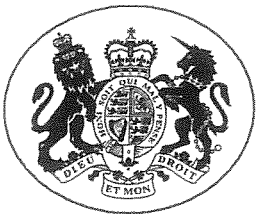


[2019] UKFTT 445 (PC)

PROPERTY CHAMBER
FIRST – TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY
LAND REGISTRATION ACT 2002

2017/1082 and 2018/0571

BETWEEN:

STEPHEN ANDREW SMITH

APPLICANT

and

PHILIP COCKBURN

RESPONDENT

Property Address: Land and Buildings at Ferryboat Lane, North Hylton SR5 3HW

Title Numbers: TY278910, TY511217, TY243468 and TY183833

Before: Mr Simon Brilliant sitting as Judge of the Property Chamber of the First-tier Tribunal

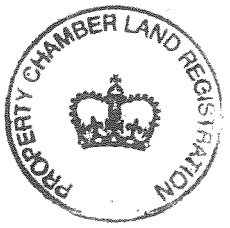
The Chief Land Registrar is directed:

(a) to give effect to the respondent's original application dated 18 August 2017 and register the respondent as the proprietor of the properties, as if the objection had not been made.

(b) to cancel the applicant's original application to rectify the register dated 12 September 2017.

Dated 3 June 2019

Simon Brilliant



BY ORDER OF THE JUDGE OF THE PROPERTY CHAMBER OF THE FIRST – TIER TRIBUNAL

[2019] UKFTT 0445 (PC)

PROPERTY CHAMBER
FIRST – TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

2017/1082 and 2018/0571

BETWEEN:

STEPHEN ANDREW SMITH

APPLICANT

and

PHILIP COCKBURN

RESPONDENT

Property Address: Land and Buildings at Ferryboat Lane, North Hylton SR5 3HW

Title Numbers: TY278910, TY511217, TY243468 and TY183833

Before: Mr Simon Brilliant sitting as Judge of the Property Chamber of the First-tier Tribunal

Sitting at: Sunderland Courts and Tribunal Centre, Gillbridge Avenue, Sunderland SR1 3AP.

On: 25 and 26 March 2019

Applicant's representation:	**Mr T Wigglesworth of counsel**
Respondent's representation:	**Ms M Jewitt (lay representative)**

Alteration of the register - rectification – applicant proprietor of four titles- applicant agrees to transfer one title to G - transfer altered to include the other three titles - issue as to whether the alteration was fraudulent or not - G registered as the proprietor of all four titles and transfers all of them to respondent - applicant applies to be reinstated as the proprietor of all four titles — if the transfer was altered fraudulently issues as to whether the applicant has an overriding interest, whether the respondent is a proprietor in possession or whether there are exceptional circumstances not to make an order for rectification but allow respondent to be registered as the proprietor

Pigot's Case (1614) 11 Co Rep 26b, 27a; Fitzwilliam v Richall Holdings Services Ltd [2013] EWHC 89 (Ch), [101]; Gold Harp Properties Ltd v MacLeod [2015] 1 WLR 1249.

Background

1. In May 2017, the applicant was the registered proprietor of four adjacent titles beside the River Wear ("the properties"). The titles were:

(1) TY278910 ("910").

(2) TY183833 ("833").

(3) TY243468 ("468")

(4) TY511217 ("217").

2. The applicant says that on 9 June 2017 he transferred 910 only to Mrs de Wulf for no consideration by a form TR1 ("TR1A") so that it could be used by her as security for a £50,000 loan she hoped to obtain for a business venture from Barclays Bank plc.

3. On 13 June 2017, Mrs de Wulf was registered as the proprietor of 910.

4. On 4 July 2017, Mrs de Wulf was also registered as the proprietor of the other three titles.

5. However, the applicant denies that he ever transferred the other three titles to her. He says that she must have altered TR1A, by dishonestly making changes to it, so that on its face it included the three other titles as well as 910 ("TR1B"). I shall refer to this transfer of all the properties as "the first transfer".

6. By a transfer dated 18 August 2017, Mrs de Wulf transferred the properties to the respondent for £110,000 by form TR1 ("TR1C"). I shall refer to this transfer of the properties as "the second transfer".

