

Real Estate
Case Law Update
Rosling King LLP



The Facts

Mr Mohammed Rashid (“**M**”) originally bought a property in 1989. He subsequently travelled to Pakistan with his wife because she was unwell. M was assisted in finding the property by a friend who was also called Mohammed Rashid (“**R**”). However, R subsequently forged M’s signature and fraudulently transferred the property into his own name and became the registered proprietor. R then gifted the property to his son, Mr Farakh Rashid (“**F**”) in the same year.

M applied to the First Tier Tribunal (“**FTT**”) to rectify the mistake on the register in accordance with Schedule 4, Land Registration Act 2002 (the “**Act**”). In accordance with the Act, a mistake can only be altered by reason of fraud or lack of proper care. The Judge found on the facts that F was collusive in the forgery.

The Act goes on to state there may be exceptional circumstances present which justify not making the alteration to the register. F argued that he was in adverse possession and this amounted to an exceptional circumstance under the Act. However the Judge rejected this argument following the decision in *Parshall v Hackney* (“**Parshall**”) which confirmed that a registered proprietor of a piece of land cannot be in adverse possession of it. The FTT consequently found for M.

F appealed to the Upper Tier Tribunal (the “**UTT**”). F argued that *Parshall* was confined to circumstances where possession had been taken lawfully, which had not happened here because of his previous fraudulent behaviour. Consequently F should be able to benefit from the limitation period afforded to adverse possession and M’s claim to the title was now barred.

The Arguments

Pursuant to Section 14(A) of the Limitation Act 1980 (the “**Act**”) the period in which a claim must be issued before it is statute barred is either, six years from the date on which the cause of action accrued, or three years from the date on which a claimant has the requisite knowledge to bring the claim.

The Application

F’s argument was threefold. Firstly, that his involvement in the fraud does not preclude him from being in adverse possession. Reference was made to case law where criminal conduct had not prevented the acquisition of title by adverse possession, a recognisable example being breaking and entering. Secondly, *Parshall* could therefore be differentiated from because that case hinged on possession which had been taken lawfully. Thirdly, it follows that rectification would be pointless because adverse possession had already been obtained.

M’s argument was twofold. Firstly, *Parshall* was not confined to the principle where registration had been lawfully obtained and, secondly, it was not open for F to plead his own

illegality so as to evade the main rule. It was this second point which M focused upon. It was argued the fraud in this case was far more serious than the minor criminal offences which occurred in the cases relied upon by F. The policy in favour of limitation of actions must give way to the far stronger policy of preventing fraud.

The Decision

The UTT upheld the decision of FTT. It focused on the central point of whether one can be in adverse possession despite being the registered proprietor.

It is established that the registered proprietor of land has a title conferred by statute which is indefeasible unless one the provisions of the Act applies, ie. if someone has lost title through fraud they are able to rectify that mistake. This does not mean, however, that until the register has been altered, the registered proprietor is a squatter, who just happens to be registered.

Therefore, it was found, simply from a common sense point of view, that F could not be a trespasser because the property was transferred to him, albeit fraudulently. It was nonsensical to have an additional title through possession.

It follows that where a registered proprietor had obtained a property through fraud they are deemed to hold it on a constructive trust for the dispossessed. Section 21 (1) Limitation Act 1980 states that no limitation period would run in respect of any beneficiary under a trust who has been the victim of a fraud.

Once rectification of the title took place, F would become a trespasser with the limitation period for adverse possession starting afresh, and M would be free to commence possession proceedings.

Commentary

The decision expands the law in *Parshall* that a registered proprietor cannot also be in adverse possession, irrespective of whether the land was obtained lawfully or not.

It was noted by the UTT that if it was wrong about *Parshall*, and a registered proprietor could have adverse possession, M would have been successful on his second argument regarding the defence of illegality. To allow R to retain the land would be to reward him for fraud.

For further information, please contact [Ann Ebberson](#) or the Partner with whom you usually deal.