Dhillon v (1) Barclays Bank plc & (2) Chief Land Registrar

In its first remote civil appeal, on 12 May 2020 the Court of Appeal handed down judgment in *Dhillon v (1) Barclays Bank plc & (2) the Chief Land Registrar* [2020] EWCA Civ 619.

Summary

This was an appeal against the decision of His Honour Judge Pelling QC[1], sitting as a judge of the High Court, which dismissed Mrs Simer Kaur Dhillon's claim that the Land Register be rectified by the removal of a charge in favour of Barclays Bank, the First Respondent ("BB"). Both BB and the Chief Land Registrar, the Second Respondent ("CLR") sought to uphold the judge's order, drawing swords over BB's entitlement to an indemnity in the event Mrs Dhillon was successful.

Applying the test set out in **Paton v Todd** [2012] EWHC 1248 (Ch), the Court of Appeal upheld the judge's decision. In the course of his judgment, with which Patten LJ and Rose LJ agreed, Coulson LJ expressed doubts over the Law Commission's recommendation, which forms part of the Land Registration (Amendment) Bill, that chargees registered by mistake should not be able to oppose rectification applications for their removal.

The facts

From 1993 Mrs Dhillon was a secure tenant of a house in London, E5 ("the Property"). In 1999 she applied to exercise a right to buy the Property from the London Borough of Hackney ("Hackney") for £167k.

Mrs Dhillon's application was, however, commandeered by her second husband, Mr Hussain. Two transfers ensued:

a. From Hackney to Mrs Dhillon, on 9 September 2002 (for £167k) ("Transfer 1");
b. From Mrs Dhillon to Crayford Estates Ltd ("CEL") on 20 September 2002 for the apparent purchase price of £250k ("Transfer 2"). CEL funded the acquisition with a bridging loan of £276k from Commercial Acceptances Ltd ("CAL").

On 3 October 2002 CEL and CAL both became registered. Just over 2 weeks later, CEL refinanced the CAL charge with a loan from Woolwich PLC (now Barclays) for £337,500 ("BB Charge"), which was duly registered.

[1] [2019] EWHC 475 (Ch)

Mrs Dhillon had had no knowledge of Transfers 1 or 2 at the time, and her signatures on those conveyances were not genuine. It was not until the following year that she discovered the fraud. Mr Hussain was later convicted.

In 2005 CEL was dissolved and struck off the Register of Companies. The Property duly vested in the Crown as *bona vacantia* - which it disclaimed in 2009. The following year Mrs Dhillon applied for a vesting order, which was granted by Master Moncaster. This resulted in her registration as freehold proprietor of the Property, subject to the BB Charge.

In 2015 Mrs Dhillon commenced proceedings for the removal of the BB Charge under schedule 4 of the Land Registration Act 2002 ("LRA") on the basis that it was mistake which fell to be corrected. The following paragraphs are material:

> "***Alteration pursuant to a court order***
>
> *2(1) The court may make an order for alteration of the register for the purpose of –*
> *(a) correcting a mistake….*
> *(b) …*
>
> *3(1) This paragraph applies to the power under paragraph 2, so far as relating to rectification.*
>
> *(2) If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless –*
>
> *(a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or*
> *(b) it would for <u>any other reason be unjust</u> for the alteration not to be made.*
>
> *(3) If in any proceedings the court has power to make an order under paragraph 2, it must do so, <u>unless there are exceptional circumstances which justify its not doing so.</u>*"

First Instance

Although he found both Transfers and the BB Charge were mistakes for the purposes of Schedule 4, the judge dismissed the claim for rectification on the basis that there were exceptional circumstances which justified non-rectification. He did however

take the view that if BB's Charge had been removed, then it would be entitled to an indemnity, per paragraph 1(2)(b) of Schedule 8 to the LRA.

The Court of Appeal

Mrs Dhillon argued on appeal that the judge had confused the tests under paragraph 3(2) (applicable where the proprietor is in possession) and 3(3) (no proprietor in possession) of Schedule 4; had reached a decision inconsistent with previous authority and the views of the Law Commission in its 380th report *Updating the Land Registration Act 2002*[2] ("the Report"); and erred when considering the existence of exceptional circumstances in focusing too heavily on the position of Mrs Dhillon (as opposed to BB's – defrauded banks are not uncommon).

