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What do We Protect in Land Registration?

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Parshall v Hackney [2013] EWCA Civ 240 appears a reasonably straightforward case of boundary disputes between two neighbours. A strip of land had been included in the registered titles to both properties by mistake. The Court of Appeal overturned earlier decisions and awarded the disputed land to one party, despite the other party having had exclusive possession of it for over twenty years. The decision was mainly on the basis of lack of adverse possession under the Limitation Act 1980. The end result is surprising in many aspects, and raises serious questions as to the value and reliability of a positive land registration system many of us take for granted.

The title to No 29 Milner Street, London SW3 was first registered in 1904. It included the disputed land, a small wedge-shaped area along a narrow private road. The title to No 31 Milner Street, on the opposite side of this narrow road, was first registered in 1980, which also included the disputed land. It was common ground that allowing overlapping registration would constitute a mistake on land registration.

In 1986, Hackney, the respondent, and her former husband bought No 31. In 1988, they put up bollards and chains to demarcate the boundary of the disputed area which they regarded as theirs, as was included in their title. Although small in size, the area provides a valuable parking space in prime London location.

In 2000, on computerisation of data by the Land Registry, the disputed land was erroneously removed from the title plan of No 29. In 2006, the Parshalls, applicant and appellant in the case bought No 29, which had been a public house for many years. In 2008, presumably having noticed the history of errors and conflicting claims, Parshall applied to the Land Registry for rectification of the title plans. They seek to be reinstated as registered proprietor of the disputed land and to remove No 31's claim over it.

The Deputy Adjudicator to the Land Registry established these facts above without much disagreement by the parties. Given the fact that there was a mistake, the correction of which would adversely affect the registered proprietor in possession, this was a rectification issue. There was no suggestion that the proprietors of No 31 caused or contributed to the mistake through fraud or lack of proper care. The only possible grounds left for rectification was that it would be unjust for it not to be made. (Land Registration Act 2002, Sche 4 para 3(2)(b))

The Adjudicator decided that it would be unjust not to allow rectification but he was persuaded not to order it, by the alternative argument of adverse possession. The Adjudicators accepted that the proprietors of No 31 had established adverse possession through exclusive possession since 1988. If a rectification was ordered, it would only trigger an immediate counter-rectification in favour of No 31.

The proprietors of No 29 appealed to the High Court. Deputy Judge David Donaldson QC upheld the decision of the Adjudicator. The appellant appealed a second time to the Court of Appeal. The Court of Appeal overturned the previous decisions and allowed rectification, awarding the disputed land to the title of No 29.

Lord Justice Mummery, with whom Lords Justice Treacy and Patten concurred, delivered the decision of the court. The main ratio of the decision, as summarised by his Lordship (at [100]-[101]), is that the time of limitation of action and adverse possession did not begin to run against No 29 or in favour of No 31.

The clock of twelve years in limitation and adverse possession starts ticking when the right to an action to recover land accrues to the party. Under the Limitation Act 1980, the right accrues when the party in possession of the land has been dispossessed or discontinued his possession. (Schedule 1 para 1) Moreover, no right of action would accrue unless the land is in the possession of some person who can claim adverse possession. (Schedule 1 para 8(1)) The court decided that the proprietors of No 29 were not dispossessed of the disputed land by the owners of No 31.

> 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.

With no adverse possession, the obstacle to the Deputy Adjudicator's original intention to allow rectification was cleared. Hence rectification would be ordered because it would be unjust not to do so.

Two further arguments were dismissed at the same time by the court. First, *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] Ch 216 does not apply to this case because there was no separation of legal title and beneficial ownership at any stage. "Subject to rectification of the register by order, both parties have a good legal and beneficial title to the disputed land conferred by registration."(at [94]). Second, no easement of parking could be acquired through prescription, because the registered owner of No 31 owned both the dominant and servient tenements during the relevant period of user (at [98]).

