to the west, in title LN 206714.

2. The line contended for as the precise boundary is marked "A-B" on a revised plan drawn by Julia Stolle, of Stolle Surveys Limited, dated 20th November 2017. In physical terms, confirmed on the site visit, this line corresponds to the outer edge at first floor level of the brickwork of a new house which is situated within what the Applicant considers to be its title. That section of brickwork overhangs and covers a passageway beneath it, some 4 feet wide, which passageway is bounded on its western side by a thin concrete screen or wall. The eastern side of the passageway is represented by the brickwork wall of the new house at ground floor level.

3. It is common ground between the parties that this ground floor brickwork of the house is in the same location as a garage which formerly stood on that land. It is the Applicant's case that the title it now owns, TGL 465362, includes the four foot wide strip now represented at ground floor level by the passageway, and at first floor level by the projecting wall of the new house. So in essence, before the new house was built, its case is that its title included an additional four feet wide strip to the west of the then garage which stood in that location.

   To use a neutral term, I shall refer to that four feet wide area as "the strip", since as will be seen below it has been referred to by different terms in the documents and evidence.

4. That is the only application which has been referred to this Tribunal by the Land Registry, having been referred on 31st August 2018 following the Respondent's

objection of 21st February 2018.

5. The Respondent applied separately, on 26th March 2018, on form ADV1, for registration of title based on adverse possession of part of the Applicant's title TGL 465362, pursuant to the provisions of Schedule 6 Land Registration Act 2002. It was clear, as shall be set out further below, that this application was closely connected to the Applicant's determined boundary application, and related essentially to the same area of land with which the boundary application was concerned – namely, the strip. For reasons which will, again, be set out in more detail below, it was clear that the grounds and evidence in support of the ADV1 application were essentially the same ones which had informed the Respondent's opposition to the Applicant's DB application. In essence, the Respondent was saying that he had been in adverse possession of the strip. By a form NAP filed and served by the Applicant, it stated that it objected to the application and also invoked its right as registered proprietor to require the application to be dealt with under Schedule 5 paragraph 5 of the 2002 Act.

6. The Land Registry declined to refer the Respondent's ADV1 application to this Tribunal. By detailed letter of 31st October 2018, it indicated that it was going to dismiss the application of its own motion, on the basis that the Respondent had shown no arguable basis for establishing the condition set out in Schedule 6 paragraph 5(4) Land Registration Act 2002, so that the form NAP filed by the Applicant would defeat the application. Upon the Applicant formally withdrawing its substantive "objection" to the application, and simply confirming that it relied on its form NAP requiring the application to be dealt with under Schedule 6 paragraph 5, the Land Registry gave formal notice of the rejection of the application on that basis, on 6th November 2018

7. The contents of that letter shall be considered in more detail below. This rejected application, however, gave rise to what might be considered a procedural oddity or uncertainty. The Respondent's own application for title by adverse possession to the strip had been dismissed, and not referred to this Tribunal. Could he nevertheless then still rely upon and argue that adverse possession by way of objection to the Applicant's application for a precise determination of that boundary in a DB application under section 60 of the Act, which determination sought to include the strip in its title? Or was that application solely concerned with the precise

determination of the paper title boundary between two existing registered 'paper' titles, and so essentially a technical and surveying exercise?

8. Before further considering that issue, and the other issues in the case, it is convenient first to describe the land in dispute, and the history of the relevant registered titles.

Creation of the boundary and titles: 1961

9. The history of these titles is unusually well documented and (in property law terms) relatively recent. In 1960 one Brohurst Development Company Limited ("Brohurst") owned all of the land in the part of Crofton Road with which we are concerned. From a plan dated May 1960 it is clear that it intended to develop and sell off four houses and parking areas in an approximately right-angled triangle area. Its title to that area was already registered, under title number LN35311.

10. By a conveyance dated 16th January 1961, Brohurst conveyed to one Sidney Marshall the house to be known as 126 Crofton Road, together with land in front of and behind it, and the parking area to be nearest to no. 126, marked 1. The parcel conveyed also, however, 'snaked around' the other two parking spaces (marked 2 and 3) and clearly included a strip of land marked "Footpath". This "footpath" ran from Crofton Road, past the parking area marked "3", then turned at an angle of around 135 degrees behind the three parking areas. The title conveyed to Mr. Marshall included the footpath up to the point in line with the eastern boundary of the house at no. 126.

11. As was said in the course of evidence and submissions, the plan attached to that conveyance, which was a marked version of the May 1960 plan, showing the land to be conveyed edged in red (and not "for the purposes of identification only"), was unusually detailed and well drawn. It contained measurements in numerous places, which although prefaced with "Abt" [about] transpire to have been reasonably accurate in relation to the features on the land then and now. The "footpath" was shown as having a width of "Abt." 4 feet and 0 inches both at its entry point from Crofton Road, where it passed the parking area marked "3", and further up at the south east corner of the plot conveyed to Mr. Marshall. The width of the plot containing no.

126 and the parking area 1 was shown as about 28 feet 2 inches. The distance from the edge of no. 126 to the western edge of parking area 1 was shown as 12 feet, with a further 16 feet six inches to the western edge of the parking area 3 where it bounded the "footpath". To the west of the "footpath", the wedge shaped area of then retained land in the corner of Crofton Road was shown as having a width of about 34 feet.

12. As Brohurst's title was already registered, this was a transfer of part of a registered title, following which a new title was created and registered for Mr. Marshall – title number LN 204961.

13. Some 18 days later, by a conveyance dated 3rd February 1961, Brohurst then conveyed to one Christopher Daniel three parcels of land, all edged in red on the plan attached to that conveyance:-

- the plot for the house to be known as no. 132, which was at the easternmost end of the original Brohurst land

- the parking area immediately to the east of the "footpath", marked "3"; and
- the large 'wedge' shaped area of land to the west of the "footpath".

It is clear that the plan attached to this conveyance, while not the actual May 1960 Brohurst plan, was based on it, and adopted some of its nomenclature and measurements, including the four foot width of the "footpath" and the "about 34 feet" width of the wedge shaped parcel.