Delivering judgment and dismissing the appeal, Coulson LJ found:

(i) the judge had referred to both tests under paragraph 3(2) and 3(3) but this did not affect the result; the current academic[3] view is that the "unjust" test was a higher hurdle than the "exceptional circumstances" test;

(ii) there was nothing inconsistent with the judge's conclusions and prior authority. He had properly applied the two-stage test in **Paton v Todd**. In that case, Morgan J had said at [67]:

> *"Exceptional" is an ordinary, familiar English adjective. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual or special, or uncommon; to be exceptional a circumstance need not be unique or unprecedented, or very rare but it cannot be one that is regularly, or routinely, or normally encountered:… Further, the search is not for exceptional circumstances in the abstract but those which have a bearing on the ultimate question whether such circumstances justify not rectifying the register."*

[2] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/07/Updating-Land-Registration-final_WEB_230718.pdf

[3] referring to M Dixon, "Updating the Land Registration Act 2002: Title Guarantee, Rectification and Indefeasibility" [2016] *Conveyancer and Property Lawyer* 6

(iii) if and to the extent that the judge's conclusions were inconsistent with the Law Commission Report - that was simply the result of his application of the current law as it stood, not what might eventuate.

(iv) focus on Mrs Dhillon, rather than BB, was inevitable. The exceptional circumstances in this case arose from how she had come to be registered proprietor. By contrast, BB's position was "unexceptionable".

(v) As indicated in **Nasrullah v Rashid** [2018] EWCA Civ 2685 the judge's decision on this issue was an evaluative judgment with which an appellate court would be unlikely to interfere, unless there was a clear error of principle. Endorsing the judge's approach, and adopting the **Paton v Todd** test, Coulson LJ found the following circumstances to be exceptional:

a. Mrs Dhillon had never owned or paid anything towards the Property, and could never have afforded to buy it without immediately selling it;

b. Mrs Dhillon could never have been in a better position than CEL. The title vested in her was precisely the same as had been vested in CEL;

c. Mrs Dhillon's claim for rectification necessarily relied on the void Transfer 1 – it would be extraordinary to rely on a document which she had never seen or signed, and which was the first stage of a fraud about which she had no knowledge.

d. if rectification was granted, Mrs Dhillon would become the owner of the unencumbered freehold as a result of that fraud. (The Property was by the date of the appeal worth £1 million, and the debt owed to the bank was over £650,000 at the date if the appeal);

(vi) He found those factors justified non-rectification:

a. rectification would bestow a windfall for Mrs Dhillon, for the reasons given above.

b. Mrs Dhillon's indirect attempt to rely on Transfer 1 must at least be a relevant factor when considering whether the non-rectification of the Register is justified. (Although this did not deprive the Court of jurisdiction to entertain her application on the basis of illegality, per **Patel v Mirza** [2016] UKSC 42, contrary to what BB had unsuccessfully contended).

c. conversely, refusing rectification would place her in much the same position had she exercised her right to buy in 2002. She would have had to have bought the Property (with a mortgage) and then sold it,

leaving her with an equity of redemption (in a sum far less then its current £350,000 value).

d. Non-rectification therefore is amply justified: it is a just and proportionate outcome.

Comment

An interesting aspect of the case is the Court's robust approach to the relevance of the availability of an indemnity to a proprietor of a lost charge.

It its Report, the Law Commission recommend that a chargee who has been registered by mistake, or the chargee of a registered proprietor who has been registered by mistake, should not be able to oppose rectification of the register (once a mistake has been found by the registrar or a court) so as to correct that mistake by removing its charge. This is to be implemented by clause 20 of the Land Registration (Amendment) Bill, which will insert a new paragraph 3D(2) into Schedule 4[4].

The recommendation forms part of a radical reformulation to Schedule 4, designed to prescribe with greater clarity how alteration of the register should operate. The position of mortgagees of void mortgages was addressed in its Consultation Paper:

"***The position of mortgagees***

13.91 A mortgagee of land has an interest that is financial only – indeed, centuries of mortgage law reform, by the courts and Parliament, has been focused on ensuring that mortgagees are entitled to repayment of loans, interest and costs but do not get the windfall of land in addition.

13.92 We think that in our AB and ABC scenarios, whether the mortgagee is B or C, its only interest in the land is financial. Therefore, when a mortgagee's title to a registered charge is registered by mistake or as a result of a mistake, the mortgagee should get an indemnity (subject to what we say below, in paragraph 13.97) and questions about rectification should be addressed on that basis.

13.93 In fact, that is the result in most cases under the existing statutory provision. Section 133[5] of the LRA 2002 provides that, in effect, for the purposes of the LRA 2002 a registered chargee is never in possession

[4] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/07/Amended-LRA-2002-final.pdf. The recommendation garnered overall support from consultees: Report at 13.106

[5] Should be a reference to s 132(1)

of land; and that will be the case even where the mortgagee has taken possession of the land in preparation for sale. Accordingly, the mortgagee will never benefit from the special protection given by schedule 4 to the registered proprietor in possession.