Before looking at implications of the case, it is worth noting that the decision seemed to have placed considerable weight on the fact that the possession by the owners of the No 31 was not "unlawful". The leading case on adverse possession cited to the court, namely *JA Pye (Oxford) Limited v Graham* [2003] 1 AC 419, never used this word. It was perhaps derived from the quote from Slade LJ in *Buckinghamshire CC v Moran* [1990] 1 Ch 623 at 636, cited in the decision.

> Possession is never "adverse" within the meaning of the Act of 1980 if it is enjoyed under lawful title. If, therefore, a person occupies or uses land by licence of the owner with the paper title and his licence has not been duly determined, he cannot be treated as having been in "adverse possession" as against the owner with the paper title.

With respect, it may be argued that Slade LJ was only contemplating situations where the person in possession had permission from the owner of paper title. Whether that passing reference to lawfulness could be stretched to the more generic position "if the possession is not unlawful it is not adverse possession" is questionable to say the least. In this context, Lord Browne-Wilkinson's observation in *JA Pye* about many of the difficulties caused by "a conscious or subconscious feeling that in order for a squatter to gain title by lapse of time he has to act adversely to the paper title owner" ([2002] UKHL 30, at [36]) comes to mind.

More fundamentally, the end result was surprising and somewhat shocking. The owners of No 31 have been the registered proprietor for over twenty years and have apparently retained exclusive control of the land during that period. It is quite possible they did not even realise there is any dispute until recently when the purchaser of a neighbouring house spotted a "mistake" on a computer database sourced from a 104-year-old title. Now they will lose their parking space which they have "lawfully" enjoyed for twenty-five years.

Yet the court seemed to see this in a very different light. Lord Justice Mummery specifically pointed to "the plain unvarnished fact that [the owner of No 31] is seeking to take the benefit of a mistake by the Land Registry, which had occurred through no fault on the [owner of No 29]'s side". It is difficult to see how any proprietor of No 31 could have done differently. The first mistake, namely the overlapping registration, was made six years before they had anything to do with the property. The second mistake, the omission of No 29's title claim during computerisation, was made by the Land Registry spontaneously fourteen years after they moved in. They have done nothing wrong or dishonest. On the other hand, the current owners of No 29 had every reason to notice the mistake during the purchase of the house in 2006, two years before they started the application for rectification. As potential purchasers, they must have observed that the disputed land was being used by someone other than the vendor they were buying from. Was it likely that any reasonable purchaser would have paid in full under the circumstances for the clearly disputed parking space, which they nevertheless got awarded after this series of litigation? Of course both parties were clearly entitled in trying to claim the disputed land. Still, it may be argued, with all due respect, that Lord Justice Mummery did not make the most convincing assessment as to who was "seeking to take the benefit of a mistake by the Land Registry".

Such intriguing result entertains two further thoughts.

First, having no title is actually better than having a valid and legitimate title. If the owners of No 31 never had title and were only squatters, they would have acquired the disputed land before the commencement of the Land Registration Act 2002. The same would apply if they ignored requirements of compulsory registration and never bothered to register their title, because then the legal title would not pass to them and their possession would be, happily, "unlawful". Indeed if they parked their car and set up those bollards anywhere else in London

for so many years, they would have acquired the land. Their failing lies in remaining lawful all this time and abiding by the law of land registration.

Second, no registered title is ever safe, unless we check the history of every registered title in a five mile radius to make sure nobody has ever had a conflicting claim. If you are sitting in your home feeling comfortable about having both possession of and registered title to it, you do so at your own peril. The developer could have made a mistake in registering title to and building on someone else's land fifty years ago. The "rightful" owner could come forward any time now to rectify the mistake. Their action may not be time-barred, thanks to *Parshall v Hackney*.

It is perhaps easier to see this case as decided on a technicality of the Limitation Act 1980. Yet the implications of the decision and its potential impact may be far greater than envisaged by the Court of Appeal. After all, if we do not protect the proprietary rights of bona fide purchasers of registered title who meticulously maintained control and possession for twenty-five years, then what do we protect in land registration?