

A VERY BOLD FRAUDSTER

In this article, Stephanie Tozer and Gavin Bennison recount a recent appeal to the Upper Tribunal, and examine what might have happened if a lender had been involved...

The Facts

A man named Mohammed Rashid (“Mohammed”) bought a property in Birmingham in 1982. In 1989, whilst he was abroad in Pakistan, another man with the same name forged various documents so as to obtain control of the Property. At the end of that process, he executed a transfer of the Property to his son, Farakh. Farakh was found by the trial judge to be complicit in his father’s fraud. From 1989, Farakh was registered as proprietor of the Property.

In 2013, Mohammed applied for rectification so as to restore himself to the position of registered proprietor. As it happens, Farakh had not sought to take any equity out of the property in the intervening years, by mortgaging, although it is easy to imagine that he might have done.

The decision

Having determined that Farakh’s father had defrauded Mohammed, and that Farakh was complicit in that fraud, the judge of the FTT had little difficulty in concluding that Farakh’s registration was a mistake, so Mohammed had established a prima facie case for rectification. This would equally have been so against a mortgagee, if Farakh had in fact mortgaged the property in the meantime: *MacLeod v Gold Harp Properties [2014] EWCA Civ 1084*.

Once a prima facie case for rectification is made out, rectification will be ordered unless there are exceptional circumstances which justify the refusal of an order for rectification: Land Registration Act 2002, Schedule 4 paragraph 3(3) and 6(3).

Farakh said that there were exceptional circumstances, but the FTT judge found against him. Farakh appealed on this point. He said that, despite his registration as proprietor at all material times, he’d been in adverse possession since 1989, and was therefore now entitled to retain ownership of the property despite the initial fraud. However, his adverse possession claim faced a significant hurdle: in *Parshall v Hackney [2013] EWCA Civ 240*, the Court of Appeal had determined that a registered proprietor cannot be in adverse possession. Farakh’s answer to that was bold: he said that *Parshall* was to be distinguished because in *Parshall*, the owner had acquired his registered title lawfully; whereas he had acquired his unlawfully. He was, in short, suggesting that he should be in a better position because he had acquired his title by fraud than he would have been in if it had happened by mistake.

The judge of the Upper Tribunal found against him too. She said that *Parshall* applied regardless of whether the owner had acquired title lawfully, and, in any event, Farakh was barred by the doctrine of illegality, or *ex turpi causa* as it is sometimes called, from relying on his fraud in order to make out his cause of action or distinguish *Parshall*. The judge followed the test set out in *Patel v Mirza [2016]*

UKSC 42 to determine whether the fraud should prevent Farakh from obtaining the relief claimed. She commented that it would not be appropriate to suggest that fraud could be condoned after many years. A copy of the decision can be found here.

<http://www.falcon-chambers.com/images/uploads/articles/Rashid v Rashid copy for parties 30 August 2017 %282%29.pdf>

What would have happened if a lender had been involved?

If Farakh had had a mortgage, could the lender have resisted rectification on the basis that Farakh had an adverse possession claim? The lender might say:

- 1) Farakh did not obtain legal or equitable title, notwithstanding his registration: Land Registration Act 1925 s 114. The case is therefore to be distinguished from *Parshall*. Farakh was, in this case, in adverse possession throughout.
- 2) Although Farakh could not have advanced that case, because Farakh would have been precluded from relying on his own fraud by the doctrine of illegality, the lender was, let us assume, entirely innocent of any knowledge of or involvement in the original fraud many years before, and was not precluded from running that case.

To the best of the writers' knowledge, there is no authority directly on point. The writers offer the following suggestions:

- (1) The loan itself would be enforceable as a matter of contract, as between the lender and Farakh, notwithstanding the underlying fraud as between Farakh and Rashid, because the lender had no knowledge of it: *Cuthbert v Haley (1799) 8 Term Reps 390; Spector v Ageda [1973] Ch 30 at 44*.
- (2) However, in considering whether the register should be rectified to remove the lender's charge, different considerations might come into play. This would be a contest between Rashid and the lender – 2 innocent parties.

The arguments for the lender

The lender would have a good argument that its innocence should mean that it was not precluded from arguing that Farakh was entitled to a fresh title by adverse possession and there were therefore exceptional circumstances which justified refusing rectification so as to remove the charge. The lender could also point to the fact that Rashid had done nothing for a considerable period of time, despite knowing that he had been defrauded, and could hardly claim any particular attachment to this property.

The arguments for Rashid

Rashid would, on the other hand, point to the general principle of property law that one cannot give what one does not have (or to use the Latin, "*nemo dat quod non habet*"), so a lender who derives his interest in a property from the borrower cannot obtain a better title

than the borrower. Here, the borrower's title was subject to rectification and he was precluded from relying on his fraud to advance an adverse possession claim. The lender cannot be in a better position than that.

It appears to the writers that Rashid's argument is slightly stronger than those of the lender.

What should lenders bear in mind?

If the lender lost the argument, all would not be lost: the lender would have a claim to an indemnity from Land Registry: Land Registration Act 2002 Schedule 8. The indemnity would cover the costs of defending the rectification claim if the registrar has consented to those costs being incurred. Although retrospective approval of costs can be given, it would plainly be prudent for prior approval to be sought by a lender before incurring costs in defending this sort of claim.

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