That was also a transfer of part, and so a new title was created for that land, number LN 206714.

14. Over the following years, it appears or is a reasonable inference from the documents and the position on the ground that:-

i) the houses numbered 126 to 132 were built
ii) on the areas originally marked as "parking areas" 1 to 3, garages were built. It appears that garages 1 and 2 may have been built earlier than garage 3

iii) the house number 132 and garage 3 were sold off and removed from the title LN 206714, and given a new title SGL 121780. That left title LN 206714 as just the title to the 'wedge' parcel of land in the corner of Crofton Road

iv) the house number 126 was sold off and removed from the title LN 204961. It is now registered under title SGL 51031, and its proprietor is the London Borough of Southwark. That left title LN 204961 as just garage 1 plus the original "footpath", which as stated above I shall refer to as "the strip".

v) it is not clear to what extent the strip marked "footpath" delineated and clearly intended to exist in the 1961 conveyances was actually ever open and used as a footpath. There is no evidence, photographic or witness-based, of its use in this way. In any event, if it was ever so used, it has not been so used in recent memory. Its original rear section behind the houses has, it appears, long since been incorporated into the rear gardens of those houses.

vi) The only other relevant piece of the above 'jigsaw' and title history is that there was also a separate title created at some point for garage 2 (the one in the middle), under number LN 202917, whose last known separate proprietor was one Priscilla White.

The present parties' titles

15. The present parties to this application succeeded to the relevant titles in somewhat different ways. From 2015 to 2016, a property developer, later incorporated as Crofton Road Limited, sought to acquire via the granting of options the three garages described above, garages 1 to 3, with a view to building a house on that land as a single plot. As set out above, title to those garages was split between three titles, in the separate ownership of three people – a Mr. Nguyen (garage 3 – SGL 121780), Ms. White (garage 2 – LN 202917) and Mr. Roy Peverall (garage 1 – LN 204961). It appears that Crofton Road Limited then purchased those titles during the course of 2017, then sold them on to the Applicant DL1 Limited on 7th September 2017 for £340,000, by then with the benefit of planning permission for a new dwelling. The Applicant was then registered as the first proprietor of a new amalgamated title TGL

465362, formed from the above three previous registered titles, with effect from 12th September 2017.

16. The Respondent, Mr. Mark Dew, purchased numbers 124 and 124A Crofton Road in 1995, under registered title SGL303137. Those properties were and are situated on the corner or right angle of Crofton Road, immediately to the west of the 'wedge' shaped parcel referred to above, which as stated was the only land remaining in title LN206714 following the separate sale of the house and garage originally within it.

17. In 2009, Mr. Dew applied for title by adverse possession to the 'wedge' land in title LN 206714. He swore a statutory declaration in support of such an application, dated 2nd June 2009, of which the Applicant obtained a copy and which was exhibited to the witness statement of Mr. Weber of the Applicant.

18. This statutory declaration is an important document, sworn on oath under the Statutory Declarations Act 1835. It will not be set out in its entirety below, but the following were some key aspects of it:-

i) Mr. Dew had identified that the land of which he sought title by adverse possession was registered under title LN206714, and that its current proprietor was one Andrew Fagan. He mistakenly thought that this title still included the house and garage (they had in fact been sold off as title SGL 121780 – see above), but in any event it was clear from his declaration that he was applying for title only to the 'wedge', which was in fact the whole and not just part of the remaining title LN 206714.

ii) he defined the land to which he claimed title by reference to a plan, marked "Plan 3", on which the subject land was said to be coloured orange (although that colouring has not survived in the copy before the Tribunal)

iii) he claimed that he had adversely possessed this land "for at least 10 years" and "since March 1995"

iv) he stated as follows at paragraph 8:

"When I purchased my Property I had not seen anyone else use the land and it appeared to be abandoned, as it was fenced on all sides with no possible access to it. There was a fence separating the Land from my Property at the time I purchased my Property. On completion and taking possession of my Property I removed the fence separating the Land from my Property."

v) he then continued at paragraph 9:

"The land is still fenced across the northern side, which abuts Crofton Road, and also the south-western side, which abuts the railway line. I have marked these fences with 'A' 'B' and 'C' on Plan 3. As I said in paragraph 8 above, I removed the fourth boundary fence separating the land from my adjoining garden. The fences were already on the land at the time I purchased my Property but from March 1995 I have been solely responsible for repairing and maintaining the said fences at my own cost."

vi) he went on to give evidence of his alleged adverse possession of this land, which he said was accessible only from his other property. This included the storage of building materials, using it "as an extension of the garden at my Property", "maintaining" it and using it for the "usual recreational purposes for which a garden is commonly used."

vii) he stated that he had not used the land under licence or tenancy, and also claimed that "Mr. Fagan has either encouraged or allowed me to act as the owner of the land and I believe it would be unconscionable for him to deny me the right of adverse possession."

19. Four further observations, and findings which I make about this document, are of importance:-

i) it is plainly a legally drafted or assisted document, since it contains much of the common language appropriate to adverse possession applications made under Schedule 6 of the Land Registration Act 2002

ii) the land which was the subject of the application was specifically defined in the declaration and its plans as title LN206714 then owned by Mr. Fagan. The filed plan to that title was exhibited twice, first to show the extent of that title, then to show the land said to have been possessed. In each of those plans, and therefore the declaration, the "strip" to the east of title LN 206714 was *not* included in the application. It was clearly visible and distinct in the plans used, separating the land claimed from what was then garage 3 to the east. Moreover, the fencing A-B-C marked on the plan 3 by Mr. Dew clearly stopped short of, and excluded, that strip. The fence described and indicated by the letter "B" was clearly represented as stopping short of, and so not including, the strip

iii) the evidence given in the declaration was solely of alleged possession of the subject land "since March 1995". There was no suggestion that Mr. Dew was relying on the possession of (for example) any predecessor to his own title to no. 124/124A, and so aggregating that period of possession with his own post-1995 possession. For that reason, this was clearly, and only, an application based on the provisions of the Land Registration Act 2002, specifically Schedule 6, and was presumably made on a form ADV1. It was not, and could not have included, an application claiming a pre-2002 Act possessory title via section 75 Land Registration Act 1925 and the transitional protection of Schedule 12 paragraph 18 of the 2002 Act

iv) this declaration made no separate mention at all of the "strip", although as stated the strip was clearly depicted on the plans, or (which is relevant to the discussion below) of any "workshop".

