LAND REGISTRATION, ADVERSE POSSESSION AND THE NATURE OF A REGISTERED TITLE

THERE are cases that the legal community welcomes with cheers because they dispel an obvious heresy, and there are cases that cause the reader to wince because of the violence they do to legal principle and common sense. *Rashid v Nasrullah (acting as Executor of the late Mohammed Rashid)* [2020] Ch. 37 does both, depending on one's view of the nature of a registered title.

Rashid appealed to the Court of Appeal against an order rectifying his registered title in favour of the late Mohammed Rashid, now represented by Nasrullah as Executor. His appeal was allowed and the order for rectification overturned, thus confirming him as owner. Rashid had been gifted the land by his father who had obtained it by fraud from the late Mohammed Rashid. Rashid (the son) had known of the fraud and that Mohammed Rashid had been deceived. However, the son had been in possession of the land for over 12 years at the time of the application (as well as being registered with it) and 12 years was the relevant period of adverse possession because the events occurred before the entry into force of the Land Registration Act (LRA) 2002. The argument for the son was, therefore, that having completed the relevant period of adverse possession, he was entitled to the land, which meant that there were exceptional reasons for refusing rectification under Schedule 4 to the LRA 2002. Apart from what some might see as the inherent lack of merit in his claim, Rashid also had to contend with *Parshall v Hackney* [2013] Ch. 568, another decision of the Court of Appeal, that had decided that a person with a registered title to land could not also be in adverse possession of it.

In allowing the appeal, Lewison L.J., leading the court, determined that *Parshall* was wrongly decided, being contrary to the House of Lords decision in *JA Pye (Oxford) Ltd. v Graham* [2003] 1 A.C. 419 on the nature of "possession" in a limitation dispute. Although some commentators report that, therefore, *Parshall* is "overruled", clearly this is not the case. The court in *Nasrullah* did not decide that *Parshall* was per incuriam, just wrong, but they have no power to overrule it, rather than simply decline to follow it. A small point, perhaps, but one that might matter in another case on another day. Note also that Lewison L.J. determines that if he is mistaken that *Parshall* is wrong, it can nevertheless be distinguished. That said, there is an awful lot in *Nasrullah* to take in.

First, *Pye* does indeed say that the litmus test in adverse possession disputes is "possession" and that "adverse" is otiose. But, *Pye* and every other limitation case also say that this possession must be without the consent of the owner. Here is the problem ignored by *Nasrullah* but recognised in *Parshall*. Rashid was the registered proprietor throughout, and this gave

him both possession and powers as owner. So, for Rashid to be in possession without consent, he must (as registered owner) have objected to his own possession (as adverse possessor), otherwise there is consent. Even if one accepts that Rashid was in possession in two capacities (and that is a stretch for me), where is the evidence that his adverse possession was without the consent of the owner (himself)? The only explanation – and one that is controversial, is that a registered proprietor is "not really" the owner when the registration is the result of a void transaction. This would mean that Rashid could not consent to himself as possessor and so could be in possession for the purposes of limitation. So, *Nasrullah* hides a deeper conflict about the nature of a registered title: it is inconsistent with those who argue that a registered title, however achieved, is a valid title until the register is rectified against them: *Swift 1st Ltd. v Chief Land Registrar* [2015] Ch. 602.

Perhaps this uncertainty is why Lewison L.J. was careful to explain that *Parshall* could be distinguished. A second justification for confirming Rashid as owner is found in the argument that the fraudster (the father) never became full beneficial owner of the land when he became registered, but held it on trust for Mohammed Rashid, and when the father gifted it to Rashid, Rashid took the land subject to this trust as he was not a purchaser (LRA 1925, s. 20(4), then in force). This is standard land registration law: a non-purchaser takes the land subject to prior interests. However, so the argument runs, Mohammed Rashid's claim against Rashid is then barred by limitation and his equitable interest is extinguished, leaving Rashid as absolute owner. This is interesting. It will be remembered that *Swift 1st* decides that a registered proprietor becomes absolute owner on registration (i.e. there is nothing "left" in the original owner), determining that *Malory Enterprises Ltd. v Cheshire Homes (UK) Ltd.* [2002] Ch. 216 is per incuriam on this issue. But – and this is a key point – *Swift 1st* does not prevent a *new* trust from arising because of the fraud of the new registered owner, so the finding that the father is a trustee is not prevented by *Swift 1st*. However, what is not clear is why Mohammed Rashid's interest is now unenforceable because of limitation. It is of course possible to adversely possesses against an equitable interest in land (Limitation Act 1980, s. 18 (1)), but not if the beneficiary's right of action arises because of fraud or a fraudulent breach of trust (L.A. 1980, s. 21(1)). In that case, there is no limitation period and so no possibility of extinguishing the equitable interest. To deal with this, Lewison L.J. reminds us that *Williams v Central Bank of Nigeria* [2014] A.C. 1189 says that a constructive trust arising from knowing receipt is not a "true" trust and that normal limitation principles apply to it. This is true, but why is the trust here within the *Williams* category? The father is the original trustee by reason of his own fraud (so not a "knowing recipient") and Rashid takes the title subject to the equitable interest under normal land law priority principles, not because

he (the son) is a knowing recipient within *Williams*. So, there is no justification for preventing Mohammed Rashid from suing to vindicate his equitable interest and his claim should not be time-barred.

As if this were not enough, the case also considers the extent to which, after *Patel v Mirza* [2017] A.C. 467, "illegality" can taint a claim (i.e. Rashid's), but that is another story. For now, this case forces us to look closely at what we mean by a registered title and the extent to which it can be lost when there is a fraud. There is clearly a worry in the case that long past events should not compromise a registered title (see here the Law Commission's "long stop" proposals on rectification), but that policy goal is achieved by some imaginative, and unnecessary, intellectual gymnastics. If the aim was to confirm Rashid in his registered title after so many years, despite his complicity in fraud, there was an easier way. Under Schedule 4 to the 2002 Act, a person in possession cannot have a title rectified against them unless they have contributed to the mistake – and Rashid was knee deep in contribution. But, even then, the register need not be rectified if there are exceptional circumstances justifying a refusal to rectify. This could simply have been Rashid's long stay on the land, irrespective of whether he had adversely possessed it or not. No doubt, it is more comforting to find that Rashid has a claim of right (adverse possession), but how much simpler to just apply the LRA 2002 and exercise a discretion against rectification, not least because Mohammed Rashid may then have been entitled to an indemnity?

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DATA PROTECTION, THE VALUE OF PRIVACY AND COMPENSABLE DAMAGE

IN *Lloyd v Google LLC* [2019] EWCA Civ 1599, [2020] Q.B. 747, the Court of Appeal adopted a broad understanding of "damage" resulting from unlawful collection of personal data, paving the way for a representative action against Google on behalf of victims of such wrongs. This could be a valuable addition to the expanding arsenal of remedies (in particular under the General Data Protection Regulation (GDPR) (Regulation (EU) No 2016/679 (OJ 2016 L 119 p.1))) against what Shoshana Zuboff has dubbed "surveillance capitalism" (see *The Age of Surveillance Capitalism* (London 2019)).

From 2011 to 2012, Google secretly tracked the Internet activity of Apple iPhone users and then used the accumulated data for various commercial purposes. This method of obtaining personal data through a web browser became known as "the Safari Workaround". Google's practice