

Fraud, Rectification and Land Registration

A Choice

“We can do this the easy way, or the hard way” is in the top ten list of the most over-used lines in cinema.¹ It now applies to the resolution of disputes involving rectification of the register following fraud. The first thing to say about *Bakrania v (1) Lloyds Bank (2) Souris*² is that as a decision of the Land Registration Division, Property Chamber of the First Tier Tribunal, it carries no formal precedential authority. The second is that it exemplifies the current uncertainty about the application of the rectification and indemnity provisions of the Land Registration Act 2002. In simple terms, the case asks whether we should apply the Act in the manner favoured by registration “hard liners” (that is, literally, believing that the Act really was meant to change our conception of title to land) or whether we should interpret the Act in the context of pre-registration property principles, especially where title has been acquired following a fraud.³

Bakrania raised familiar facts. The applicants were the former registered proprietors of a house that, they alleged, had been fraudulently transferred to joint-proprietors of similar names. Those joint-proprietors had then sold it to Mr and Mrs Souris, who now lived there. The Souris had purchased it with the aid of a mortgage from Lloyds Bank and the fraudsters and the money had disappeared. Consequently, the Bakranias⁴ applied for alteration of the register on the ground of mistake, asking that Mr and Mrs Souris and Lloyds Bank be removed from the register, with title reverting to them unencumbered by any mortgage. Originally, the application had been stayed pending the decision of the Court of Appeal in *Swift 1st v The Chief Land Registrar*,⁵ but now consideration could be given to their application for alteration under Schedule 4 to the Land Registration Act 2002 and to the question of indemnity within Schedule 8. As a preliminary, not only was it common ground that registration of a proprietor following a fraudulent transaction was a “mistake” within Schedule 4, but more importantly, that the initial mistake tainted all subsequent dealings with the title. Thus, it was accepted that the registration of the later transactions (Mr & Mrs Souris as proprietors and Lloyds Bank as mortgagee) were also “mistakes” that could be dealt with under Schedule 4.⁶ This, hopefully, lays to rest the argument that it is only the initial, fraudulent, transaction that is “mistaken”, although it might fuel the (arguably hypothetical) fears identified by the Law Commission of long-delayed rectification applications against persons at the end of a chain of transactions.⁷ However, after this moment of clarity, things become complicated. We now step into the muddy waters of the meaning of Schedule 4 and its relationship to pre-registration property principles, made all the more pressing because

¹ <http://www.shortlist.com/entertainment/the-20-most-overused-lines-in-cinema#gallery-1>

² [2017] UKFTT 0364 (PC)

³ The memorable “tail and dog” analogy presented by Lady Hale in *Scott v Southern Pacific Mortgages* [2014] UKSC 52 at para.96/

⁴ The two survivors of the three siblings who were once registered proprietors.

⁵ [2015] EWCA Civ 330, [2015] 3 WLR 239.

⁶ See *MacLeod v Gold Harp Properties* [2015] 1 WKR 1249, and the non-binding Tribunal decisions in *Ajibade v Bank of Scotland* [2008] EWLandRA 2006_0163 and *Knights Construction v Roberto Mac* [2011] EWLandRA 2009_1459.

⁷ *Updating the Land Registration Act 2002: A Consultation Paper*, No.227. para.13.98 et seq.

two innocent parties⁸ are claiming the land, with the disappointed party likely to recover “only” an indemnity.