20. Mr. Dew was registered as proprietor of title LN 206714, with effect from 4th June 2009. We do not have any other documentation relating to that application and registration, but this can only have happened following a failure by the then registered proprietor, Mr. Fagan, to object or (more straightforwardly) serve a counter notice on form NAP requiring the application to be dealt with under Schedule 6 paragraph 5 of the Act. Mr. Dew's evidence was that he tried to trace Mr. Fagan at the time, but he could not be found. It is likely, therefore, that his address for service at the Land Registry was not up to date, so that Mr. Dew's application simply went through unopposed and un-"vetoed" (via Schedule 6 paragraph 3) by the registered proprietor,

and by the Registry accepting at face value and as sufficient the evidence of possession of this land "since March 1995".

21. Mr. Dew has had that title LN 206714, undisturbed and unchallenged, since 2009. He did not, however, then acquire or even apply for title to the strip, which by reason of the history set out above was in 2009 comprised within title LN 204961. At the date of his 2009 application the registered proprietor of the strip was a Mr. Roy Peverall. We know this from a previous office copy of that title, which states on its face that Mr. Peverall was registered as proprietor to that title (including garage 1 and the strip) with effect from 18th July 2007, stating that the price paid for it on 9th October 2006 was £3000. Mr. Peverall was not notified of any application for adverse possession of his title, in 2009 or at all.

22. Mr. Peverall provided an ST1 statement in support of the Applicant's original DB application, but did not provide a witness statement or give evidence in these proceedings. His ST1 stated that he had acquired the garage "in 1989" from a neighbour, but that it was only registered in 2007. Since he did not give any evidence on this, we will never know what the explanation for this delay was, or the discrepancy between this statement and the date of purchase recorded on the title. It may be that the title changed hands informally on the earlier date, and was only regularised by a transfer many years later. In the event, nothing turns on that puzzle. Mr. Peverall was undoubtedly the registered proprietor of title LN 204961, including garage 1 and the strip, from 18th July 2007, and in 2009, until its eventual sale and amalgamation into what is now the Applicant's title.

The precise title boundary between the Applicant's and Respondent's registered titles: paper title and surveying evidence

23. This part of the application was relatively straightforward. The only admissible expert evidence before the Tribunal was that in the report of Ms. Julia Stolle FRICS MAE, dated 19th December 2018, together with the plans and other documents attached to it. An informal "report" dated 19th March 2019 by a Mr. Youv Ramburn of "Icelabz Solutions" filed on behalf of the Respondent was not compliant with the requirements of expert reports in civil proceedings, and Mr. Ramburn did not participate in the

meeting or discussion of experts which was directed. In any event his report appeared essentially to agree with the measurements set out in the Stolle report, but then sought simply to make the Respondent's factual adverse possession case based on the alleged presence of a "workshop".

24. Ms. Stolle, who produced the plan with the red line "A-B" which accompanied the determined boundary application, took the measurements from the 1960 site plan used in the January 1961 conveyance described above, and compared those to her own measurements made on the ground in relation to still-present features shown on the 1960 plan. Her conclusion was that the present day measurements "tally well" with the 1960 plan measurements, with only minor discrepancies. Her red line A-B was therefore a measurement of 4 feet from the face of the flank wall of what was, at the time of her visit on 6th June 2017, still "garage 3", since replaced by the new house built in that location. That was the 4 feet measurement shown on the 1960 plan, used in the January 1961 conveyance, as the width of the proposed "footpath".

25. As a matter of surveying accuracy and projection on the ground, this evidence appears accurate and was essentially undisputed. It confirms the present day position of the 4 feet wide strip shown in the January 1961 conveyance plan, as described above at paragraphs 2 and 3.

26. It is therefore clearly the case that the red line A-B, on the plan which accompanied the determined boundary application, accurately and precisely represents what was originally the boundary between the registered titles LN 204961 and LN206714.

27. It is therefore also an accurate depiction of the 'paper title' boundary between the present day registered titles TGL 465362 (now the Applicant's title, incorporating the former LN 204961) and LN 206714 (to which title the Respondent succeeded in 2009 by virtue of his successful and unopposed adverse possession application).

Adverse possession?

28. The only possible argument, and issue, is therefore whether the above clear title position and boundary was changed by events after the creation of those titles, and that

boundary, in 1961.

29. This was the Respondent's only real argument; in the absence of any serious challenge to the paper title position and its depiction by the surveyor. He claimed that title to the 4 feet wide 'strip' was now his, by virtue of his adverse possession of it.

30. His evidence was that he had stored materials and used the land in that 4 feet strip, all the way up to the flank wall of garage 3, and that this had taken place within a structure which he described as a "workshop". He produced some photographs of the "workshop" and some of the materials, dated from 2012 and 2013. He protested that the Applicant and its contractors had destroyed and removed his "workshop", leaving only its western side intact, when they carried out the works to construct the new house. He therefore claims that the new house encroaches on what is his land – both the passageway at ground level, and the projection of its first floor.

31. Before considering that evidence in more detail, it is quite clear from looking at the Respondent's evidence as a whole, and also at the terms of his 2009 statutory declaration in support of his claim to the adjacent title LN 206914, that he can realistically only speak to matters "since 1995". All of the evidence in his 2009 declaration was so expressed. He only 'came on the scene' in March 1995, so all of his evidence of alleged adverse possession is from that time onwards.

32. Although in his statement he hints (at paragraph 6) that "by repute" (he does not say from what source) the position on the ground that he described since 1995 had existed for "some fifty years before that time", or for "well over thirty years", or "I am informed by local residents and believe that it was in situ for well over 20 years before that [1995] (statement of case, paragraph 6), there is no evidence of this whatsoever. No evidence was adduced from any "local resident" or anyone else as to the position on the ground, let alone any adverse possession of this strip, from before 1995.

