Not positively unjust?

The difficulty in obtaining rectification of the register against a proprietor in possession.

Headlines

Mistakes happen. When they do in the context of land registration, Sch.4 to the Land Registration Act 2002 is there to set them right through alteration of the register – at least in some cases. However, as *Rees v 82 Portland Place Investments LLP* [2020] EWHC 1177 (Ch) shows, there is no guarantee that an innocent party who loses out by reason of a Land Registry mistake will prevail in securing rectification of the register in its favour. The fact that it would be just to rectify may not be enough. Everything may boil down to whether it is positively unjust not to rectify. This is a high hurdle which a claimant may fail to surmount.

Statutory framework

So far as is material, Sch.4 to the 2002 Act provides:

1. In this Schedule, references to rectification, in relation to alteration of the register, are to alteration which—
   (a) involves the correction of a mistake, and
   (b) prejudicially affects the title of a registered proprietor.

2. (1) The court may make an order for alteration of the register for the purpose of—
   (a) correcting a mistake
   …

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 any other reason be unjust 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, *unless there are exceptional circumstances which justify its not doing so*.

I refer to the condition in para.3(2)(b) – that in bold – as the 'unjust not to rectify' condition. I refer to the condition in para.3(3) – that in italics – as the 'exceptional circumstances' condition. *Rees* concerned the unjust not to rectify condition.

Background

Stripped of some detail, the facts of *Rees v 82 Portland Place* are fairly straightforward.

The title to 82 Portland Place comprised a freehold, headlease and a series of long leases of individual flats of which Flat K was one. In 2011 Ms Rees acquired Flat K with the benefit of a notice given under s.42 of the Leasehold Reform, Housing and Urban Development Act 1993 in respect of a claim to a new (extended) lease. She applied to register the notice against both superior titles (the freeholder being the competent landlord). At the time there was in progress a prior collective enfranchisement claim in respect of the building. As a result the operation of Ms Rees' s.42 notice was suspended by s.54 of the 1993 Act during the currency of that claim.

On Ms Rees' application HMLR registered a unilateral notice in respect of the s.42 notice against the headlease title. However, it refused to enter such a notice against the freehold title, asserting that the collective enfranchisement process prevented this. This was wrong – the suspension of the s.42 notice did not preclude registration of a unilateral notice to protect it – but nonetheless it was what happened.

Then, of course, the inevitable came to pass. The collective enfranchisement was eventually completed in 2017. The freehold and headlease were transferred to the Second Defendant, the nominee purchaser. On the same day it granted the First Defendant a concurrent lease of Flat K. The Second Defendant was registered as the proprietor of the freehold, the First Defendant as proprietor of the concurrent lease. The former headlease was merged by the Second Defendant and that title closed. Thereupon HMLR migrated the unilateral notice which had been registered against the headlease and entered it (for the first time) directly against the freehold title. Likewise it entered it against the title to the newly created concurrent lease.

However, the Defendants maintained that by reason of the special rule of priority in s.29 of the 2002 Act the Second Defendant (as a registered transferee for valuable consideration) had acquired the freehold free of the unprotected s.42 notice. They contended that the s.42 notice was not binding and enforceable against the Second Defendant and, in turn, that the same position applied to the First Defendant which derived its title from the Second Defendant.

The proceedings

Ms Rees then brought a claim. She claimed: (a) that the Defendants were bound by the s.42 notice; (b) an order rectifying the registers of title in respect of the freehold and/or the concurrent lease to correct HMLR's mistaken failure to enter the unilateral notice in respect of the s.42 notice in 2011 and the consequences of that mistake. The Defendants counterclaimed for declarations that they were not so bound and for removal of the migrated unilateral notices.

The trial was heard by HHJ Gerald. The Judge held that the absence of a unilateral notice against the freehold title meant that Ms Rees' rights arising from the s.42 notice were not protected against the Second Defendant when it acquired the freehold for valuable consideration. He also held that HMLR should not have carried forward the notice registered against the headlease title to the freehold title on the subsequent merger of the headlease. Therefore, he ordered that the unilateral notices be removed from the superior titles.