(i) *The easy way*

A simple, clear and, it is submitted, entirely accurate way to approach this case and all cases like it, is to apply the 2002 Act as if it means what it says. Following from *Swift Ist*, it can no longer be argued that the applicants retained any interest in the property once it had been registered in the names of new proprietors, even if the new proprietors had acquired it fraudulently or from a fraudster. In short, a “void” transaction has no meaning in the law of registered title because s.58 LRA 2002 deems the registration to be effective to transfer absolute ownership. Consequently, the Bakranias as former owners would have no interest under a trust or similar which could be used to challenge the new proprietors.⁹ Therefore, to remove the title from Mr and Mrs Souris (and to vacate the bank’s charge) could be done *only* within the confines of the Land Registration Act, Schedule 4. We cannot drag pre-registration principles into the mix in the way espoused by *Malory Enterprises v Cheshire Homes*¹⁰ and *Fitzwilliam v Richall*¹¹ and ultimately rejected by *Swift Ist*. Further, to remove the new proprietors and absolute owners in these cases would be a “rectification” within that Schedule because it would *prejudicially* affect the title of a registered proprietor.¹² This is important because a “rectification” (as opposed to a mere “alteration”) *cannot* be ordered against a proprietor in possession unless they consent, they substantially caused or contributed to the mistake or it would be unjust not to rectify the register.¹³ Hey presto, as if by statutory magic, and subject only to the proviso of unjustness, which is not to be interpreted liberally,¹⁴ where an innocent proprietor is in possession in relation to a rectification, the register is unlikely to be altered. The former owner would collect an indemnity if they qualified within Schedule 8. The law is clear. Title is guaranteed and we can all rely on the Register safe in the knowledge that our innocent ownership is unlikely to be undone.

This would have disposed of the matter, leaving Mr and Mrs Souris as registered proprietors, the bank with a registered charge, and the applicants to an indemnity claim under Schedule 8.¹⁵ Unfortunately, the Tribunal Judge felt unable to take this pain-free path and instead felt driven to take the hard way, even though she arrived at the same place. She did this because, it is submitted, previous case law fails to recognise that the 2002 Act is not, in this respect, a re-incarnation of the 1925 Act.

⁸ In this case, there was an unresolved issue as to whether the applicants knew the fraudsters and, perhaps, even authorised the transfer to them. However, it was accepted that the first transfer was indeed a forgery and not executed by the applicants and, for the purposes of the hearing, further accepted that the applicants were not involved in any way with that transfer. Their potential, but unproven, involvement might affect their claim to an indemnity if title remained with Mr and Mrs Souris.

⁹ This was fully accepted by the Tribunal Judge.

¹⁰ [2002] Ch 216

¹¹ [2013] EWHC 86 (Ch), [2013] 1 P&CR 19

¹² Schedule 4 para. 1(b) LRA 2002.

¹³ Schedule 4 para. 6(2) LRA 2002.

¹⁴ *Bakrania*, para.89.

¹⁵ This might not have been to the applicants’ liking because the indemnity would have to be calculated by reference to the value immediately *before the mistake*, not immediately before *the rectification*, Schedule 8 para.1. So, the indemnity would have been much greater for Mr and Mrs Souris, than the Bakranias.

(ii) *The hard way*

The key to understanding the importance of the arguments raised in this case is the difference between an “alteration” and a “rectification” under the 2002 Act. Under the Act, an “alteration” must be made unless the circumstances are exceptional,¹⁶ but a “rectification” against a proprietor in possession is very difficult to achieve (as above). If the Bakranias could establish that they were asking for an “alteration”, they would have a much better chance of recovering their property.¹⁷ It would be an “alteration” if the Souris’ title was compromised by a pre-existing right, because then it would not be *the alteration* itself which prejudicially affected their title (which is the definition of a “rectification”¹⁸) but that pre-existing right. Hence the search for a pre-existing right which might have bound the title in the hands of the Souris and the bank.

Of course, as above, *Swift 1st* ensures that a defrauded former owner retains no beneficial interest in the land sufficient to establish an overriding interest which could affect the new owner’s title. However, it was argued – and accepted by the Tribunal Judge – that the “right” to rectify the register enjoyed by the Bakranias was a proprietary entity which could, in appropriate circumstances, bind the new registered proprietors. This would mean that the new proprietors’ title could have been comprised in their hands when they acquired it – either by an entry of a Notice on the Register protecting the “right to rectify” (which there was not) or because it amounted to an overriding interest within Schedule 3 to the Act (being supported by the Bakranias’ discoverable actual occupation). In turn, changing the register would not therefore *prejudicially* affect their title, because it would have been already affected. Hence, any change would be an “alteration”, not a rectification and so much more likely to succeed.