33. Having regard to the Respondent's 2009 statutory declaration, and the purpose for which it was made, such evidence would have been unlikely. In some cases, the would-be adverse possessor adduces evidence of successive previous owners of the adjacent land from which the possession of the subject land is said to have been

exercised, with which he then aggregates his own period of possession. So this might have been a case in which, for example, the Respondent, having purchased title LN 206714 by conventional means, obtained declarations and statements from its previous owners, stating that they had encroached from that land onto, and possessed, the strip as an adjunct to their existing title. That is not this case. The proprietor of title LN 206714, until it was taken away from him by the Respondent's successful 2009 application, was Mr. Fagan. No suggestion has been made, and no evidence adduced, that Mr. Fagan or any predecessor of his was also in possession of the strip while they owned LN 206714.

34. The significance of this absence of any pre-1995 evidence of adverse possession is that any application or claim made by the Respondent of this nature must therefore be made under the provisions of the Land Registration Act 2002. Title to the strip, as stated, has been separately registered since 1961, and it was clearly part of a larger registered title before that. Because the Respondent's evidence of possession only dates from 1995, he is not able to argue that he had successfully barred title under the Limitation Act 1980, by 12 years' or more adverse possession, generating a statutory trust of the possessed land under section 75 Land Registration Act 1925, prior to the coming into force of the 2002 Act on 13th October 2003. So no application is possible under Schedule 12 paragraph 18 of the 2002 Act, which preserves pre-accrued titles acquired by adverse possession of registered land prior to that date. Any application must be made, and succeed, under Schedule 6 of the 2002 Act, or not at all.

The previous applications

35. The Respondent must be well aware of that, because he has made, with legal representation, no fewer than <u>four</u> attempted applications under the 2002 Act for title by possession to the strip, all of which have been rejected by the Land Registry. The history of those applications is set out in a letter from the Land Registry dated 31st October 2018:-

i) an application dated 13th July 2015 was cancelled because the statutory declaration in support of it did not meet the requirements of r. 188 Land Registration Rules 2003

ii) a further application of 3rd December 2015 was cancelled following an on site inspection by the Ordnance Survey, whose surveyor found that the area in question was "inaccessible as it appears to be used to store a large pile of wood and other building materials" and "was not covered and does not appear frequently ordered". That survey, and the photographs taken on that occasion, were in evidence. It is stated that the Respondent's solicitors disputed that cancellation, but then did not pursue it further after 5th December 2016

iii) a further application of 1st November 2017 was cancelled because it was in substance a re-submission of the previous application, which did not address the reasons for that application's cancellation.

36. The Land Registry's letter of 31st October 2018 was dealing with the Respondent's fourth such application, referred to at paragraphs 5 and 6 above, dated 26th March 2018 but received 5th April 2018. The way in which they dealt with this application, and rejected it, is of some importance, even though it is not a binding "judicial decision" as such. This rejection was the reason why, as was at one point anticipated, there was not a simultaneous reference to this Tribunal of both the DB application and this competing adverse possession ADV1 application, to be heard together.

37. The Land Registry stated, and concluded, as follows:-

i) the application had been made under Schedule 6 of the 2002 Act on form ADV1

ii) as such, notice of it was served on the Applicant as registered proprietor of the title, now TGL 465362, against which the application was made

iii) as was its right, the Applicant filed and served in the time period prescribed a counter-notice on form NAP, dated 11th October 2018, under Schedule 6 paragraph 3(1) of the 2002 Act, requiring the application to be dealt with under Schedule 6 paragraph 5. The Applicant had also stated that it substantively "objected" to the application on the evidence.

iv) following service of the form NAP, invoking Schedule 6 paragraph 5, the

application could therefore only succeed if the Respondent established one of the three conditions in paragraphs 5(2) to 5(4)

v) the only condition on which he had claimed reliance in his application was paragraph 5(4):-

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

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

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

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

vi) his reliance on this exception was bound to fail, under sub-paragraph (c) above, for the very reason that his previous applications in 2015 and 2017 necessarily constituted acknowledgments that he did not believe (or had ceased to believe) that he owned the land in question. Reference was made to *Zarb v. Parry* [2011] EWCA Civ. 1306, and the principle that while literal application of the "belief" condition would by definition defeat all such applications, the applicant should have applied "promptly" after he ceased to believe that he already owned the land in question. The passage of time between and following the successive applications in this case was such that condition (c) could not be satisfied in this case, at the point of an application made in March 2018.

vii) as a procedural matter, the Land Registry indicated that they were minded therefore simply to reject the application on the basis that Schedule 6 paragraph 5 applied , and would do so if the Applicant (DL1 Limited) confirmed that it withdrew its "objection" (i.e. its substantive opposition on the evidence) to the application, so

that there would be no reference to this Tribunal to deal with that objection. The Applicant therefore withdrew the objection, and the Registry formally rejected the application, on the basis of Schedule 6 paragraph 5, by letter of 6th November 2018.

The Tribunal's power to deal with the adverse possession issue

38. This being so, it was strongly arguable, and the Applicant (through Mr. Healey) argued, that there was simply no reference of an adverse possession claim before the Tribunal at all, so it should not deal with it. The only referred application was the DB application, to plot the precise boundary between two registered titles, and that was straightforward. Further or in the alternative, Mr. Healey argued that to raise the same adverse possession case and arguments which had been the subject of four previous rejected Land Registry applications, but now by way of objection to the Applicant's DB application, was a form of abuse of process: the Respondent was seeking a further, potentially fifth, 'bite of the cherry'. Alternatively, it was submitted that any such claim was a potential future one, by way of fresh application or court proceedings (although it might be met by abuse of process arguments if made), but that the Tribunal should proceed to determine the DB application before it in the meantime without regard to that possibility.

39. The Respondent, represented by Mr. Waritay by direct access instruction, urged upon the Tribunal that it could and should deal with the Respondent's adverse possession evidence and arguments in this reference, as part of the overall exercise of determining the precise boundary between the titles. The Respondent's previous applications, and their rejection, were administrative matters and not judicial decisions. Where the Tribunal was seised of a determined boundary application, and there was any argument at all of any nature about the location of that boundary – whether based on surveying evidence or projections, or the moving of a previous paper title boundary by adverse possession – the Tribunal should determine those issues as part of the reference before it.