7. Whether or not she had forged TR1B, Mrs de Wulf was undoubtedly the registered proprietor of the properties at the date of the second transfer. Accordingly, she had the power, by virtue of section 58 of the Land Registration Act 2012 ("the Act"), to pass a good title to the properties to the respondent.

8. On 24 August 2017, the respondent applied to Land Registry to be registered as the proprietor of the properties in place of Mrs De Wulf ("the first original application").

9. On 4 September 2017, Land Registry sent a notice to the applicant informing him that the first original application had been received.

10. The applicant says that this was the first time he learned he was no longer the proprietor of titles 833, 468 and 217.

11. On 14 September 2017, the applicant objected to the first original application. The dispute was referred to the First-tier Tribunal on 20 November 2017 under section 73(7) of the 2002 Act and given reference number 2017/1082 ("the first reference").

12. The First-tier Tribunal pointed out to the applicant that the second transfer by form TR1C was valid, unless and until the applicant was reinstated as the proprietor of the properties

in place of Mrs de Wulf.

13. Accordingly, on 12 September 2017, the applicant applied to Land Registry to be reinstated as the proprietor of the properties in place of Mrs de Wulf ("the second original application").

14. On 5 April 2018, the respondent objected to the second original application. On 3 July 2018, the dispute was referred to the First-tier Tribunal under reference number 2018/0571 ("the second reference").

15. Both the first and second references have been case managed and tried together.

All

16. The properties include a pumping station, boathouses and slipways. They have seen better times. They also include what, until recently, has been the applicant's residence. This is a building which was converted into a house from a marine supplies shop about 30 years ago ("the house"). The house is unfit for human habitation: see paragraphs 47 and 48 below.

The witnesses

17. The applicant gave oral evidence. At the time of the hearing he was 76 years old. His health is not good. He is registered disabled and is on seven different medications. At the hearing his mobility appeared to be impaired, he was dishevelled and he was clearly confused, although no one has suggested he does not have capacity. He has prostate cancer, but has declined invasive investigations. He suffered a fall on 20 September 2018, which led to a hospital visit but the notes disclose no lasting injury. However, Ms Jewitt says that his memory has declined since the fall.

18. Some would regard the applicant as being eccentric, particularly in his choice of living conditions as explained below. However, it is fair to say that he is a cultivated man who enjoys singing and music, and he had a not undistinguished career as a mariner. He is by all accounts a very kind man and, fortunately, has a number of friends who are able to give him comfort and assistance in what are difficult times for him. One of those friends is Ms Jewitt, who ably

represented him at the hearing. His case is that his kindness was the cause of his misfortune.

19. Ms Jewitt also gave oral evidence. She allowed the De Wulf family to stay with her until they suddenly disappeared on 19 August 2017. Ms Jewitt represented the applicant and gave the tribunal considerable assistance. She is a good friend to the applicant and supported him through difficult times. Although I do not accept her evidence about where the applicant was living in August 2017, I am sure she was telling the truth as she recollects it.

20. The respondent gave evidence and called no witnesses. He is an experienced businessman who develops property. As I have said, he bought the properties from Mrs de Wulf for £110,000. The applicant contends that the properties are worth about £1 million. However, the respondent has obtained a valuation report, dated 12 September 2018, from Mr Elliott MRICS who inspected the property and concluded that the properties were realistically only amenity space and that the respondent paid a full price in 2017. The costs of clearing the properties together with the abandoned vessels moored there is likely to be in excess of £100,000.

21. The applicant suggest that the respondent has acted dishonestly and obtained the properties at a considerable under value. I reject this suggestion entirely. The respondent has acted in good faith throughout.

The facts leading up to first transfer

22. The applicant first met Mrs de Wulf, together with her husband and children, in May 2017. The circumstances are as follows. Around Easter 2017, the applicant was contacted by Captain Ullah, the Harbourmaster at the Port of Sunderland. The de Wulfs had been living in unsuitable conditions in an old trawler at the Fish Quay. The applicant was asked whether he could provide moorings for their boat.

