

[2017] UKUT 332 (TCC)



Appeal number UT/2016/0113

Registered land – fraud - rectification - adverse possession

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

FARAKH RASHID

Appellant

- and -

MOHAMMED RASHID

Respondent

TRIBUNAL: JUDGE ELIZABETH COOKE

Sitting in public at the Royal Courts of Justice, London WC2A 2LL on 14 June 2017

Mr Michael Paget, of Cornerstone Barristers, for the Appellant

Ms Stephanie Tozer, instructed by Green & Olive Solicitors, for the Respondent

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DECISION

- 5 1. This is an appeal from a decision of Dr Antony Verduyn sitting as a judge of the Land
Registration Division of the First-tier Tribunal (“the FTT”), made on 31 March 2016.
The learned judge directed the Chief Land Registrar to respond to Mr Mohammed
Rashid’s application to alter the register as if Mr Farakh Rashid’s objection had not
10 been made. Mr Mohammed Rashid had applied to alter the register of title to 40
Henley Street, Birmingham B11 1JA (“the Property”) so as to restore his name as
registered proprietor. He was the registered proprietor until May 1989 when, as the
judge found, Mr Farakh Rashid’s father forged Mr Mohammed Rashid’s signature on
a transfer of the Property and was registered as proprietor of the Property. In 1990 Mr
15 Farakh Rashid’s father executed a transfer of the Property by way of gift to Mr
Farakh Rashid, and he has been the registered proprietor of the Property ever since.
Accordingly the judge’s order restored to Mr Mohammed Rashid land of which he
had been deprived by fraud. Mr Farakh Rashid now appeals the decision in the FTT.
2. The appeal fails and the alteration of the register will proceed as directed in the FTT.
20 In the paragraphs that follow I set out the findings of fact and the decision made in
the FTT; I then set out the legal background to the grounds of appeal. I summarise the
arguments of the Appellant, Mr Farakh Rashid, and those made for the Respondent,
Mr Mohammed Rashid and finally I set out my analysis and conclusions.
3. The Appellant’s father’s name is also Mr Mohammed Rashid; I refer to him only as
the Appellant’s father so as to avoid a potential confusion.
- 25 4. I heard the appeal in the Royal Courts of Justice on 14 June 2017. The Appellant was
represented by Mr Michael Paget and the Respondent by Ms Stephanie Tozer, both of
counsel; I am most grateful to them for their helpful arguments.

The findings of fact and the decision in the FTT

- 30 5. The findings of fact that the judge in the FTT had to make were complicated because
the parties had had dealings for a number of years before 1989. Some of the facts
found by the learned judge are irrelevant to the appeal; permission to appeal his
central finding, that the transfer in 1989 was forged, has not been given and
accordingly I take the facts as the judge found them.
- 35 6. The relevant points can be stated briefly. The Respondent to this appeal (who was the
Applicant for rectification in the FTT) bought the Property in 1982. The Property had
been found for him by the Appellant’s father, who was known to him – the judge
thought it likely that they were distantly related - but the Appellant’s father made no
contribution to the purchase price.
- 40 7. In 1989 the Respondent travelled to Pakistan with his wife because she was unwell.
While he was absent the Appellant’s father forged his signature on a transfer and
other documents and had the transfer registered. He telephoned the Respondent to tell
him not to come back to the Property, and the Respondent (for various reasons which
are not relevant to the appeal) did not dare go back there when he returned to this
45 country later in the year. He saw a solicitor but had no documents to prove his

entitlement to the Property; he and his family spent months in a hostel before being re-housed by the local authority.

8. Later in 1989 the Appellant's father gifted the Property to him and he was registered as proprietor in 1990. The judge in the FTT described the transfer as "collusive".
- 5 9. The Respondent is illiterate in English and in Urdu. Only in 2011 when the Respondent's father died did he find among his father's papers evidence that enabled him to apply for rectification of the register.
- 10 10. The Appellant in the FTT resisted rectification. His case was that the transfer to his father was not forged. The judge found against him on the facts. On the basis that the registration of the Appellant's father was therefore a mistake for the purposes of Schedule 4 to the LRA 2002, it was not in dispute that the registration of the Appellant was also a mistake for the purposes of that Schedule.
- 15 11. The judge of the FTT found that the Appellant was the registered proprietor in possession of the Property. The statute gives special protection to such a proprietor; the register cannot normally be rectified so as to prejudicially affect his title. However, a registered proprietor who has caused or substantially contributed to the mistake by fraud or lack of proper care (as the judge found the Appellant had done) does not have that protection, and the register will be rectified unless there are exceptional circumstances that would justify not altering the register. The Appellant argued that he was in adverse possession of the property and that that amounted to exceptional circumstances, but the judge rejected that argument. He followed the Court of Appeal's decision in *Parshall v Hackney* [2013] EWCA Civ 240 which he took (correctly, as I shall explain) to be authority for the proposition that a registered proprietor of land cannot be in adverse possession of it.
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The ground of appeal and the legal background