The idea that a former owner who can establish a mistake has a “right” to rectify the register is, in my view, mistaken and wrong. Even if such a right exists, it is by no means clear that it is proprietary and capable of binding the new registered proprietors.¹⁹ However, the Tribunal Judge thought bound to conclude otherwise, and accepted that the Bakranias had such a right and that it was *capable* of binding Mr and Mrs Souris.²⁰ This led, in turn, to further complexity. To have priority to Mr and Mrs Souris and Lloyds Bank, the Bakranias would have to show that this “right” endured immediately prior to the registration of Mr and Mrs Souris and that it took priority under s.29 LRA 2002.

The Tribunal Judge decided, for two alternative reasons, that the Bakranias “right” to rectify did *not* have priority to the new proprietors. So, in the end, the Souris did take the title unencumbered and removing them would be a rectification against a proprietor in possession and would not succeed. However, this route is tortuous and massively over-complicates the law of land registration. First, the Judge decided that the “right” to rectify had been overreached by the sale to Mr and Mrs Souris, having been concluded by two trustees of land

¹⁶ Schedule 5 para. 6(3). See *Paton v Todd* [2012] EWHC 1248 (Ch)

¹⁷ Although in this case the Tribunal Judge in fact decided (should it be necessary) that there *would* have been exceptional circumstances justifying a refusal to alter the register, *Bakrania* para.93. It is not self-evident that there were exceptional (i.e. that there was fraud or that the Souris would lose more than the Bakranias) as opposed to being merely a consequence of the Act’s title by registration system.

¹⁸ Schedule 4 para.1

¹⁹ See Dixon, *Rectifying the register under the LRA 2002: the Malory 2 non-problem* [2016] Conv. 382; Cooper and Lees, *Interests, Powers and Mere Equities in Modern Land Law* (2017) 37 OJLS 435.

²⁰ It is not clear why the Tribunal Judge accepted this, *Bakrania* at para.21, as neither of the authorities cited decide this.

as joint-owners. This is interesting because it suggests – like *Mortgage Express v Lambert*²¹ – that overreaching is not limited to beneficial interests behind trusts of land but extends to other types of equitable right (here the alleged right to rectify the register). It also confirms that even mistakenly registered proprietors – the fraudsters in this case – have the power to conduct an overreaching transaction, presumably because of s.23 LRA 1925. As far as I am aware, this has never been decided before, although I would agree entirely that it is right (just unnecessary in this case). Secondly, just in case the Judge was wrong on the overreaching point, she concluded that, in any event, the Bakranias could not maintain priority under s.29 LRA because their “right” to rectify (not being entered by means of a Notice on the Register) did not amount to an overriding interest within Schedule 3 LRA 2002. This was because the “right” holders were not in actual occupation of the land at the time of the Souris’ registration and, even if they were, this occupation was not “discoverable” on a reasonable inspection of the land.²² Hey presto, but not by the statutory magic of the LRA 2002, the Souris’ title was unencumbered at the time of their registration. So, to remove their title would be to *prejudicially* affect them and would be a rectification. There were no reasons to disturb the proprietor in possession in the light of this rectification because they did not consent, they were not the cause of the mistake and it was not unjust not to rectify. The Bakranias should claim an indemnity under Schedule 8.

These issues are not academic. It is not inevitable (or even likely) that the easy way and the hard way reach the same destination. The “easy way” promotes a view of land registration that is simple, clear and effective. It sees the jurisdiction to alter/rectify the register consequent on a mistake as one issue. And the question of how to deal with that mistake as giving rise to a completely separate jurisdiction which is to be exercised by applying Schedule 4 to the Act and nothing else. The counterbalance to this simplicity is the indemnity for the innocent person deprived of the land.²³ The “hard way” cannot let go of the idea that a mistake *should* have consequences for the new proprietor. *Swift Ist* put paid to one strand of reasoning that championed this, but the so-called right to rectify lives on, at least for some, and continues to complicate our understanding. To quote that modern fable, “Let it Go!”.

Martin Dixon.

²¹ [2016] EWCA Civ 555

²² This is all fact based and fully justified on the evidence.

²³ And in a welcome aside, the Judge notes that the different levels of potential indemnity for the original owner (less money as the relevant time for assessment is the time of the mistake) and the new owner (more money as the relevant time for assessment is the later time of the rectification) is not to be regarded as sufficient to make the refusal to rectify “unjust”, see para. 89 et seq.