40. While there was considerable force in the Applicant's submissions, particularly given the Land Registry's positive decision not to refer the ADV1 Application to this Tribunal, on balance my view was and is that safest and best course was to hear the

arguments and evidence, tested by cross-examination and submissions, as part of the exercise of "determining the location of the boundary" in the course of a section 60 application – as that exercise of the Tribunal's function is now understood following the Upper Tribunal decision of Morgan J. in *Lowe v. William Davis Limited* [2018] UKUT 206, reviewing and explaining the previous cases, and in particular the guidance at paragraph 55 of that decision. I consider it proportionate and sensible, as a matter of case management and considering the nature of the land and dispute in question, to decide the issue of "..which of them is right as to the location of the boundary" [*Lowe*, per Morgan J., paragraph 55(8)] rather than just confining the exercise to one of assessing the "accuracy of the application plan".

41. That is clearly what the Respondent sought, and the Mr. Healey for the Applicant, although he made the procedural and abuse arguments, had come prepared to meet and cross-examine upon the factual adverse possession case too. Since, on the day of the hearing, the evidence for the Respondent consisted simply of the Respondent Mr. Dew himself, plus one other brief witness (Mrs. Marion Scrivens), I took the view that it was possible and desirable to hear that evidence on the day, rather than deciding summarily that I would not hear it at all, then proceeding to determine only the narrow issue of the accuracy of the plan. The hearing of the evidence was without prejudice to the arguments the Applicant might (and did) make in closing on procedure and abuse, but for the reasons set out above I am satisfied that it was and is correct to "determine the location of the boundary" on all the arguments and evidence, including those of the Respondent's alleged adverse possession. I am not satisfied that he is debarred from making those arguments at all, or that it would be an abuse of process for him to do so. The Land Registry's decision not separately to refer his ADV1 application to the Tribunal was a legal but administrative one, and not a binding judicial decision. That said, however, the legal reasons for the Registry's rejection of that application will clearly be highly germane and relevant when considering the evidence and arguments now before the Tribunal.

The evidence and case on adverse possession

42. Having heard the evidence of the Respondent Mr. Dew, under cross-examination, that of his additional witness Marion Scrivens, and having considered the other pieces of evidence including aerial photographs of the land taken at various time, and plans accompanying applications for planning permission for work chiefly on the land in title LN 206714, I make the following findings of fact.

43. First, despite the submissions of Mr. Healey, the Tribunal is not in a position to reject Mr. Dew's evidence as set out in his 2009 statutory declaration, and so effectively undermine his existing title to LN 206714 by holding that he acquired it on an evidentially false and perjurous basis. His title to that extent is not on trial, or in issue, in this reference.

44. That declaration is, however, highly relevant to the present claim for title by adverse possession to the strip, by reason both of what it actually said, and what it did *not* say. Mr. Dew swore that declaration on oath, and acquired title LN 206714 in reliance on it. He is therefore, to a large extent, bound by its contents.

45. As stated above, the plans attached to the declaration clearly displayed and delineated the 'strip' as a distinct piece of land lying between the land then claimed – title LN 206714 – and what was then garage 3. It is shown as a white gap between the two. Yet the declaration, and the application it then supported, made no claim to that strip. It would have been extremely straightforward for Mr. Dew, and those advising him, to make clear that he claimed all the land up to garage 3, and so simply extended the green colouring on his "plan 2" all the way up to it, so as to include the strip as part of the land said to have been possessed. Yet he clearly did not do so. Had he done so, that colouring of the strip would have extended the claim to the then registered title LN 204961 of Mr. Peverall, and he would have been notified of the application. This was not what was done, so Mr. Peverall was not notified of any application to claim part of his title by adverse possession.

46. To re-inforce the above point, Mr. Dew gave positive evidence in the declaration that the land which he was claiming – Mr. Fagan's title LN 206714 – was bounded by fencing, which he marked "A-B-C" on the plan 3 attached to the declaration. On any reasonable view of that plan, the fence marked "B" is shown on the eastern edge of

title LN 206714, with the strip again visible between it and the garage to the east. So not only was Mr. Dew, on the face of the declaration, not claiming that he was also in possession of the strip – he was distinguishing it from the land of which he did claim to be in possession by swearing that a fence separated the two.

47. When this was put to him in cross-examination, Mr. Dew's explanations were at best incoherent, and at worst evasive and misleading. At times his explanation was that he had simply been mistaken in his 2009 application and declaration, and had meant to apply for title by adverse possession to the strip as well, but had mistakenly described and depicted the land of which he was actually then in possession. Alternatively he appeared to argue at one point that the Land Registry had made a mistake, despite the fact that it is clear that his application was never expressed to extend to the then existing registered title to the strip. When asked about the fence he had depicted at "B", he alternated between answers that there was no full fence in that position, or that the "fence" shown was in fact co-extensive with the flank wall of garage 3, or that it represented a partial fence which was aligned with that garage wall and perpendicular to the highway.

48. I reject these explanations as unsatisfactory and implausible, and prefer to take Mr. Dew at his word as expressed in his sworn 2009 statutory declaration and its accompanying plans. From that evidence I find as follows:-

i) when Mr. Dew arrived on the scene in 1995, the 'wedge' land (title LN 206714) was not in the possession of anyone and "appeared to be abandoned".

Pausing there, if that was true of the wedge land in title LN 206714, it must logically also have been true of the 'strip' lying between that land and garage 3. If no-one was then in possession of the former, then no-one could realistically and separately have been in possession of the latter.

ii) he probably did, as he said, open up access to the wedge land from his title to the west at no. 124, and begin to make some use of that land.

iii) he probably did then begin to make some fairly rough and ready use of that wedge

area for storage of building materials, other items and general 'junk'. Whether, as he swore in his declaration, he proceeded to "maintain it as a garden..as an owner would maintain their garden" is a little more doubtful, particularly given aerial photographs from as late as 2008 showing the area largely overgrown with the canopy of trees or other foliage, but that may be a question of degree and emphasis. It is in any event probable that he had access to and control of this 'wedge' from his existing property at no. 124, and stored materials on it at the very least.

iv) there was some form of fence, as he swore, separating that land from the strip further to the east.

