

# The misty world behind Land Registration

*Registration of title had as one of its purposes the move towards certainty. What is said on the title is what you need to know about the land.*

Cecily Crampin



For Land Registration, the misty world of what one sometimes might wish to describe as reality, should be of limited effect. Despite the aims of the Land Registration Act 2002, however, difficult cases remain. Three recent cases shed some light.

The first, *Sackville v Robertson* [2018] EWHC 122 (Ch), is about exercise of owner's powers. Sections 23 and 24 of the Land Registration Act 2002 extend owner's powers, including the power to make a disposition of any kind permitted by the general law, to a person 'entitled to be registered as the proprietor'. In this case, the unregistered transferee sought to serve a tenant's break notice. The landlord said service was invalid since it was the tenant who must serve. Fancourt J agreed.

What mattered was the definition of tenant in the lease as including successors in title. Section 24 did not assist, just as it hadn't in the statutory context in *Pye v Stodday Land Ltd* [2016] 4 WLR 168, where a notice to quit under the Agricultural Holdings Act 1986 had to be served by the legal landlord in accordance with the common law. Whatever s24 allows someone entitled to be but not yet registered to do, it isn't to do what only a legal owner can.

In *Antoine v Barclays Bank* [2018] EWCA Civ 2846, the issue was whether entry of a legal charge onto a title could be removed as a mistake, when that charge was granted by a proprietor who had been registered by an order of the court obtained by reliance on forged documents. In schedule 4 of the Land Registration Act 2002, the court's powers to alter the register include by rectification, that is an alteration correcting a mistake. 'Mistake' has no further definition in the 2002 Act. Its meaning has been the subject of some case law.

In *NRAM v Evans* [2018] 1 WLR 639, Kitchin LJ referred to commentary suggesting that there was a mistake where the register showed something as a result of an act by the Registrar which he would not have done had he known the true state of affairs at the time.

This description has led to a distinction being made between a void transfer and one which is voidable. If a transfer is void then the Registrar would not have registered it had he known that of the fraud. Registration would be a mistake. If, however, the transfer is voidable, but has not been avoided, at the time of its registration there is no mistake.

In *Antoine*, the registration of the fraudster was obtained via fraud. However, unlike in a case of an application directly to the registrar, where registration would be a mistake, in this case, the fraudulent documents were relied on to obtain an order from the court an update of the register. An order of the court has to be obeyed, whatever the circumstances, until set aside.

The Registrar had to register the fraudster as proprietor. He was under a duty to obey the court order. Since the registration of the fraudster was not a mistake, the

registration of the charge could not be. Though the defrauded proprietor could be returned to the register, he would take subject to the charge.

The analysis in *Antoine* suggests an answer to the often debated question, is a charge granted by a fraudulently registered proprietor itself open to rectification, or must the defrauded proprietor take subject to the charge?

The reasoning in *Antoine* suggests the answer is yes, though the court deliberately expressed no opinion on it. As many have argued in commentary, the fraudster once registered has owner's powers, hence is entitled to grant the charge. The Registrar would register the charge because made by the registered proprietor. The registration of the charge would not be a mistake.

The third case discusses a defence to a fraudulent registration as proprietor of an estate, reliance on adverse possession by the fraudulently registered proprietor. In *Rashid v Nasrullah* [2018] EWCA Civ 2685, the fraudster was registered by relying on fraudulent transfers. This was 12 years prior to October 2003 when the law on adverse possession changed. When the defrauded proprietor claimed rectification of the title the fraudster argued that he had adversely possessed and hence the claim must fail. For the defrauded proprietor it was said adverse possession could not succeed because the possession of the fraudster, as registered proprietor, could not be adverse. It was by right. Lewison LJ disagreed.

Lewison LJ asked what happened to the equitable interest on the fraudulent registration. Following *Malory Enterprises Ltd v Cheshire Homes Ltd* [2002] EWCA Civ 151, he concluded that on the fraudulent registration the legal and beneficial titles split. The fraudster held on trust for the defrauded proprietor via a constructive trust. When the fraudster went into occupation, he dispossessed the defrauded proprietor who could have claimed possession against him. At the end of the 12 years, in effect the defrauded proprietor's beneficial interest was extinguished, and the fraudster had all.

The first two cases discussed above seem to promulgate the primacy of the register. It is the registered proprietor who can serve notices. It is the registered proprietor who can grant charges. The underlying transactions are not determinative. The third, however, suggests that the effect of equity, even now, is more important than the aim of registration would suggest. Presumably the analysis in *Rashid* could succeed now, despite the change in the law on adverse possession for registered estates. The adverse possession was of the equitable estate, not the registered title, so that, presumably, the old law would continue to apply.

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