HHJ Gerald then went on to consider whether HMLR's mistake in failing to register the unilateral notice in 2011 should be rectified under Sch.4 to the 2002 Act.

By way of note, the alteration of the registers sought by Ms Rees constituted 'rectification' (within the meaning of Sch.4, para.1) because the correction of HMLR's undoubted mistake would prejudice the title of the Second Defendant freeholder; to subject its title to the 2011 s.42 notice (so that it became bound thereby) would mean that it would be required to grant a new lease at a much lower price than it could claim as a result of a later s.42 notice (served by Ms Rees in 2017).

Further, in the case of rectification, special protection is given by Sch.4, para.3(2) to a registered proprietor of an estate in land who is in possession. Leaving aside cases of fraud or lack of proper care (not here in play), *no order for rectification may be made against such a person unless it would be unjust not to rectify the register: Sch.4, para.3(2)(b).* This is the result of the operation of the unjust not to rectify condition.

Incidentally, curiously the Second Defendant freeholder was to be regarded as in possession of Flat K notwithstanding the existence of Ms Rees' lease. This is because s.131 of the 2002 Act provides that the possession of a tenant is to be treated as the possession of the landlord.

Therefore, in the circumstances it was insufficient for Ms Rees simply to point to the existence of a mistake by HMLR. Sch.4, para.2 required more than that. She could only succeed in obtaining rectification if she could meet the unjust not to rectify condition.

Again, the decision went against Ms Rees. HHJ Gerald ruled that, for the purposes of Sch.4, para.3(2)(b), it would not be unjust for alteration of the register *not* to be made. (Note the double/triple negative.). Essentially he reasoned that it was simply hard luck for Ms Rees; the loss of the rights flowing from her unprotected s.42 notice was simply the consequence of the want of registration and the operation of s.29 of the 2002 Act which conferred priority on the Second Defendant as purchaser of the freehold. This was despite the fact that to obtain a new lease based on the later s.42 notice would likely cost Ms Rees an extra £1.8 million. A harsh outcome some might think.

The appeal

Ms Rees appealed the decision that it was not unjust to refuse rectification of the registers of title. For their part, the Defendants, by a respondents' notice, advanced a contention that in any event it was not open to the court to order rectification which would have the effect of retrospectively reviving the 2011 s.42 notice. The s.42 notice had, so they said, died on the registration of the transfer of the freehold to the Second Defendant in 2017 and could not later be resurrected. Hence, they submitted, the court could not make a consequential order that the Second Defendant was bound by the s.42 notice.

Snowden J, hearing the appeal, considered that logically the Defendants' contention should be considered first.

Retrospective rectification?

Sch.4, para.8 to the 2002 Act provides that the powers under Sch.4 to alter the register, so far as relating to rectification, extend to changing *for the future* the priority of any interest affecting the registered estate or charge concerned.

The Defendants argued that rectification could not operate retrospectively so as to treat the Second Defendant freeholder as always having been bound by the s.42 notice, i.e. as if the s.42 notice had been the subject of a unilateral notice on the register at all material times.

The difficulty for the Defendants was the decision of the Court of Appeal in *MacLeod v Gold Harp* [2015] 1 WLR 1249. Indeed, Snowden J held @ [33] that *Gold Harp* is clear authority for the proposition that when granting rectification the court has power to make ancillary orders to correct the consequences of the mistake, and if necessary can do so by changing priorities as between the respective interests of the applicant and respondent in a manner that gives the applicant's interest the priority which it should have had, but for the mistake.

The Defendants tried to distinguish *Gold Harp*, relying on *Curzon v Wolstenholme* [2018] P&CR 9, CA. That attempt failed. As Snowden J noted, *Curzon* (which concerned an unprotected notice of a claim to collective enfranchisement given under s.13 of the 1993 Act) was *not* a case involving any *mistake* in relation to the protection of a notice on the register of title. All that had happened in *Curzon* was that the beneficiary of the notice had failed to make any attempt to register it, leading the freeholder to seek to take advantage of the omission.