49. He says nothing whatsoever in that declaration about also storing materials in a "workshop" in the strip hard up against the garage to the east. Yet his evidence on his alleged adverse possession of the strip is now that there was at all times from 1995 such a "workshop" in that very location, possessed and used by him, for the storage of materials and other activities. This was the principal foundation of his claim to that strip by adverse possession.

50. If such a structure was in place, and being used and possessed, from 1995 to 2009, one would have expected such evidence to also be the principal evidence in support of any claim based on adverse possession made at that time. The existence and possession of a building or structure might be expected to be among the strongest evidence of possession, compared to mere acts of storage or maintenance. Yet it was not mentioned at all in the 2009 declaration.

51. The only evidence of the existence of such a "workshop" were some photographs, disclosed very late, but purporting to show a corrugated roof structure abutting the wall of garage 3, with various building materials stored beneath it. These photographs were said to date from 2012 and 2013. Ms. Marion Scrivens also gave some evidence of her storage of cleaning materials in this area, from 1995 onwards. It is true that she described it as a "workshop", made of sleepers, breeze blocks and a tin roof, but while she identified it with reference to the 2012 and 2013 photographs, I was not satisfied from her evidence – and am not satisfied – that there was any permanent and defined structure in that location during all of that time, whether it is described as a

"workshop" or not.

52. My finding on the evidence is that, predominantly after 2009, the Respondent's use and storage of materials on his 'wedge' land LN 206714 gradually increased and spilled over into the area of the strip, and that any remaining fence or barrier between the two was removed, so that he did in fact make some use of that area in conjunction with his other land. He may also have affixed some rudimentary covering over his materials stored there. Whether that created something which could be called a "workshop" or any sort of structure may be a matter of language and semantics, and is not in my view ultimately of great relevance. The storage of materials in itself is capable of amounting to possession - see e.g. *Treloar v Nute* [1976] 1 WLR 1295. So to the extent that the 2012 and 2013 photographs, which I accept were taken in those years, show the Respondent's building materials stored and piled up against the garage, that is capable of being possession.

53. I am not satisfied, despite the evidence of Ms. Scrivens, that such storage and possession had been exercised to this extent at all times since 1995, so that from that time Mr. Dew was thus in possession of the strip to the exclusion of all others, including its true owner. It is correct to say that there was no live evidence before me of anyone else, including its paper owner, making use of the strip in that time. In Mr. Peverall's ST1 statement, he said that at the time he bought what he thought was just a garage (which he said was in 1989, but which the registered title suggested was in 2006), he did not realise that the title also included the "footpath" (i.e. the strip). He does not say when it was that he did become aware of this, or give any evidence of his own use of it. He describes how in 2013 and 2014, he became aware of Mr. Dew dumping materials and erecting fence panels around the "footpath", and had confrontations with Mr. Dew over his use of this land. He later describes how, when he had the "footpath"/strip area cleared in 2016, his workmen found a "ramshackle structure built half way along the footpath straddling it completely. It was made out of railway sleepers and had been hidden under rubbish piled on top." This evidence was, as stated, not before the Tribunal in the form of a witness statement on which he could be cross-examined, but Mr. Dew (through Mr. Waritay) embraced that evidence as confirmation that a "workshop" had existed as he claimed.

54. Considering this evidence, and all of the evidence before me, I find that Mr. Dew's use of the strip area for storage was a gradual exercise, which was significantly increased and built up by 2013 when Mr. Peverall became aware of it and raised it as an issue. By that time, and the time shown in the photographs, it is possible to say that Mr. Dew was in adverse possession of the strip, having taken it over and excluded the paper owner to an extent which was apparent, and contentious. I am not satisfied that he had been exercising a similar degree of possession and control of this area at all times since his first arrival in this area in 1995, whether by the existence of an enclosed "workshop" or anything else. I find that, on the balance of probabilities, prior to 2009 he had at best exercised some minor acts of storage on this area, as an 'overspill' from his use of the area of which he then actually claimed (in 2009) title by possession, but not to the extent visible in 2013 or as now claimed. If he had been in such possession, via the enjoyment of an actual built structure, he would have said so, and this would have been a major part of any claim for title based on possession. Yet he did not say so, and he did not claim title to the strip in 2009, as stated above.

55. It is not possible, in the absence of more detailed evidence, to put a precise date on when Mr. Dew's storage and use of the strip first reached a level amounting to possession in law, but it is clear on his own evidence that he was dispossessed and lost control of it from 2016 onwards. He complains in his original statement of case that from 2016, his workshop and materials were cleared and removed; that he attempted to retake possession on two further occasions; but that in the end his workshop was demolished, his material removed and the current house built. So in that period he could not be said to have been in exclusive control and possession of the strip – he acknowledges that it was an area of continuing dispute and rival claims.

56. I am not satisfied that he had actually been in sufficient possession of the strip area for more than a few years before that time, and probably not until after the date of his declaration in 2009. So at best he enjoyed around seven years of sufficiently exclusive possession and control of this area for the purposes of the law of adverse possession. On any version of the law of adverse possession applicable to such a claim, that would not be enough.

Schedule 6 paragraph 5 Land Registration Act 2002

57. The critical and decisive point, however, is that even if my findings of fact above are wrong, and Mr. Dew's evidence were accepted to a much greater extent – so that he had been in sufficient factual possession and control of the strip, with intent to possess it, since 1995 – his claim for title to the strip by adverse possession would still have to be made by him via Schedule 6 of the Land Registration Act 2002.

58. In my judgment, that being so, his claim must fail, substantially for the reasons given by the Land Registry on 31st October 2018.

59. Under the 2002 Act, unless a party's case is that he had already accrued adverse possession of a registered title for a period of 12 years or more before the 2002 Act came into force, any application must be on form ADV1 and be made under Schedule 6 paragraph 1 of the 2002, whether the period of possession relied upon is the minimum of 10 years or some much longer period.