23. The applicant agreed. The boat arrived on 20 May 2017. The boat subsequently sank, but the de Wulfs were rehoused locally. Mr de Wulf told the applicant that he was proposing to set up boating business doing trips up and down the river Wear. He was unable to apply for a loan as he had been declared bankrupt in Belgium. Following a discussion, the applicant

generously decided to give 910 to Mrs de Wulf to enable her to borrow £50,000 from Barclays Bank plc set up boating business.[1]

24. On 9 June 2017, the applicant executed TR1A transferring 910 only to Mrs de Wulf. The consideration was expressed to be not for money. No lawyers were involved on either side and TR1A was completed in handwriting. On the same day, Mrs de Wulf prepared an application to change the register in respect of 910 only. On 5 June 2017, the applicant filled in a proof of identity form which related to 910 only.

25. On 9 June 2017, the applicant and Mrs de Wulf attended the Land Registry offices at Durham. They saw Mr Cole, who has worked for Land Registry for 37 years and has 10 years' experience of verifying identities.

26. Although Mr Cole did not attend to give oral evidence, he provided answers to a number of questions asked by the respondent's solicitors in a letter to the Government Legal Department dated 20 March 2019. I accept his evidence that, when he saw TR1A and the other documents referred to in paragraph 24 above, they only related to 910 and not to the other titles. He sent these documents onto Land Registry's Welsh office which is based in Gloucester. In the course of these proceedings the applicant has suggested either that Mr Cole did his work incompetently, or that he was dishonestly colluding with the respondent. These allegations have no foundation whatsoever, and I acquit Mr Cole of any incompetence on the facts before me, or of any wrongdoing.

27. A number of internal emails were produced by Land Registry which cast light on what happened thereafter. On 13 June 2017 at 09:31 there is a note of a phone call made by Sophie Rogers:

Customer advised that he has forgotten to add two title numbers to his application and wanted to make an appointment to see if he can amend the forms. Referred to Julie Liburn.

28. At 10:46 the same morning Julie Liburn made the following note:

[1] It would, of course, have been wiser for the applicant to have offered 910 as a third party security to the bank for any loan. There was never a loan, so there would never have been a charge against 910.

Application has not been captured as yet. Stop added to day list to ensure caseworker is aware of additional title numbers ([833] and [468]). OCRM passed to Citizen Live Applications for info.

29. Finally, there is a note by Diane Waggott at 09:58 the following day:

*[*Mrs de Wulf*] is coming back in Office to bring new TR one for us to send to Wales? To match up with the appln TY/278910/UO44XMP/048. She was only in on the 9th but forgot to add the other two titles. Does not want email to confirm..*

30. As already explained, the applicant's case is that Mrs de Wulf altered TR1A so that it became TR1B. This was done subsequently to the meeting with Mr Cole. TR1B was re-dated 20 June 2017. TR1B contains four signatures or purported signatures of the applicant evidencing the alterations.

31. On 15 June 2017, Land Registry sent notice of a requisition to Mrs de Wulf:

I am writing to inform you that your application affecting the above property [910] , received on 13 June 2017 is being processed, but cannot be completed until you are able to do the following:

1. We refer to your telephone call on 13 June 2017 in which you advised that it was intended that your application should include also other titles.

2. We therefore return herewith ... transfer in form [TR1A] ... .. Please arrange for the forms to be amended to include reference to any other properties and title numbers to which the application relates.

3. Please note that any amendment to the Transfer should be initialled by all parties to the deed.

4. Please return the amended documents, duly initialled where required, to Land

Registry.

Was the first transfer valid?

32. I am entirely satisfied, on the evidence I have heard and read, that the applicant never knew of, and was not involved in, the insertion of the other three title numbers in TR1A. I accept his written evidence which is consistent with Land Registry's emails set out above. His muddled and confused oral evidence can be explained by his general ill health following the stroke and fall.

33. I am satisfied that Mrs de Wulf dishonestly added the three other title numbers to TR1A, so as to acquire title to the properties. The applicant was overgenerous in just transferring 910. There is no reason why he should have transferred the other three titles as well. The sudden disappearance of Mrs de Wulf and her family shortly after the second transfer corroborates her fraudulent intent. TR1B is a forgery and therefore void.

34. The applicant was sent a form B1 by Land Registry dated 4 July 2017 asking him for his consent to the registration of 910, 217 and 468. It refers only to 910 in type. There has been added in manuscript 217 and 468, but there is no mention of 833. On balance, I do not consider that the applicant signed this document. But, if he did, he cannot have appreciated the significance of it.

