



Snooze you lose: Fraud on the Land Register and limitation

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Michael Paget, Cornerstone Barristers, considers the Court of Appeal's recent reminder that even fraud may not prevent the acquisition of property rights by adverse possession.

Introduction

In *Rashid v Nasrullah* [2018] EWCA Civ 2685, the Court of Appeal decided that a victim of property fraud cannot seek rectification of the register where the fraudster has obtained an interest in the land through adverse possession. It also decided that an earlier Court of Appeal case was wrong.

The facts of the case are quite involved, as is the law (which pre-dates the Land Registration Act 2002).

Mohammed Rashid (MR2) was the registered owner of a property (P), but his friend and namesake (MR1) felt he had at least a beneficial interest in P. In April 1989 MR2 travelled to Pakistan. In his absence, MR1 took possession of P and then fraudulently executed a transfer of the registered title into his name. Shortly afterwards there was a further transfer of legal title to MR1's son R for nil consideration.

MR1 telephoned MR2 in Pakistan and told him what he had done and told MR2 not to return to P. MR2 returned to the UK but did nothing to recover P. In September 2013, MR2 applied for rectification of the register.

The First Tier Tribunal held that, although R had been in possession of P since 1990, rectification would be granted as R was complicit in the 'mistake' on the register.

That decision was upheld in the Upper Tribunal, [2017] UKUT 0332 (TCC), by Professor Elizabeth Cooke. She concluded that the ratio of *Parshall v Hackney* [2013] Ch 568, that time cannot run in favour of a person in lawful possession, was broad and binding but in any event the principle of illegality, as explained in *Patel v Mirza* [2017] AC 467, meant that R could not benefit from the fraud.

Parshall v Hackney

In *Parshall*, the same, expensive piece of land had been registered in two titles – No.29 and No.31. No.31 had possession of the land from July 1988 and had used it as a car park. It was then removed from No.29's title. Both the land's registration to No.31 and its removal from No.29's title were Land Registry mistakes! The Court of Appeal rejected No.31's defence that they had obtained the land by adverse



possession. Mummery LJ concluded that time could not run because there had been no dispossession of the land as No.31's steps had all been lawful.

The judgment

Lewison LJ, giving lead judgment, concluded that:

- *Parshall* is wrong because it incorrectly applied the simple test of adverse possession, set out by the House of Lords in *Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, of "going into ordinary possession of the land for the requisite period *without the consent of the owner*" (emphasis added) - §50.
- *Parshall* was irreconcilable with *Pye* and that, even if it wasn't wrong, *Parshall* was distinguishable - §51.
- The doctrine of illegality cannot be used to disapply limitation periods and prevent R retaining title: "What the law of adverse possession is concerned with is what happened on the ground. *Patel v Mirza* is not, in my judgment, any warrant for the rewriting of history." - §69. 'Even if the doctrine of illegality were to apply, I cannot see that it could do more than invalidate the registration. It cannot undo the fact that MR1 and [R] have been in possession for over 20 years.' - §72. 'There can be no doubt that bad people are entitled to the benefit of limitation periods.' - §74. As the court departs from one of its own decisions, LLJs King and Jackson give a combined concurring judgment stating: "correctly analysed, the outcome in this case is not the result of the fraud but of the true owner's subsequent failure to take effective action to challenge it." - §82.

Comment

The ability to rectify the register at any time does not stop limitation running. This case highlights first that, despite some commentators' hopes, registration is not all. And secondly, it shows that the Court of Appeal took a wrong turn in *Parshall*, with or without a parked car.

The test for adverse possession is simple so, as Lewison LJ explains at [78],

"What makes [R]'s claim good is not his father's fraud in procuring his registration as proprietor or his complicity in that fraud; but the fact of possession of the property for the requisite 12 years without the consent of MR2."
