Neutral Citation Number: [2011] EWCA Civ 120

Case No: A3/2010/0785

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHANCERY DIVISION
THE HON MR JUSTICE HENDERSON
[2010] EWHC 573 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

22/02/2011

B e f o r e :

THE RT HON LORD JUSTICE MUMMERY
THE RT HON LORD JUSTICE JACOB
and
THE RT HON LORD JUSTICE TOMLINSON

Between:

Steven John Baxter	**Appellant**
- and -	
Thomas Francis Mannion	**Respondent**

Ms Helen Galley (instructed by MA Law LLP) for the Appellant
Mr Tom Weekes (instructed by Taylor Vinters) for the Respondent
Hearing date: 25 January 2011

Lord Justice Jacob (giving the first judgement at the invitation of Mummery LJ)**:**

1. Mummery LJ gave permission for this second appeal because he considered it raises an important question of principle. And so it does. It is this: can a man who has got his name registered as the proprietor of a parcel of registered land by wrongly claiming that he had been in adverse possession for ten years hang on to that title if the original proprietor, within 65 days of its being posted to him, failed to fill up and return a form posted to him by the Land Registry? Or can the original proprietor apply to the Registrar to have the register of title rectified by "correcting a mistake"? Does the machinery of the Land Registration Act 2002 allow a party to take someone else's land by operation of a bureaucratic machinery which trumps reality?

2. The appeal is from a judgement of Henderson J of 18th March 2010, [2010] EWHC 473 (Ch) upholding a decision of a deputy Adjudicator to the Land Registry, Ann McAllister, of 5th February 2009. It is about a small field in Chatteris, a little market town near Ely in Cambridgeshire. The dispute is between Mr Mannion, the original registered proprietor of the field, and Mr Baxter who successfully invoked the procedure under the Act to get himself registered as the proprietor instead of Mr Mannion. Having found out about this, Mr Mannion applied to the Registrar to have his name put back as the owner and that of Mr Baxter removed. Mr Baxter in turn applied for registration of a right of way over a yard leading to the field. Nothing turns on this later application and I say no more about it.

The Legislation

3. Rather than clutter up this judgement with the relevant text of the legislation, the Land Registration Act 2002, I have set it out in an annex.

4. The Act was the result of much work by and ultimate recommendations of the Law Commission and HM Land Registry. The Commission and HM Land Registry published a consultative report in 1998, "Land Registration for the Twenty-First Century: a Consultative Document" (LC254) and a final report "Land Registration for the Twenty-First Century, A Conveyancing Revolution" (LC271). The final report was accompanied by a draft Bill. The text of the relevant provisions of the Act is the same as in that draft Bill. It is not surprising, therefore, that both Ms Galley (for Mr Baxter) and Mr Weekes (for Mr Mannion) took us to parts of both reports, each contending that certain parts supported their respective cases.

5. It should be noticed that both the consultative document and the final report were the responsibility of Mr Charles Harpum, who was a Law Commissioner for England and Wales from 1994-2001, head of the Property and Trust Law team at the Commission and a consultant to HM Land Registry during the passage of the Act through Parliament.

What happened in this case

6. Mr Mannion bought the field in 1996 and was duly registered as its proprietor. Over the years Mr Baxter made some use of the field by way of keeping horses on it, though the amount of use was not, the deputy Adjudicator found, either continuous or as extensive as Mr Baxter claimed.

7. In August 2005 Mr Baxter made an application to the Land Registry for registration of the field in his name. The application was made under paragraph 1(1) of Schedule 6. Mr Baxter claimed he had been in adverse possession of the field since 1985, supporting the application with a statutory declaration to that effect. The Registry examined the application. It seemed in order and indeed on its face it apparently was. So, on 1st February 2006, the Registry sent a notice to Mr Mannion as required by paragraph 2(1). The notice contained the paragraph 2(2) warning, stating in bold type that if Mr Mannion objected or wished to give a counternotice to the Chief Land Registrar he must do so before 12 noon on 8th May 2006 (i.e. 65 working days after the date of the notice, that being the period prescribed by rules pursuant to paragraph 3(2)). The notice was accompanied by detailed explanatory notes and a blank form, ("NAP") for Mr Mannion to complete if he wished the application to be dealt with under paragraph 5.