13.94 Nevertheless, there are cases in the current law where the registered chargee's position is not clear. It may be that no one is in possession of the land. In that case, the register must be rectified in A's favour unless there are exceptional circumstances that justify doing otherwise. It is difficult to imagine exceptional circumstances where it would be right not to rectify in A's favour so as to remove a charge, but easy to imagine circumstances where the chargee was able to prolong litigation by arguing that such circumstances existed. The matter should be put beyond doubt." (emphasis added)

Mrs Dhillon contended that the Court should have close regard to the reasoning and conclusions of the Law Commission– especially in light of the judge's findings that BB would likely be indemnified in due course. BB was after all a bank with a purely financial motivation – whereas Mrs Dhillon had been defrauded of her right to buy, her secure tenancy and would lose her home of 30 years.

Coulson LJ defended the judge's decision firstly, as noted above, on the basis it was incumbent on him to apply the law as it is, not as it might be. Secondly, he noted, the scenarios contemplated in the Report were a far cry from the facts of the instance case. He continued, at [59]:

"Thirdly, it appears that the Law Commission's recommendations are not themselves free from controversy. On one view, they appear to recommend doing away with the whole concept of "exceptional circumstances" because they regard it as a device by which the rightful proprietor can be put to the expense and inconvenience of a contested hearing by an undeserving defendant. But the facts of this case show that that might be thought to be something of a one-eyed view. Moreover, I consider that the suggestion at paragraph 13.105 of the Report, that a party in the position of BB "should be indifferent as to whether the charge remains in the Register, given that [BB] will be indemnified if the charge is removed", must be open to doubt. It assumes that the right to an indemnity in these circumstances is undisputed, which seems optimistic and is not the case here. More significantly, when applied to the facts of this case, it would mean that the Law Commission would endorse Mrs Dhillon's right to acquire the freehold of the property unencumbered (without ever having paid a penny piece for it), and that BB should not worry themselves about that result, because they will be

indemnified for their loss by the tax-paying public. Such a conclusion might be said to raise eyebrows, not least amongst that same tax-paying public."

Later in his judgment, his Lordship turned to the relevance of indemnities to applications for rectification more generally.

There can be little doubt that the prospect of a future indemnity routinely features, to varying degrees, during the course of rectification applications, as part of the macroscopic assessment of the competing merits: see for example **Epps and Anr v Esso Petroleum Co Ltd** [1973] 1 WLR 1071, **Pinto v Lim** [2005] EWHC 630 (Ch), **Ajibade v Bank of Scotland Plc** (Ref No. 2006/0163/0174)**; Knights Construction (March) Ltd v Roberto Mac Ltd** [2011] 2 EGLR 123, **Paton v Todd**, **MacLeod v Gold Harp Properties Ltd** [2015] 1 WLR 1249[6].

Indeed, in this appeal, BB and CLR devoted of much of their argument to BB's potential entitlement (indeed CLR argued at length that this was a case of alteration rather than rectification).

However, Coulson LJ forcefully rejected the suggestion that the availability of the indemnity was a "critical alternatively a key factor" in the evaluation of rectification applications [80]. Remarking that the issue was not properly before the Court, he said that, in any event, at [83]:

"*It would be curious if a detailed investigation of the disputed contingent rights as between B (BB in the present case) and C (the CLR) had to be undertaken and decided before the primary rights as between A (Mrs Dhillon) and B were determined. On one view, the possible existence of the indemnity should be irrelevant to Mrs Dhillon: it is res inter alios acta."*

He concluded at [92]:

"…The highest that it can be put in principle is that the existence of an indemnity may be a factor in the two-stage test in Paton v Todd. It has no relevance or application to the present case."

This was an overdue interrogation of the relevance of indemnities to rectification proceedings. Although the concept of an indemnity 'sub-trial' within a rectification

6 Though see the very recent rectification case *Rees v 82 Portland Place Investments LLP* [2020] EWHC 1177 (Ch) in which Snowdon J said he could not judge the outcome of any indemnity proceedings and so regarded it as a neutral matter: [81]-[84].

application is plainly undesirable, Schedules 4 and 8 form a carefully calibrated scheme - and it is challenging to imagine evaluation of an application under the former without naturally opining on the eventual operation of the latter. The decision may however signal a more principled approach to rectification applications by discouraging expectations that indemnities will achieve overall fairness[7]. It might be that rectification becomes harder to achieve, if the solution cannot be seen to lie in eventual indemnification. But does the suggestion that an indemnity is *res inter alia acta* go too far? The system of guaranteed title does not necessarily sit comfortably with that analogy.

Finally, the Court of Appeal's observation that the Bill potentially over-simplifies a chargee's position in rectification proceedings may prompt its reconsideration – something lenders would no doubt welcome.

[7] For an analysis of this trend, see **E Lees, 'Guaranteed Title: No Title, Guaranteed,'** in **A. Goymour, S. Watterson and M. Dixon (eds.),** New Perspectives on Land Registration, (2018), 108-109