35. As explained above, 910 was registered in the respondent's name on 13 June 2017 and the other titles were all registered in the respondent's name on 4 July 2017. It might be thought that 910 was registered by virtue of the valid TR1A, whilst the other three titles were registered by virtue of the fraudulent and void TR1B.

36. However, the requisition letter sent out on 15 June 2017, referred to in paragraph 31 above, suggests that TR1A was itself altered to become TR1B, and then sent back to Land Registry. It has been the law for over 400 years that altering a deed in any way at all renders the deed entirely void (Pigot's Case (1614) 11 Co Rep 26b, 27a and Emmet and Farrand 20.027).

37. Accordingly, I find that the first transfer of the properties to Mrs de Wulf was void and of no effect.

The issues

38. Following this finding, the issues I have to determine are:

(1) Does the applicant have an overriding interest which gives his freehold estate in the properties priority over the respondent's title to the properties acquired by the second transfer?

(2) If not, should the applicant be reinstated as the proprietor of the properties?

(3) If not, should the respondent be registered as the proprietor of the properties?

39. In respect of issue (1) I will have to decide whether the applicant was in actual occupation of the properties at the date of the second transfer, namely 18 August 2017.

40. In respect of issue (2) I will have to decide whether the respondent was a proprietor in possession at the date of the second original application, namely 12 September 2017.

Overriding interest, mistake and rectification

Overriding interest

41 The registration of Mrs de Wulf as the proprietor of the properties was a mistake. Had Land Registry known that TR1B was a forgery it would not have registered Mrs de Wulf as the proprietor of any of the four titles.

42. The applicant has an equity to rectify the registers of the properties by being reinstated as the registered proprietor of them in place of Mrs de Wulf. If the applicant was in occupation of the properties at the date of the second transfer to the respondent, then this equity would take precedence as an overriding interest (paragraph 2 of schedule 3 to the 2002 Act). In these

circumstances there will be alteration of the register, but no rectification, because the applicant had at all times a right taking priority over the second transfer (section 29(2)(a)(ii) of the 2002 Act).

43. The requirement of occupation arises from the provisions of paragraph 2(c) of schedule 3 which excludes an interest:

> (i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and
>
> (ii) of which the person to whom the disposition is made does not have actual knowledge at that time.

44. There is a direct conflict of evidence between the applicant and Ms Jewitt, on the one hand, and the respondent, on the other, as to whether the applicant was still in occupation of the properties on 18 August 2017. In his oral evidence, the applicant said he last lived in the house two years ago when the Police and said it was too dangerous, but he did not specify a particular month.

45. Both parties have put into evidence a number of written statements intended for injunction proceedings which were heard in the County Court. By a consent order dated 2 March 2018, those proceedings were stayed pending this decision and each party agreed not to enter any of the properties until the determination of these proceedings.

46. None of the makers of the statements have attended to be cross examined, so I can only put very little or no weight on them.

47. In 2017, the house was in a shocking state. The photographs in the trial bundle show this. There were a few of the applicant's possessions in the house, such as pictures on the wall, but in the main the house seemed to be filled with junk. There was also a caravan with sleeping facilities stationed nearby. Mr Elliott said in his report dated 13 September 2018:

> *There would appear to be a domestic dwelling on the site, though gaining access to this*

property is virtually impossible as the property is so cluttered. We do, however, consider that the dwelling will not be fit for human habitation and is likely to require demolition.

48. Persons living near to the properties had complained about their state to the local Member of Parliament, who in turn contacted the Environment Agency and Sunderland City Council. The latter said in a letter to her dated 26 July 2017:

The council has been pursuing Mr Smith for some time to remove an old caravan and a build up of what can only be described as 'junk', which has been amassed between the rear of the pumping station and the riverbank.

49. The respondent gave credible evidence that he inspected the properties he was buying one week before doing so. At the time of the first transfer, the applicant was not in my judgment in occupation of the properties which had been secured. The respondent was given 10 keys by Mrs de Wulf. Even if the applicant was still in occupation at that time, which I very much doubt, the state of the house was so chaotic that I do not consider a reasonably careful inspection would have revealed that it was occupied.

50. I therefore conclude that the applicant did not have an overriding interest to rectify the register at the time of the second transfer.