12. I granted permission to appeal the FTT's decision on a point of law in the Upper Tribunal after an oral hearing.
13. The point is this: the Appellant says that the judge of the FTT was wrong in law because there were exceptional circumstances that would justify not altering the register, namely that he was in adverse possession and that the Respondent's title had been barred. Mr Paget argues that the decision in *Parshall v Hackney* is relevant only where a registered proprietor is lawfully in possession of the land, and is not relevant where ownership is unlawful as it is in this case, so that the judge in the FTT was wrong to regard adverse possession as being ruled out by *Parshall v Hackney*.
14. I refused permission on this ground on the papers in the Upper Tribunal, on the basis that even if the Appellant could show that he had been in possession and had the requisite intention to possess, he must have been holding the land on constructive trust for the Respondent.¹ Although section 58 of the LRA 2002 vests legal and

¹ This is a very different proposition from the finding, now overruled, in *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151 that where registered land is transferred by fraud, the statute vests the legal estate in the new registered proprietor but the dispossessed registered proprietor retains a beneficial interest. The Court of Appeal's decision in *Swift 1st Ltd v The Chief Land Registrar* [2015] EWCA Civ 330 makes it clear that that is not the law; section 20 of the Land Registration Act 1925 and its successor section 58 of the LRA 2002 vest the legal and beneficial ownership of the land in its registered proprietor. Nevertheless, a registered proprietor's own conduct

beneficial title to the land in the registered proprietor, in circumstances such as these the Appellant's own conduct makes him a constructive trustee for the Respondent. And section 21(1) of the Limitation Act 1980 states that no limitation period runs in respect of any action by a beneficiary under a trust, being an action in respect of fraud or of any fraudulent breach of trust. I took the view that the Appellant's argument was doomed to failure on that basis.

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15. However, at the oral hearing of the Appellant's renewed application for permission to appeal it was pointed out that it has been held that section 21(1) does not apply where the trust arises by virtue of wrongdoing. It is designed to protect beneficiaries who have deliberately entrusted their property to a trustee; it does not apply in cases where the defendant is treated as a trustee only because of fraud, as is the case here: see *Paragon Finance PLC v DB Thackerar & Co* [1998] EWCA Civ 1240 and *Halton International Inc (Holdings) SARL v Guernry Ltd* [2006] EWCA 801. Accordingly I granted permission to appeal so that the argument about the scope of *Parshall v Hackney* could be properly explored.

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16. To set the scene for that argument I now set out the statutory background to the Respondent's action to have the register rectified in his favour and the arguments made by the Appellant about those statutory provisions.

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17. The relevant statutory provisions are set out in Schedule 4 to the LRA 2002. Paragraphs 5 and 6 of that Schedule are about the alteration of the register by the registrar. The outcome of a reference to the Tribunal is a direction to the registrar either to cancel the application for alteration or to respond to the application as if the objection had not been made; accordingly paragraphs 5 and 6 are relevant rather than paragraphs 2 and 3 which are about orders of the court for alteration of the register – but the substance of the two sets of provisions are the same and what is decided in this reference about paragraphs 5 and 6 is equally applicable to paragraphs 2 and 3.

18. Paragraphs 1, 5 and the relevant parts of paragraph 6 read as follows:

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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.

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

- (a) correcting a mistake,
- (b) bringing the register up to date,
- (c) giving effect to any estate, right or interest excepted from the effect of registration, or
- (d) removing a superfluous entry.

may give rise to a constructive trust; that would certainly be the case where the registered proprietor was responsible for, or colluded with, a fraudulent transfer. As Millet LJ put it in *Paragon Finance* (see text at paragraph 15 above), “In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be “liable to account as constructive trustee.” Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions “constructive trust” and “constructive trustee” are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are “nothing more than a formula for equitable relief”: *Selangor United Rubber Estates Ltd. v Cradock* [1968] 1 WLR 1555 at p. 1582 *per* Ungood-Thomas J.”