8. The form was simple and would have been very easy to complete. Mr Mannion did receive it. But he did not complete it and send it back in time. There were reasons: he had first consulted a solicitor who said this was not his kind of expertise. Before Mr Mannion could consult another solicitor terrible things happened: his only brother died (in Ireland, where Mr Mannion went to be with him for his last few weeks) and then his grandson of only three weeks died of meningitis. In addition Mr Mannion went to the US for a short period to attend his godson's wedding.

9. It was not until 8th September, some 4 months too late, that Mr Mannion's new solicitors wrote. They asked for an extension of time to deal with the notice. Actually there is no power under the legislation to extend time, whether prospectively or retrospectively. This is a not unimportant matter when one considers whether matters can be put right out of time. In any event the Registry had already acted on Mr Baxter's application, doing so on 8th May soon after the deadline had been passed.

10. The Registry replied saying it was too late and that it had already acted on the application. It added however, that if Mr Mannion wished to pursue the matter he would need to lodge an application for rectification. It is noteworthy that this was the official view: for it indicates that the remedy of rectification could be invoked after a title had been registered pursuant to the Schedule 6 procedure. Whether that view is correct is in issue before us.

11. Mr Mannion took that advice and duly lodged an application for rectification pursuant to Sched. 4. He sought an alteration of the registration of title by way of substituting his name for that of Mr Baxter. He said this would be an alteration *for the purpose of correcting a mistake* within the meaning of Sched. 4 para. 5(a).

12. Mr Baxter challenged the application so the matter was referred to the deputy Adjudicator. She heard the evidence from both sides (which on Mr Mannion's side included a number of neighbours) and held that Mr Baxter had not been in exclusive possession during the relevant period (August 1996 to August 2006) and that he had not had the necessary intention to exclude the world at large. She considered that both limbs of paragraph 6(2) of Sched. 4 were satisfied and ordered the rectification sought.

13. Mr Baxter appealed. His principal point was that there was no "mistake" to be corrected: that the Registry had acted correctly on the material before it. The registration of Mr Baxter as a proprietor was a result of the failure of Mr Mannion to object by filling up and returning the NAP form, not any mistake by anyone.

14. Henderson J rejected that contention. He said:

> [39] …I can see no good reason to confine the jurisdiction of the registrar to the correction of a procedural nature. In my opinion there is a mistake in the register, which the registrar has power to correct, if any statutory condition which a prerequisite for registration, is shown not have been satisfied. ..
>
> And, a little later in the same paragraph:
>
> The precondition refers to a factual test (ten years adverse possession) which has to be satisfied, and upon which a squatter's right to apply for registration is predicated. The paragraph does not say that a squatter may apply for registration.

15. Mr Baxter advanced other points before Henderson J, namely that the deputy Adjudicator had applied the wrong onus of proof and had wrongly considered that Mr Baxter was not at the time of the application for rectification in possession of the land so that the safeguard of Sched. 4 para. 6(2) applied. He also pursued an appeal on the facts.

16. As to the facts, Henderson J, not surprisingly since it involved an overall evaluation of these, rejected the argument. It is only resurrected before us as part of an argument about the burden of proof. As to the onus point, Henderson J accepted that the Adjudicator had apparently got that wrong. But, he held, it made no difference. As to the "in possession" point he again accepted that the Adjudicator had erred. He also held that she had erred in simply saying shortly that both limbs of paragraph 6(2) were satisfied. He thought in particular that a finding about limb (a) (fraud or lack of proper care) required a clear pleading and proper investigation, which had not happened. So he reassessed the position under limb (b) for himself, concluding that it would be unjust for the alteration not to be made.