60. As already stated above, since in this case the Respondent's best evidence and case is of possession only since 1995, he is wholly reliant on the above provisions. This is not a case in which, despite the fleeting references to "repute" in his statement, Mr. Dew can rely on any pre-accrued barring of registered title prior to the 2002 Act coming into force. For that he would have needed evidence of possession going back at least as far as 1991, which he does not have. Indeed his own evidence, and the best evidence, is that the strip area must have been in the same "abandoned" state as was the adjoining title LN 206714 when he first arrived in 1995.

61. So whether the alleged period of possession relied upon when making an ADV1 application is 10 years, or (if claimed to have commenced in 1995) 20 or 23 years, it does not matter. Under Schedule 6 paragraph 2, any such application must be notified to the registered proprietor of the land claimed.

62. The Land Registry's 31st October 2018 letter does not record whether, in relation to Mr. Dew's rejected 2015 and 2017 applications, they even got as far as notification being given to the then registered proprietor/s of the strip – which would still have

been Mr. Peverall in 2015, then (by 1st November 2017) the present Applicant and proprietor DL1 Limited. The letter rather suggests that they did not even reach that stage, the Registry rejecting the applications on paper.

63. When Mr. Dew applied again, however, on 26th March 2018, such notification was given to DL1 Limited. As the Registry confirmed, by a form NAP dated 11th October 2018 they exercised their right under Schedule 6 paragraph 3(1) to require the application to be dealt with under Schedule 6 paragraph 5. They also, further and in the alternative, and in the event that paragraph 5 did not dispose of the application, substantively objected to the application on the grounds (amongst others) that Mr. Dew had not been in possession of the strip for ten years or more.

64. As set out above in paragraphs 5, 6 and 34 to 36, the Schedule 6 paragraph 3 right gives the registered proprietor of land claimed by adverse possession a presumptive 'veto' over, and right to defeat, the application. The Applicant can then only succeed if he brings himself within one of the exceptions in paragraphs 5(2) to 5(4). In this case, as stated, the only exception relied upon by the Applicant in his application was that under paragraph 5(4): the "reasonable mistaken belief" provision.

65. For the reasons given by the Land Registry in their letter of 31st October 2018 as summarised at paragraph 36 above, but also considering all the evidence before the Tribunal, in my judgement there is simply no basis upon which the Respondent can satisfy sub- paragraph (c) of paragraph 5(4): that:

"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".

66. The ST1 evidence of Mr. Peverall was put to Mr. Dew in cross-examination. He accepted that Mr. Peverall had made him aware in 2013 that the strip belonged within Mr. Peverall's registered title. Mr. Dew said that this was the "first I knew of it", but he accepted that he had such knowledge by that time. While he did not appear to accept (and I do not need to make any finding on this) that he actually offered to buy the strip from Mr. Peverall, he clearly accepted, and I find, that this issue of title to the

strip had been brought to his attention. I also find that from that point on, there was to some extent a running dispute over title to and possession of the strip, but the key point is that Mr. Dew was aware that a separate registered title to the strip was asserted, of which he was not the proprietor.

67. I find that the raising of this issue, and the consequent dispute, must have been what prompted Mr. Dew's first application for title to the strip by adverse possession on 13th July 2015. I have not seen the form ADV1 or declaration he submitted on that occasion. I only know from the Land Registry's letter that the application was rejected because the statutory declaration did not meet the requirements of r.188 Land Registration Rules 2003. Nor do I know whether he stated that he would rely on paragraph 5(4) if Mr. Peverall served a form NAP invoking Schedule 6 paragraph 5. If he did, then the fact that the application was made, by definition, confirms that by that time Mr. Dew no longer believed he had registered title to the strip. There might have been a finely balanced question, applying the test from *Zarb v. Parry* (supra), of whether he had applied sufficiently "promptly" in this regard after his discovery of the title position, and so loss of any belief that it was already his, in 2013. That question did not then arise, because the application was rejected.

68. As set out above, he applied again on 3rd December 2015, which application was cancelled by the Registry following the site survey. Their letter records that for a time he and his solicitors objected to this cancellation, but did not then correspond further after 5th December 2016. Nearly a further year then passed before a further application was made on 1st November 2017, which was likewise cancelled. Then there was the 26th March 2018 application, rejected on 11th November 2018. Now the argument, and reliance on paragraph 5(4), arises on this determined boundary application. For that purpose, I will consider the position as if, for the purposes of paragraph 5(4), the raising of that argument was the equivalent of another application.

69. The net result is that, on his own evidence as to his *actual* belief and knowledge of the registered title to the strip, over six years have passed since Mr. Dew first became aware that it was registered in another title. Over a year passed before he made any sort of application for title at all. Nearly two years passed between his second and

third applications.

70. On that basis, he has not since at least 2013 had any actual "mistaken belief" that he was already the registered proprietor of the strip. He has known since then that someone else (then Mr. Peverall) had such title, and that if he (Mr. Dew) wished to claim title to it, he would have to do by an ADV1 adverse possession application. In my judgement, having regard to the principle set out in *Zarb v. Parry*, there is no basis upon which it can be said that he now comes within paragraph 5(4)(c), if he ever did in the first place. He has made a series of four separate applications, punctuated (as the Land Registry stated) by relatively long periods of time. He is not in the category of the applicant envisaged by *Zarb* who, after having believed for 10 years or more that he already owns the subject land, then discovers the true registered title position and so "promptly" makes an ADV1 application.

71. I would also go further in this case, and find that Mr. Dew can have had no *reasonable* mistaken belief that he already owned the strip, by reason of his 2009 statutory declaration and the plans attached to it. That application, as I have stated, clearly recognised the separate existence of the strip, and far from showing any belief that he already owned it, he excluded it from the scope of his application. I find that a reasonable person, acting with legal advice on such an application, would clearly have realised (and would easily have discovered by the index map search which would usually accompany such an application) that title to the strip was registered under then title number LN 204961. As I have already stated above, he did not even then claim to be in possession of this strip.