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

5 (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

10 (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.

15 19. These provisions can be summarised as follows:

1) The registrar can alter the register to correct a mistake, such as the registration of a transfer that procured by fraud (paragraph 5) and indeed must do so if he has power to do so unless there are exceptional circumstances that justify not doing so (paragraph 6(3)).

20 | 2) That said, by virtue of paragraph 6(2) the registrar may not alter the register to correct a mistake if that would prejudice a registered proprietor in possession (such as the Respondent here) unless that proprietor has by fraud or lack of proper care contributed to the mistake (as is the case here). In that case the registrar may alter the register.

25 3) Because in that case the registrar *may* alter the register, he must do so (paragraph 6(3)), but the proviso about exceptional circumstances still applies. So the registered proprietor in possession who has contributed to the fraud will suffer rectification (paragraph 6(2)) unless there are exceptional circumstances that justify not altering the register (paragraph 6(3)). In other words, in exceptional circumstances the registered proprietor in possession will remain registered even though he has contributed to the fraud.²

30 20. The Appellant's appeal hinges upon paragraph 6(3). The learned judge of the FTT found that he was the registered proprietor in possession of the property. In normal circumstances he would have no protection from the alteration of the register (paragraph 6(2)). The Respondent says that here there are exceptional circumstances, namely the fact that he has been in adverse possession of the Property since 1990. And he argues that the judge of the FTT was wrong to hold that *Parshall v Hackney* makes that argument impossible.

40 **The arguments made for the Appellant**

² Likewise, a registered proprietor in possession may be protected from alteration by paragraph 6(3) even in circumstances where it would be unjust not to alter the register (paragraph 6(2)(b)), because sometimes no outcome is wholly fair and the Tribunal must decide between competing injustices. I put it that way because that balancing exercise will almost always be made

21. I have summarised the Appellant’s argument in the preceding paragraph. In more detail, Mr Paget’s argument was as follows.
22. First, he argued that the Appellant’s involvement in his father’s fraud does not preclude him from being in adverse possession. He referred to the decision in *Best v Chief Land Registrar* [2014] EWHC 1370; Mr Best was in adverse possession of residential property, and such possession became a criminal offence when section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“the 2012 Act”) came into force. The Chief Land Registrar therefore rejected his application for registration as proprietor on the basis of his adverse possession. Mr Best sought judicial review of that decision, and succeeded in the Court of Appeal. Sales LJ said, at paragraph 44, “The wider idea that a person should not benefit from his own wrong has not permitted the law of adverse possession from operating.” Arden LJ put it this way at paragraph 108(v):
- “In my judgment, the registrar’s act of registering the adverse possession does not condone the illegality or assist it. Its primary effect is to regularise the legal position for the future... The registrar is right to say that the commission of any act which Parliament has made a criminal offence is a serious matter which necessarily entails condemnation by the court and by the registrar. However, the sanction for a breach of section 144 is laid down in that section. The commission of an offence is not affected by the registration of adverse possession. Parliament’s express purpose in criminalising the activity is observed. The applicant cannot, therefore, be said to benefit from his criminal conduct in the sense of having avoided the penalty.”
23. The members of the Court of Appeal did not rule out the possibility that there might be extreme conduct that prevented the operation of the statute of limitations – for example, murdering the owner of the land in order to prevent him claiming possession of the property. The appeal in *Best* was decided on the narrow point relating to Mr Best’s offence only, but the decision certainly makes it clear that the criminality of a squatter does not prevent the operation of the law of limitation. Reference was made to other cases where criminal conduct had not prevented the acquisition of title by adverse possession, an obvious example being breaking and entering (*Lambeth London Borough Council v Blackburn* [2001] EWCA Civ 912). Mr Paget argued that the same approach should be taken to the Appellant’s fraud, suggesting that getting himself registered as proprietor was rather like changing the locks.
24. Second, Mr Paget turned to the specific point on which the appeal was founded, namely whether the learned judge in the FTT had been right to say that a finding of adverse possession was ruled out by the decision of the Court of Appeal in *Parshall v Hackney*.
25. The facts in *Parshall v Hackney* were unusual. Title to a small area of land – part of a car parking space – was registered in 1904 as part of the title to No 29 Milner Street in Kensington. In error Land Registry registered it also as part of the title to No 31

necessary by an objection to an application to registration and would be referred to the Tribunal rather than being the subject of a decision by the registrar.