Points on this appeal

17. Ms Galley takes three points:

    (a) Henderson J was wrong about *correcting a mistake;*

    (b) Henderson J was wrong about the consequences of his decision concerning onus;

    (c) Henderson J was wrong when he held that it would be unjust not to make the alteration.

(a) The meaning of "correcting a mistake"

18. Ms Galley submits that *correcting a mistake* has limited ambit. She did not put it quite as it had been put by leading counsel below, namely that the ambit was limited to procedural mistake. She submitted that the whole purpose of the new procedure was to do away with the previous law under which difficult questions of fact could arise where a squatter claimed the benefit of the Limitation Act. Whether the squatter been in exclusive possession for 12 or more years was a notoriously difficult question to try and created uncertainty in dealings in land which might be subject to "squatter's rights." The inquiry of the deputy Adjudicator in this case was just the sort of dispute the Act was intended to do away with.

19. She submitted that the essence of the new scheme was simplicity so as to give certainty in dealing with ownership of land. The principle is notice after an initial factual examination of the application by the Registrar. There is a limited time period to challenge. (She described it as "generous" but it should be borne in mind that the 65 day period is only provided by the rules – which cannot be used to construe the statute). Failing such challenge title would be registered and everyone would know where they were.

20. Ms Galley supported her contentions by reference to a number of passages in both the consultative and final reports of the Commission and HM Land Registry. I go only to her best ones, to a passage in the consultative document and the two passages in the final report:

    10.2 (of the consultative document) If a system of registered title is to be effective, those who register their titles should be able to rely upon the fact of registration to protect their ownership except where there are compelling reasons to the contrary. All that should be required of them is to keep the Registry informed of their address for service. As we explain below, the land registration system enables registered proprietors to be protected against adverse possession in ways that would be very much harder to achieve where title is unregistered.

    2.74 (of the final report) The essence of the new scheme in the Bill is that it gives a registered proprietor one chance, but only one chance, to terminate a squatter's adverse possession. In summary, a squatter will be able to apply to be registered as proprietor after 10 years' adverse possession. The registered proprietor and certain other persons (such as a chargee) who are interested in the property will be notified of the application. If any of them object, the squatter's application will be rejected, unless he or she can establish one of the very limited exceptional grounds which will entitle him or her to be registered anyway.

    14.34 (of the final report). Where a notice is served by the registrar (as explained in paragraph 14.32) and no counter-notice is served on him within the time prescribed, the registrar *must* approve the squatter's application to be registered as proprietor of the land in place of the existing proprietor. We explain the effect of such registration below, at paragraph 14.71.

21. She submitted that the intention was clear: a once and for all system by way of notice to be followed by a counternotice, failing the latter, registration. That produced the intended clarity, certainty and simplicity

22. Ms Galley also showed us the views of the learned authors Ruoff & Roper, *Law and Practice of Registered Conveyancing* 46/5-6 (the sheets of the loose-leaf work are dated December 2007). They say this:

    The court has power to order the alteration of the register for the purpose of correcting a mistake. The mistake may consist in a mistaken entry on the register or the mistaken omission of an entry which should have been made. Whether an entry on the register is mistaken depends on its effect at the time of registration. So the entry of an estate or interest purportedly arising under a void disposition is a mistake. The entry made on the register does not reflect the true effect of the

purported disposition when the entry was made. However, the entry of a person as having acquired an estate or interest under what proves to be a voidable disposition is not a mistake. Unless it had been rescinded at the time of registration, the disposition would be valid and it would not be a mistake to enter the disponee as the proprietor of the estate or interest under it. An entry cannot retroactively become a mistake. It cannot be argued therefore that the rescission of a voidable transaction retroactively makes the entry which recorded the disposition a mistake. That would undermine the policy of the Act.

It is implicit from this, Ms Galley suggested, that all that matters for the purpose of deciding whether there was a mistake is the position at the time of registration.