Snowden J remarked that, in the light of Sch.4 and *Gold Harp*, it is impossible to see why the court should be powerless to grant meaningful relief. Alteration of the register is incomplete and valueless if the court is unable to deal with the consequences of the mistake which is the basis for the alteration. In his view, the court has the power to order alteration of the register and, to give that remedy value, to make an order giving a (trumped) s.42 notice the priority over the interest of the freeholder which it would have had but for the mistake on the register.

In *NRAM v Evans* [2018] 1 WLR 639, CA Kitchen LJ said of Sch.4, para.8:

> "It is a power to change for the future the priority of any interest affecting the estate *and not in some way to backdate the alteration or, in the words of the judge's order, to re-register the charge "as if it had never been removed*"."

However, Snowden J observed that these remarks were *obiter* and irreconcilable with the reasoning in *Gold Harp* which decision he considered he should plainly follow. In his judgment, the court did have jurisdiction to make orders consequential on alteration of the register to put the parties in the position they would have been in had there been no mistake by HMLR in 2011, i.e. had the unilateral notice been registered against the freehold title then.

Unjust not to rectify?

So Ms Rees saw off the first challenge. Could she get home though? This would depend on whether she could secure rectification of the registers of title, i.e. whether she could reverse HHJ Gerald's decision that it was not unjust not to rectify.

On this issue Snowden J (endorsing the views of the Law Commission) remarked that:

- The unjust not to rectify condition is more demanding than the exceptional conditions condition (which requires proof of 'exceptional circumstances' in cases where rectification is claimed against someone who is not a registered proprietor in possession, i.e. where the tables are turned from the position in *Rees*).
- Where applicable the exceptional circumstances condition provides a reason not to do something which would otherwise be done.
- By contrast, the unjust not to rectify condition, which provides a reason to do something which would otherwise not be done, operates at a different level of intensity: it *positively* requires that it is unjust not to rectify.

So what did Ms Rees argue? Well, she contended that there were four reasons why it would be unjust not to rectify:

A. HMLR's mistake in refusing to register the unilateral notice in 2011 had been 'serious and deliberate'.
B. The Second Defendant had known that the s.42 notice was unprotected.
C. She would suffer substantial detriment (the likely £1.8 million increase in lease premium) if denied the ability to rely on the 2011 s.42 notice.
D. The First Defendant (as the new competent landlord) would obtain a corresponding windfall.

Ms Rees' arguments came to nothing. All four reasons were held to be insufficient to warrant the conclusion that it was unjust not to rectify.

Mistake

As to the mistake, Snowden J held that (in the light of Sch.4, para.1) a mistake is an essential requirement for *any* claim for rectification. Accordingly, categorisation of a mistake as 'serious and deliberate' added nothing of relevance. Moreover, although HMLR had made an error, the error was simply a genuine mistake.

Knowledge

So far as knowledge was concerned, it was common ground that the Second Defendant had known that the s.42 notice was not protected by a unilateral notice against the freehold title. However, it had not known *the reasons* for that absence at that time.

HHJ Gerald had stated that the very purpose of the system of registration is to immunise a purchaser for valuable consideration from anything which has not been registered. Snowden J thought that was going too far since the availability of rectification under Sch.4 to the 2002 Act provides a limited exception to absolute immunity. Snowden J also eschewed the notion that a proprietor's knowledge of any unprotected interest, however extensive, can *never* be relevant to a rectification case.

However, that point made no difference in *Rees*. The facts were a world apart from those in *Gold Harp* in which the registered proprietor was not independent of the former landlord which had been guilty of sharp practice in bringing about the mistake on the register. In *Rees* the Second Defendant had not caused or contributed to the mistaken omission of the unilateral notice. Further, it did not know why the notice was absent, let alone that it had been the result of a mistake by HMLR.