Milner Street in 1986. The registered proprietors of No 31 took possession of it, by putting up chains to prevent anyone else from accessing it, in July 1988. Later still, in October 2000, Land Registry made another mistake: the disputed land was removed from the title of No 29 at the point when title to No 29 was computerised. At first instance and in the High Court the decision was that the land should now remain within the title of No 31 on the basis that the proprietors had acquired title by adverse possession. The Court of Appeal, however, held that no adverse possession had taken place. The owners of No 31 were entitled to be in possession of the disputed land because they were the registered proprietors of it, and so their possession was not adverse. The owners of No 29, who were also the registered proprietors of it until 2000, had no better title, and could not sue until the register was rectified in their favour; and there was no time limit for her to make an application to rectify the register. Accordingly the owner (being the survivor of the joint owners) of No 29 was able to recover the land. At paragraphs 88 to 92 Mummery LJ explained:

“There was no dispossession in July 1988, because the taking of possession of the disputed land was not unlawful. It was lawful for the owners of No 31 to take and remain in possession of the disputed land, because they had a registered title to it. As long as they remained registered proprietors of the disputed land, that possession would be lawful and could not be adverse to the owners of No 29.

... unless and until the register is rectified by order, the legal position is that the owners of No 29 did not have a completed cause of action for recovery of the disputed land. They could neither have nor plead a better title to the disputed land than the owners of No 31. They both had registered title to it with all that that entails under the 1925 Act. ...

It is true that the owners of No 29 could get that mistake rectified and would normally seek to do so once it has been discovered, but there is no time limit set for making such an application, as distinct from bringing an action for the recovery of land.”

26. Mr Paget argued that the decision in *Parshall* was confined to circumstances where possession has been taken lawfully, pointing to the opening phrase of the passages just quoted. Everything hinged on that. Where possession is unlawful, the observations quoted above are inapplicable. The Respondent in this case had a right of action from 1989 onwards and then did nothing for 22 years; *Parshall v Hackney* does not describe the legal position here, where the Respondent had rights of action for 22 years, and did nothing. The owners of No 31 in *Parshall* were innocent (the mistake was Land Registry’s alone) and were therefore in a very different position from the Appellant who, as a wrongdoer, could eventually benefit from the limitation of the actions that could be taken against him. His registration as a proprietor was the icing on the cake, and was in a sense incidental to his entitlement as a successful squatter.

27. Mr Paget developed his argument that the Appellant’s adverse possession amounts to exceptional circumstances by pointing out that if the register were rectified so as to restore the Respondent as registered proprietor, the Appellant would nevertheless be able to resist possession proceedings on the basis that he has title by adverse

possession – therefore rectification will be pointless. He points to the situation in *Derbyshire County Council v Fallon* [2007] EWHC 1326 (Ch) where grounds for rectification were made out but rectification was not ordered because of the presence of exceptional circumstances. In that case the issue was the position of a boundary; although there were grounds for rectifying the register by changing the boundary line, it appeared that following rectification the newly registered proprietor of the disputed strip of land might not be able to get possession of it, because Mr and Mrs Fallon might be able in other proceedings to establish a proprietary estoppel in their favour or might be able to resist an injunction as a matter of discretion. Accordingly it was held that rectification would be pointless and it was refused. Mr Paget argues that the Appellant’s entitlement to the land by virtue of adverse possession would mean that the Respondent could not recover possession and that therefore rectification should be refused here.