23. I am unable to accept these submissions for a variety of reasons which I think are compelling.

24. I start with the language of the Act. Sched. 6(1) says that *a person may apply to the registrar to be registered .. if he has been in adverse possession of an estate.* That surely indicates that a person who has not in fact been in adverse possession is simply not entitled to apply. Parliament cannot have intended that such a person could get registered title. A registration obtained by a person not entitled to apply for it would be mistaken. So, putting the register back in the condition it was prior to the application would be *correction of a mistake* within the meaning of Sched. 4(1) and (5)

25. I can see no reason for limiting *correction of a mistake* to a mistake through some official error in the course of examination of the application, as Ms Galley in part contended for.

26. Secondly, like the Judge, I think the proposed construction would be an invitation to fraud. A dishonest applicant (perhaps knowing the registered proprietor would be away or otherwise unable or unlikely to send in a NAP form in time or at all) could falsely claim he had been in adverse possession for 10 years. His application would succeed because on its face it looked in order and the true owner would lose his land. The fact that there is no possibility of extending the prescribed time means that Parliament either intended that the rectification power could cover such a case or that the true owner could lose his land for want of a form in time. The latter is wholly improbable.

27. Ms Galley felt the force of that. She first suggested the difficulty could be overcome because a fraudulent applicant would be met by a counternotice. But that will not cover the case where the counternotice is not sent back in time – which could include the case where the fraudster knew the Registrar's letter would not be received or, if received, would not be dealt with in time.

28. Her second submission on this point involved a concession: that a registration pursuant to a fraudulent application could amount to a mistake, whereas a registration pursuant to an innocent but mistaken application could not. Thus she accepted that a registration obtained by the use of a forged conveyance could be rectified as *correcting a mistake.* And, when she was pressed by the case of an application made when the applicant knew that the landowner would not respond in time, e.g. because he or she would be away or for some other reason other than mental incapacity – specifically provided for in para. 8 of Sched. 6 – she accepted that that too would be a mistake within the meaning of Sched 4. Her concession was made by a general appeal to the old adage "fraud unravels everything".

29. The insuperable difficulty with this submission is that it is impossible to draw any rational distinction between a mistake induced by fraud and a mistake induced by a wrong application. The reason for the mistake – that the Registrar was given false information – is the same in both cases.

30. Thirdly her submission goes against the policy of the Act as regards obtaining land by adverse possession. That policy was to make it <u>more</u> difficult to do that. It was set out in the consultation document thus:

10.2 We then put forward proposals for a wholly new substantive system of adverse possession that would apply only to registered land, and which is consistent with the principles of title registration. This would offer much greater security of title for a registered proprietor than exists under the present law, and would confine the acquisition of land by adverse possession to cases where it was necessary either in the interests of fairness or to ensure that land remained saleable.

As the Judge observed, "it would be very strange if a registered proprietor could be at risk of losing his land to a squatter who had never been in adverse possession."

31. Fourthly her reliance on Ruoff and Roper is misplaced. Their suggestion that there is a distinction to be drawn between a void and a voidable transaction, interesting though it is, sheds no light on an application made by someone not entitled to apply. I would add that I would reserve my position as to whether the authors are right in their proposed distinction: it is difficult to see why, for instance, a transaction induced by a fraudulent misrepresentation (which would only be voidable) could not be corrected once the victim had elected to treat it as void.

32. Fifthly I am not persuaded by her references to passages in the consultation and final reports. True it is that they refer to the need for certainty and simplicity. The normal operation of the provisions will indeed lead to that – a 10 or more year squatter who wants to claim title can invoke the Sched. 6 procedure and the landowner will generally respond. If he objects to registration upon receipt of the notice it will be refused. But if he then does nothing about it the squatter can come back after two years and get title. The normal procedure brings things to a head one way or another.

33. What the passages do not do is say anything about what happens when the application is made by someone who has not been in adverse possession. Nor is there anything in either report suggesting a special, limited, meaning, should be given to *correction of a mistake.* Indeed, if anything, to the contrary. The discussion of the Bill's provisions which became Sched. 4 says this:

10.61 … Rectification is confined to cases where a mistake is to be corrected. This will not include every case which is at present treated as rectification. It will not therefore cover cases where the register is altered to give effect to rights that have been acquired over the land since it was registered, or where the register was originally correct, but subsequent events have made it incorrect.