72. For these reasons, the simple position is that the Applicant DL Limited, having served its form NAP, has defeated any claim the Respondent Mr. Dew has to title to the strip by adverse possession, since he cannot bring himself within Schedule 6 paragraph 5(4) of the 2002 Act. I have also found, on the balance of probabilities, that Mr. Dew was not in factual possession of the strip for ten years or more, but even if he had been, Schedule 6 paragraph 5 would have defeated his claim anyway.

73. The consequence of that is that the location of the boundary between the strip (within the Applicant's current title TGL 465362) and the Respondent's title LN 206714

remains as it was when separate registered titles to those lands, and the boundary between them, were first created in January 1961.

74. For the reasons set out above, I accept the evidence of Ms. Stolle, and the plan drawn by her to accompany the DB application, as a sufficient and accurate delineation of the precise boundary between the two titles. I will therefore direct the Registrar to give effect to the Applicant's application as made, in whole.

Costs: provisional

75. The clear result of the above decision is that the Applicant has been successful, and the Respondent unsuccessful in his objection and opposition. It follows that the usual order would be an order that the Respondent pays the Applicant's costs since the reference of the application to the Tribunal, the date of which was (as I read the papers) 4th July 2018. Such costs will be assessed by summary assessment, on the standard basis, unless agreed. I will therefore make such an order, which will take effect by the stated date unless either party wishes to make submissions to the contrary. If no submissions are made, or if the costs order is confirmed, summary assessment will proceed via the submission of a Schedule by a stated date, in response to which the Respondent may then file any objections or observations.

Judge Ewan Paton

Ewan Paton

Dated this 29th day of January 2020

By order of the Tribunal

REF/2018/0738

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN:

DL1 LIMITED

Applicant

and

MARK EDWARD DEW

Respondent

Property Addresses:
Land on west side of 126 Crofton Road, London SE5 8NA
Land on south side of Crofton Road

Title Numbers: TGL 465362 and LN 206714

Before Judge Ewan Paton

Sitting at the First-Tier Tribunal, 10 Alfred Place, London WC1E 7LR

On 16th January 2020 (site visit 15th January 2020)

For the Applicant: Mr. Greville Healy (counsel), instructed by Gregg Latchams, London
For the Respondent: Mr. Samuel Waritay (counsel), instructed by direct access

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ORDER

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1. The Registrar is directed, pursuant to rule 40, Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013, to give effect in whole to the Applicant's application on form DB dated 15th December 2017, so that the plan lodged with that application shall delineate the exact line of the boundary between title numbers TGL 465362 and LN 206714.

2. Subject to paragraph 3 below, it is ordered that the Respondents shall pay the Applicant's costs of this reference, from the date of the reference, such costs to be the subject of summary assessment on the standard basis, and as to which the Applicant shall file and serve on the Respondents a Schedule of Costs for summary assessment by 4pm on 20th February 2020

3. The above costs order having been made without a separate hearing, if either party wishes to make any submissions that any different costs order should be made, they should file and serve such submissions with the Tribunal and on each other by 4pm on 13th February 2020

4. On receipt of any such submissions, the Tribunal will then consider whether any different costs order should be made, and will issue a further direction and order accordingly.

5. If no such submissions are filed, the order at paragraph 2 above shall stand, and the Respondents shall by 4 pm on 6th March 2020 file and serve on the Tribunal and the Applicant (via his solicitors) any objections to and submissions on the amount of the Applicant's costs as set out in the Schedule. The Tribunal will then assess the costs summarily and issue a further direction and order.

Dated this 29th day of January 2020

Ewan Paton

By order of the Tribunal

UPPER TRIBUNAL (LANDS CHAMBER)

LREG/5/2020

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

AN APPLICATION FOR PERMISSION TO APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER) UNDER S.11 OF THE TRIBUNALS COURTS AND ENFORCEMENT ACT 2007

Applicant: Mr Mark Edward Dew

Property: Land on the west side of Crofton Road

Decision of the First Tier Tribunal (Property Chamber) dated 29 January 2020

Permission to appeal is REFUSED for the following reasons:

1. The applicant seeks to appeal the decision of the First-tier Tribunal ("the FTT") on a determined boundary application; the FTT refused permission to appeal on 9 March 2020.

2. The applicant in his opposition to the determined boundary application, brought by the registered proprietor of neighbouring land, sought to show that he had acquired title to the disputed strip of land by adverse possession. The FTT held that the applicant's own sworn evidence given to HM Land Registry in 2009, when he applied for title by adverse possession to land registered under title number LN 206714, made it clear that at that stage he made no claim to the strip that is now in dispute and was not in occupation of it. That was obviously correct and the Upper Tribunal could not make any other finding.

3. The FTT also found that while the applicant had made use of the strip after 2009, he had not been in possession of it for anywhere near 10 years. That is a finding of fact with which the Tribunal will not interfere.

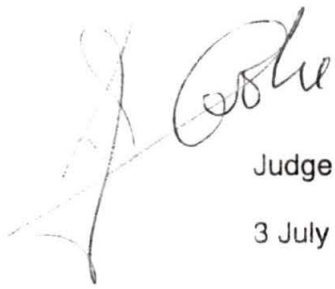
4. Finally, the FTT found that the applicant could not satisfy the requirements of paragraph 5 of Schedule 6 to the Land Registration Act 2002 because it was clear – and his repeated applications to HM Land Registry made it abundantly clear – that from 2013 he knew that he did not own the disputed strip. Accordingly the applicant's case based on adverse possession has no possible prospect of success, whatever further evidence might be available.

5. The applicant now seeks to challenge the position of the boundary itself and to challenge the expert evidence given by Mrs Stolle. It appears from the FTT's decision, and is confirmed by what it said when refusing permission to appeal, that Mrs Stolle's measurements were not challenged at the hearing. Moreover the

decision about the position of the boundary rested largely on the accurate measurements recorded on the 1960 conveyance plan (see paragraph 11 of the FTT's decision), to which there was no challenge.

6. None of the other points made in the grounds of appeal has any prospect of founding a successful appeal.

7. There is no realistic prospect of a successful appeal in this case and permission is refused.



Judge Elizabeth Cooke

3 July 2020