The arguments made for the Respondent

28. Ms Tozer regarded the appeal as being confined to the question whether adverse possession could be argued in the light of *Parshall v Hackney*. She pointed out that the Appellant did not plead adverse possession at first instance and that the point only arose in closing submissions. And because the judge ruled the point out on the basis of *Parshall v Hackney*, she argued that if the Appellant were to be successful on that point in this appeal then the matter must be remitted to the FTT so that it could make findings as to whether the Appellant was in factual possession for the requisite period (he would have to show 12 years’ adverse possession prior to the change in the law in 2003); whether he had the requisite intention to possess the land; and whether, if those elements were made out, his adverse possession amounted to exceptional circumstances under paragraph 6(3) of Schedule 4 to the LRA 2002.
29. Mr Paget disagreed; he argued that the relevant findings of fact were made by the FTT, that intention to possess could readily be inferred from them, and that the Upper Tribunal was well able to make its own decision on the exceptional circumstances point.
30. Ms Tozer’s argument about *Parshall* itself was two-fold; first, that the principle in that case was not confined to cases where registration had been lawfully obtained, so that it was not open to Mr Paget to make an argument at all; second, that if it was so confined then it was not open to the Appellant to plead his own illegality – his involvement in his father’s fraud – so as to evade the main rule. She relied on the common law doctrine of illegality as a defence, in effect, to the Appellant’s claim to adverse possession.
31. The leading authority on the illegality defence is now the Supreme Court’s decision in *Patel v Mirza* [2016] UKSC 42. In paragraph 101 of that decision it was said that three factors were relevant to a decision whether illegality should prevent a claimant from obtaining the relief sought (here, title by adverse possession):
 - 1) The underlying purpose of the prohibition which has been transgressed, and whether the purpose will be enhanced by denial of the claim;
 - 2) any countervailing public policies which might be regarded as less effective if the claim were rejected; and

3) whether denial of the claim would be a proportionate response to the illegality.

5 32. Ms Tozer argued that the fraud perpetrated here by the Respondent's father, in which he was involved and shares culpability, was far more serious than the minor criminal offence with which the court was concerned in *Best*. The purpose of the prohibition of fraud would be undermined by the award of title to the land in this case. The countervailing public policy in favour of the limitation of actions must give way to the far stronger public policy of preventing fraud. And in light of the seriousness of the Appellant's offence, denying him the ability to rely upon adverse possession – if 10 he is right that the decision in *Parshall* does not preclude such a claim where possession is unlawful – would be proportionate and right. The Respondent, by contrast, was not involved in the fraud and is, so far as the events relating to his land are concerned, innocent.

15 **Analysis and conclusion**

33. I accept Mr Paget's general point that adverse possession is not ruled out by a squatter's wrongful or even criminal behaviour. That is clear from the decision in *Best v Chief Land Registrar*. But that is to put the cart before the horse. Can the Appellant be said to have been in adverse possession in this case despite being the 20 registered proprietor of the land?

34. Just from a practical and common-sense point of view that strikes me as a very unrealistic argument. Both the Appellant's possession of land and the Respondent's current predicament arise because the Appellant is the registered proprietor of the Property. As a matter of fact the Appellant is in possession because his father transferred the land to him; to say that he is a trespasser who happens to be registered in much the same way as another trespasser might change the locks is to 25 mischaracterise the situation. And the Respondent has failed to recover the land because the Appellant is the registered proprietor. He went to see a solicitor in 1989 but was unable to get any help because – in the absence of documentary title or any paperwork – he had no evidence of his entitlement to the land and nothing to show that he might be able to seek rectification of the register. To describe this as a situation primarily of trespass, in which the registration of the Appellant as proprietor was just the “icing on the cake”, does not accurately describe what has happened.

35. The legal analysis of the situation has to start from first principles. The registered proprietor of land has a title conferred by the statute: section 58 of the LRA 2002 is the current provision, and for the period before November 2003 the relevant provision was section 20 of the Land Registration Act 1925. There can be more than one fee simple in land, even in registered land.³ But registration confers a title that is 35 indefeasible save as provided for by Schedule 4 to the Land Registration Act 2002 (“the LRA 2002”). Schedule 4 is self-sufficient; it enables persons in the Respondent's position, who have lost their title as a result of fraud or any other 40

³ That is a little counter-intuitive; but it is clear from paragraph 9(1) of Schedule 6 to the LRA 2002 that a squatter in adverse possession of registered land acquires a fee simple in it, by virtue of his

mistake on the register, to have the register put right, and there is no time limit on their doing so. But subject to that right, the title conferred by the statute puts the registered proprietor in an unassailable position.