This is far from suggesting any special meaning of *mistake to be corrected.*

34. Nor can I see any answer to the point accepted by the Judge, that if land could be lost in this way the landowner would have lost it without compensation with a consequential breach of Art. 1 to the first Protocol of the Convention on Human Rights.

35. Finally, although we were referred to other passages of Ruoff and Roper and to passages of the 7th Edn. of *Megarry & Wade's The Law of Real Property* (2008) whose editors include Mr Harpum, none of the passages were directly in point – no bull's eye for either side. But one passage in *Registered Land, Law and Practice under the Land Registration Act 2002* (2004) coauthored by Mr Harpum is – to use a mixed metaphor – squarely in point. It is a footnote to para. 30.1 and says this:

If an applicant was registered under the scheme provided by the LRA 2002 and it then transpired that he had not in fact been in adverse possession for 10 years, his registration would be a mistake, and there would, therefore, be grounds for an application for rectification of the register: see LRA 2002, Sch. 4 paras 2(1)(a), 5(a).

So the opinion of the architect of the Act is dead against Ms Galley's contentions. That clearly has considerable weight in view of Mr Harpum's deep connection with the Act and its drafting.

36. Accordingly I unhesitatingly reject the main point on this appeal.

(b) The onus point

37. It was common ground that, as the Judge said, the Adjudicator had "by implication misdirected herself on the burden of proof." The Judge went on to consider whether the error arguably invalidated her findings of fact. If so he would have to remit. He held that the decision on the facts did not turn on the onus and accordingly there should be no remission. Ms Galley submitted that the Judge was wrong to hold that the wrong approach to onus could not have made any difference.

38. I do not agree. The legal onus of proof lay on Mr Mannion. He put in evidence prima facie showing that Mr Baxter's claim to have been in exclusive possession for upwards of ten years was wrong. That shifted the evidential burden to Mr Baxter. On the facts he failed to prove that he had been in adverse possession.

39. Actually the findings simply did not turn on onus of proof. The deputy Adjudicator had "no hesitation in accepting the evidence given by and on behalf of Mr Mannion". She rejected part of Mr Baxter's evidence (e.g. "I reject the assertion that the horses were on the Field every day"; "I do not accept that Mr Baxter seeded the land every year nor that he sprayed it regularly"). These holdings were not as a result of any question of onus of proof, they were a result of the Adjudicator seeing and hearing key witnesses and evaluating the effect of this evidence along with the written evidence which had been accepted without challenge.

40. The Judge was right to reject this point.

(c) The "unjust point"

41. It is common ground that the Adjudicator overlooked the fact that Mr Baxter had, by the time of the application, assumed possession of the land. So Sched. 4(6)(2) applied. Putting aside sub-paragraph (a), the question which the Judge assessed for himself was this: would it be unjust not to put Mr Mannion back as registered title holder. He held it would be, saying that it was a matter of "simple justice." And so it was. Mr Baxter had made an unjustified attempt to get himself title. Mr Mannion would otherwise lose his property.

42. The only factor to which Ms Galley could point to suggest that it would be unjust to alter the register now was that Mr Mannion had failed to return the NAP form when he could have done. Mere failure to operate bureaucratic machinery is as thistledown to Mr Mannion losing his land and Mr Baxter getting it when he had never been in adverse possession. There is nothing in this point.

43. So I would dismiss this appeal.

Lord Justice Tomlinson:

44. I agree.

Lord Justice Mummery:

45. I also agree.

Annex: Relevant Provisions of the Land Registration Act 2002

Alteration of register

s.65 Schedule 4 (which makes provision about alteration of the register) has effect.