Mistake and rectification

51. The power for the tribunal to correct a mistake in the register is to be found in schedule 4 to the Act.

52. Paragraph 1 of schedule 4 to the Act provides that references to rectification, in relation to alteration of the register, are to alteration which involves the correction of a mistake and prejudicially affects the title of a registered proprietor. By removing Mrs de Wulf as the proprietor of the properties, and by refusing the respondent registration as the proprietor of the properties, their respective titles would be prejudicially affected.

53. Paragraph 5(a) provides that the registrar may alter the register for the purpose of correcting a mistake.

54. Paragraph 6(1) applies paragraph 6 to such a power, so far as relating to rectification.

55. Paragraph 6(2) provides no alteration affecting the title of the proprietor of a registered estate in land may be made under paragraph 5 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**.

56. The relevant date for the land to be in proprietor's possession is the date of the relevant application to Land Registry to correct the mistake (Fitzwilliam v Richall Holdings Services Ltd [2013] EWHC 89 (Ch), [101]). In this case it is the second original application, which was made on 12 September 2017.

57. Paragraph 6(3) provides that if on an application under paragraph 5 the registrar has power to make the alteration, the application must be approved, **unless there are exceptional circumstances which justify not making the alteration**. In these proceedings the tribunal is exercising the powers of the registrar.

58. It is now settled law that correcting a mistake includes correcting the consequences of that mistake: Gold Harp Properties Ltd v MacLeod [2015] 1 WLR 1249. The consequence of Mrs de Wulf being mistakenly registered as the proprietor of the properties, was that she was able to transfer the properties to the respondent by the second transfer. The second original application must be taken as including an application that Land Registry should not give effect to the second transfer and should not register the respondent as the proprietor of the properties. This is the mirror image of the applicant's objection to the first original application by which the respondent seeks to be registered as the proprietor of the properties.

59. Mrs de Wulf is not entitled to rely upon the special protection given by paragraph 6(2). It was her fraud which caused mistake to be made.

60. As Mr Wigglesworth pointed out in closing submissions, the respondent is entitled to be treated as the proprietor in possession (if he is in possession) because he is a person who is entitled to be registered as the proprietor of a registered estate: see section 131(1) of the 2002 Act.

61. As stated in paragraph 49 above, I do not consider that the applicant was in possession of the house at the time of the second original application, but I find that the respondent was. The respondent did not go out of possession of the properties until 11 April 2018, the date of the consent order in the County Court proceedings.

62. Accordingly, I cannot make an order rectifying the register without the respondent's consent because (a) the respondent has not by fraud or lack of proper care caused or substantially contributed to the mistake, and (b) I do not consider it would for any other reason be unjust for the alteration not to be made.

63. If I am wrong on this, and I have power to make the alteration, the application must be approved, unless there are exceptional circumstances which justify not making the alteration.

64. Are there are exceptional circumstances which justify not making the alteration? The facts of this case are very unusual, and after careful thought I have reached the conclusion that there are exceptional circumstances (a) not to make the alteration asked for in the second original application, and (b) to give effect to the first original application.

65. The exceptional circumstances are as follows:

(1) The applicant has not lived at the properties for at least 19 months.

(2) The properties are unfit for human habitation.

(3) However deeply he feels about it, the applicant is highly unlikely ever to be fit enough to return to live at the properties.

(4) It would be wholly against his own best interests for the applicant to attempt to return to live at the properties.

(5) If the properties are not cleared, as the respondent intends to do but which would be highly unlikely in the event of the applicant returning, significant environmental damage will continue to occur and a serious nuisance will continue to be suffered by neighbouring landowners.

(6) The respondent has incurred time (several months) and expense (several thousand pounds) in beginning to clear the properties of the significant amounts of junk which have accumulated. In particular, asbestos needs to be removed and the estimated cost of this is £24,906.50 plus VAT.

(7) The applicant has recourse to Land Registry's indemnity.

Conclusion

66. I will direct Land Registry:

(a) to give effect to the first original application and direct the respondent to be registered as the proprietor of the properties, as if the objection had not been made.

(b) to cancel the second original application.

66. Costs are to follow the event. The respondent must provide to the applicant and the tribunal within 14 days a schedule of costs in form N260 so I can determine whether there should be a summary or detailed assessment.

Dated this 3rd day of June 2019

Simon Brilliant

BY ORDER OF THE JUDGE OF THE PROPERTY CHAMBER OF THE FIRST- TIER TRIBUNAL