- 5 36. Accordingly, just like the owners of No 29 in *Parshall v Hackney*, the Respondent cannot take possession of the Property until the register is rectified in his favour. To say that meanwhile the registered proprietor is in the position of a squatter, holding a precarious estate derived from his possession pursuant to *Asher v Whitlock* (1865) 1 QB 1, is inconsistent with the provisions of the statute.
- 10 37. Equally, it is obvious nonsense to suppose that the Appellant now holds both his title conferred by the land registration legislation and, alongside that estate, a fee simple derived from his possession. He is the registered proprietor with the statutory title; it is nonsense to regard him as having an additional title by possession.
- 15 38. Nor can the Appellant take up the position of a successful squatter who has barred the title of the dispossessed proprietor after the register is rectified. Once rectification takes place he becomes a trespasser, starting afresh as a person in adverse possession of the land until the Respondent takes possession proceedings. True, at that point he will have an estate derived from his possession; but that estate will come into existence only once the register is rectified. If the Respondent does nothing to recover possession for another ten years the Appellant will then have the precarious rights conferred on him by Schedule 6 to the LRA 2002.
- 20 39. Turning to *Parshall v Hackney*, the decision of the Court of Appeal focussed on the unusual situation of double registration. The owners of No 31 had done nothing wrong. Nevertheless, it is not the case that registration conferred on them the legal estate, and entitled them to be in possession, only because their conduct had been lawful; rather, their possession was lawful – despite the double registration – because of their registered title, and until the register was rectified. Absent the registration they would have been trespassers.
- 25 40. Accordingly I do not take the narrow view of *Parshall v Hackney* that the Appellant puts forward. The title conferred by statute upon the registered proprietor is in a sense morally blind, in that it puts the registered proprietor in a unique position whose weakness is defined, wholly, by the statutory provisions relating to alteration and rectification. That does not limit the courts’ powers to put right what has gone wrong, because the statute provides that the register can be rectified to correct a mistake (for example where a void transfer has been registered) or to bring the register up to date (where a voidable transfer is registered and later avoided). But until the register is altered, the registered proprietor is not a squatter, who just happens to be registered, with a squatter’s vulnerability to possession proceedings and a squatter’s power – until the LRA 2002 changed the law – to bar the title of someone with a cause of action against him or her.⁴ Although the facts of *Parshall v Hackney* were unusual,
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or her possession (*Asher v Whitlock* (1865) 1 QB 1, which is extinguished in the event that the squatter acquires the registered estate.

⁴ That is the case even if the registered proprietor is a trustee as a result of his own wrongdoing, because of the provisions of the LRA 2002 and in particular Schedule 4, even though outside the context of registered land a limitation period would run against the beneficiary (see paragraph 15 above).

the ratio of the decision is that a registered proprietor cannot be in adverse possession of land. The decision of the Court of Appeal reflects the provisions of the legislation and the unique position of the registered proprietor, rather than being confined to its facts.

5 41. If I am wrong about that and the decision in *Parshall v Hackney* does depend upon
lawful possession, then I would be persuaded by Ms Tozer's argument that the
Appellant cannot be allowed to plead his own fraud so as to escape from the principle
in *Parshall v Hackney*. To allow the Appellant to retain the land would be to reward
him for fraud and to give the message that fraud can be condoned after some years.
10 To deny the Appellant's claim in adverse possession would be a wholly proportionate
response to his conduct and his father's.

42. Finally, therefore, I note that I do not have to deal with Ms Tozer's argument that if
there were exceptional circumstances arising from the Appellant's adverse possession
I must remit the matter to the FTT for further findings of fact and for a decision as to
15 whether adverse possession amounts to exceptional circumstances. Had my
conclusion been otherwise I would not have remitted the matter; it seems to follow
from the findings of fact made in the FTT that the Appellant has been in possession
of the Property for many years and had an intention to exclude others including (or
rather, especially) the Appellant. That being the case the Upper Tribunal would have
20 been able to make the decision required by paragraph 6(3) of Schedule 6 to the LRA
2002 rather than wasting time and costs in remitting the matter. But in the
circumstances that does not arise.

Conclusions

25 43. Accordingly the appeal fails. The Appellant has not acquired title to the Property by
adverse possession, and accordingly his argument that there are exceptional
circumstances that justify not altering the register in the Respondent's favour must
fail. There is no appeal from the learned judge's finding that the delay in itself did not
amount to exceptional circumstances.

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ELIZABETH COOKE
TRIBUNAL JUDGE
RELEASE DATE: 30 August 2017