Disapplication of periods of limitation

s.96 (1) No period of limitation under section 15 of the Limitation Act 1980 (c. 58) (time limits in relation to recovery of land) shall run against any person, other than a chargee, in relation to an estate in land or rentcharge the title to which is registered.

(2) No period of limitation under section 16 of that Act (time limits in relation to redemption of land) shall run against any person in relation to such an estate in land or rentcharge.

(3) Accordingly, section 17 of that Act (extinction of title on expiry of time limit) does not operate to extinguish the title of any person where, by virtue of this section, a period of limitation does not run against him.

Registration of adverse possessor

s.97 Schedule 6 (which makes provision about the registration of an adverse possessor of an estate in land or rentcharge) has effect.

Schedule 4 Alteration of the Register

Introductory

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.

Alteration otherwise than pursuant to a court order

5 The registrar may alter the register for the purpose of—

(a) correcting a mistake,

….

6 (1) This paragraph applies to the power under paragraph 5, so far as relating to rectification.

(2) 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.

(3) If on an application for alteration 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.

SCHEDULE 6

Registration of adverse possessor

Right to apply for registration

1 (1) A person may apply to the registrar to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for the period of ten years ending on the date of the application.

Notification of application

2 (1) The registrar must give notice of an application under paragraph 1 to—

(a) the proprietor of the estate to which the application relates,

...

(2) Notice under this paragraph shall include notice of the effect of paragraph 4.

Treatment of application

3 (1) A person given notice under paragraph 2 may require that the application to which the notice relates be dealt with under paragraph 5.

(2) The right under this paragraph is exercisable by notice to the registrar given before the end of such period as rules may provide.

4 If an application under paragraph 1 is not required to be dealt with under paragraph 5, the applicant is entitled to be entered in the register as the new proprietor of the estate.

5 (1) If an application under paragraph 1 is required to be dealt with under this paragraph, the applicant is only entitled to be registered as the new proprietor of the estate if any of the following conditions is met.

(2) The first condition is that—

(a) it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant, and

(b) the circumstances are such that the applicant ought to be registered as the proprietor.

(3) The second condition is that the applicant is for some other reason entitled to be registered as the proprietor of the estate.

(4) The third condition is that—

(a) the land to which the application relates is adjacent to land belonging to the applicant,

(b) the exact line of the boundary between the two has not been determined under rules under section 60,

(c) for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him, and

(d) the estate to which the application relates was registered more than one year prior to the date of the application.

(5) In relation to an application under paragraph 1(2), this paragraph has effect as if the reference in sub-paragraph (4)(c) to the date of the application were to the day before the date of the applicant's eviction.

Right to make further application for registration

6 (1) Where a person's application under paragraph 1 is rejected, he may make a further application to be registered as the proprietor of the estate if he is in adverse possession of the estate from the date of the application until the last day of the period of two years beginning with the date of its rejection.

(2) However, a person may not make an application under this paragraph if—

(a) he is a defendant in proceedings which involve asserting a right to possession of the land,

(b) judgement for possession of the land has been given against him in the last two years, or

(c) he has been evicted from the land pursuant to a judgement for possession.

7 If a person makes an application under paragraph 6, he is entitled to be entered in the register as the new proprietor of the estate.

Restriction on applications

8 (1) No one may apply under this Schedule to be registered as the proprietor of an estate in land during, or before the end of twelve months after the end of, any period in which the existing registered proprietor is for the purposes of the Limitation (Enemies and War Prisoners) Act 1945 (8 & 9 Geo. 6 c. 16)—

(a) an enemy, or

(b) detained in enemy territory.

(2) No-one may apply under this Schedule to be registered as the proprietor of an estate in land during any period in which the existing registered proprietor is—

(a) unable because of mental disability to make decisions about issues of the kind to which such an application would give rise, or

(b) unable to communicate such decisions because of mental disability or physical impairment.

Effect of registration

9 (1) Where a person is registered as the proprietor of an estate in land in pursuance of an application under this Schedule, the title by virtue of adverse possession which he had at the time of the application is extinguished