Snowden J noted that, if 'mere knowledge' of the existence of an unprotected interest could expose a prospective purchaser to a material risk of a rectification claim if it was subsequently to turn out that there had been a mistake falling within Sch.4, then any purchaser would be left in an invidious position. It would have to proceed and run a risk, or seek comfort from the vendor, or enquire of the third party. These considerations led Snowden J to conclude that to give such a low level of knowledge *any* weight in the scales when determining whether it is unjust not to rectify would undermine the core purpose of the registration system (which is to make conveyancing faster, easier and cheaper).

Therefore he held that HHJ Gerald had been correct on the facts not to place any weight on the mere fact that the Second Defendant had been aware that the s.42 notice was not the subject of a unilateral notice on the freehold title when deciding whether the unjust not to rectify condition was met.

Detriment and windfall

That left the related matters of detriment and windfall.

On detriment, again Snowden J upheld HHJ Gerald's reasoning. HHJ Gerald had said that the loss of rights through non-protection by notice is simply a function of the 2002 Act, and that if it had been intended that there should be some value-based criteria for granting relief from those consequences via the medium of rectification, Sch.4, para.3 would have been drafted in different terms. Snowden J fully agreed. The value of the rights lost by Ms Rees was irrelevant.

Furthermore, to the extent that Ms Rees would have to pay more for a new lease (pursuant to the 2017 s.42 notice) if rectification were refused, the Defendants would receive a correspondingly smaller premium if rectification were allowed. Therefore, the financial sum in issue by way of premium was neutral. Thus, the size of the differential in premium could not, without more, be taken into account for the purposes of the unjust not to rectify condition.

Was there more? What of the 'windfall' argument? As a matter of principle, Snowden J accepted, as had HHJ Gerald, that rectification *may* lie on the basis that it would be unjust not to grant it in cases where the mistake has resulted in the registered proprietor getting a potential windfall which was never part of its bargain: see e.g. *Sainsbury's Supermarkets Ltd v Olympia Homes Ltd* [2016] 1 P&CR 17.

However, this principle did not avail Ms Rees. On the facts, the Second Defendant had not obtained any windfall. When it had acquired the freehold the price it paid (in the context of the collective enfranchisement) had in no way been affected/discounted by reason of Ms Rees' s.42 notice. This was because the price for the freehold was determined as at the (2009) date of the s.13 notice which preceded the service of her s.42 notice. The Second Defendant had never expected to take subject to the s.42 notice; quite the reverse. There was, in truth, no windfall.

Consequently, although Ms Rees might have to pay an extra £1.8 million to acquire a new lease courtesy of the second (2017) s.42 notice, that did not make it unjust not to order rectification of the register.

Indemnity relevance?

Snowden J also added that the existence of a possible indemnity under Sch.8 to the 2002 Act, either for Ms Rees (if rectification were refused) or for the Defendants (if rectification were granted) was an essentially neutral matter. He could not judge whether one or other would be likely to end up being less fully compensated than the other. That being so, the possibility of any indemnity did not advance Ms Rees' case that it would be unjust not to rectify.

Outcome

In the result, the appeal was dismissed, leaving Ms Rees unable to rely on the original s.42 notice which had not been protected because of a manifest error by HMLR, and potentially having to dig much deeper to fund the acquisition of the new lease she desires.

Commentary

The following points may be drawn from the decision in *Rees*.

First, where rectification is sought against a registered proprietor of an estate in land who is in possession the burden lies firmly on the applicant for rectification to prove one of the conditions in Sch.4, para.3(2).

Second, in relation to the unjust not to rectify condition in Sch.4, para.3(2)(b) it is <u>not</u> enough that it would be just to rectify the register in the applicant's favour. To prevail, the applicant must go further and demonstrate that it would be positively unjust not to rectify. This is an exacting demand.

Third, such requirement is stronger than the exceptional circumstances condition in Sch.4, para.3(3). This is in line with the conclusion of the Court of Appeal in *Dhillon v Barclays Bank plc* [2020] EWCA Civ 619 (a decision handed down just one day before that in *Rees*) @ [51].

Fourth, since a mistake is a fundamental facet of any rectification claim, the categorisation of that mistake (as 'serious' or otherwise) is irrelevant when it comes to assessing whether or not it is unjust not to order rectification of the register.

Fifth, the mere fact that a purchaser knows that a subsisting right or interest has not been protected by entry of a notice will not, of itself, be weighed in the balance for the purposes of the unjust not to rectify condition. There exists the possibility of a different

approach/conclusion in a case where the purchaser is positively aware of the existence of a mistake in that regard – but, in basic terms, the purchaser may rely on the sanctity of the register. Although it is too strong to say that knowledge can *never* be relevant, it will *hardly ever* be so. Certainly, knowledge of non-registration *without more* will count for nothing.

Sixth, because it is inevitable that financial loss will be occasioned by dint of the loss of priority of an unprotected right or interest, the quantum of such loss is, of itself, irrelevant for the purposes of the unjust not to rectify condition. Loss (of whatever order) is simply the function of the working of the system of land registration.

Seventh, although the fact that a purchaser will, absent rectification, obtain a windfall may potentially count in favour of a conclusion that it would be unjust not to rectify, it is necessary to establish that a true (cf illusory) windfall will otherwise result. That may be the case if the purchaser has obtained the property at a price discounted to reflect the existence of the right or interest to which it *prima facie* takes priority. However, if the purchaser has paid full value for the property on the basis that it will not be bound by the unprotected right, there can be no suggestion of it obtaining a windfall.

Eighth, it is unlikely that a necessarily speculative assessment as to the outcome of any Sch.8 indemnity claim will be of material consequence in the context of an appraisal for the purposes of the unjust not to rectify condition. Again, Snowden J's view in this respect is broadly in tune with the views of the Court of Appeal in *Dhillon* @ [87] where it was said (in the context of the exceptional circumstances condition), "it seems … that the very highest that it can be put is that the possibility of an indemnity is a factor which may, in certain cases, be relevant".

Ninth, if (despite the odds) rectification can be obtained, the court does have (per *Gold Harp*) the power to make consequential orders so that the effect is to restore all concerned to the situation in which they would have been had the mistake not been made. If the position were otherwise, rectification might be an empty gesture. Sch.4, para.8 ensures that it is not.

Overview

Snowden J's reminder – based on the statutory wording (and in accordance with the policy of the 2002 Act) – that the unjust not to rectify condition in Sch.3, para.2(b) requires more than merely showing that it would be just to rectify should be writ large in the minds of all who deal

with Sch.4 applications. The question is not: is it just to rectify? The question is: is it unjust not to rectify? The difference is important.

Also, his views in relation to what may and may not come into the reckoning when determining whether it is unjust not to rectify provide welcome clarity and certainty for practitioners on several aspects (in particular, on knowledge, windfall and indemnity) which feature in many cases, even if the ultimate result in this particular case may have been a hard one for Ms Rees.

Indeed, it may be noted that Ms Rees was indeed the victim of a combination of circumstances and statutory provisions which were set against her (besides the unfortunate occurrence of the mistake by HMLR which had not been challenged by her then solicitors in 2011). For one thing, she could not assert an overriding interest (under the 2002 Act, Sch.3, para.2) in respect of her entitlement to a new lease; this is barred by s.97(1) of the 1993 Act. For another, it is ironic that the effect of s.131 of the 2002 Act was to deem her possession of Flat K that of the Second Defendant, thereby conferring on the Second Defendant the tender protection given to registered proprietors in possession by Sch.4, para.3(2). The cards were certainly stacked against her. As Snowden J put it, the situation was counter-intuitive.

That said, all is not necessarily lost for Ms Rees. As was noted by Snowden J, it seems likely that she will have a potential claim against HMLR for an indemnity under Sch.8 to the 2002 Act, together with a possible claim against her former solicitors. Therefore, she is not without remedy. Further, she remains entitled to a new lease, albeit not pursuant to the 2011 s.42 notice (but instead founded on the 2017 notice) and at a likely increased price.

The decision in *Rees* can be found here.

MARTIN DRAY

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