

Serle Court

Prepared by Kysen PR

Date 26 May 2017
Publication New Law Journal
Type of publication Legal

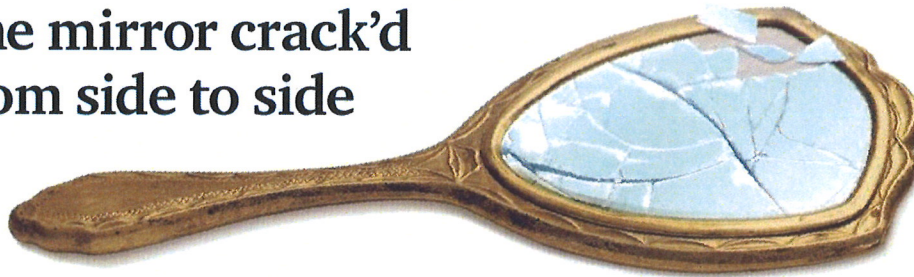
NewLawJournal

Leading on debate, litigation and dispute resolution

www.newlawjournal.co.uk | 26 May 2017

 PROPERTY LEGAL UPDATE **11**

The mirror crack'd from side to side



Amy Proferes considers overriding interests, overreaching, & the perils of the 'registration gap'

IN BRIEF

- ▶ Property practitioners should take *Baker v Craggs* as a timely warning of the perils of the registration gap where land is being sold by co-owners.
- ▶ Until registration is complete, it must not be assumed that rights in the land conveyed are settled.

The Land Register is intended to provide certainty by reflecting all factors relevant to a parcel of land, from ownership to restrictive covenants to charges. However certain interests, sometimes called 'the crack in the mirror of title', are deemed to be important enough that they can 'override' a registered disposition even if they do not appear on the Register.

Under ss 29 and 30 of the Land Registration Act 2002 (LRA 2002), an unregistered interest must exist and be enforceable at the date of registration of the disposition (rather than the date of transfer) in order for it to take priority over a registered disposition of an estate or charge. This presents the worrying possibility that an interest could arise during the so-called 'registration gap', the period between the transfer and registration. The case of *Baker v Craggs* [2016] EWHC 3250 (Ch), [2016] All ER (D) 93 (Dec) demonstrates the pitfalls which may accompany delayed registration.

Overriding interests & overreaching: an overview

A transferee under a registered disposition (whether or not for value) takes the land subject to unregistered interests which override as defined in Sch 3 of LRA 2002, including the interests of persons in actual occupation. Only proprietary rights will qualify; personal rights may give rise to an estoppel and an equitable remedy, but will not override a registered charge.

An overriding interest may still be defeated by the doctrine of overreaching at s 2(1) of the Law of Property Act 1925 (LPA 1925), which includes at ss 1(ii) a provision with

regard to the sale of land by trustees: '(1) A conveyance to a purchaser of a legal estate in land shall overreach any equitable interest or power affecting that estate, whether or not he has notice thereof, if— ... (ii) the conveyance is made by trustees of land and the equitable interest or power is at the date of the conveyance capable of being overreached by such trustees under the provisions of sub-s (2) of this section or independently of that subsection, and the requirements of s 27 of this Act respecting the payment of capital money arising on such a conveyance are complied with.'

S 27(2) states: 'Notwithstanding anything to the contrary in the instrument (if any) creating a trust of land or in any trust affecting the net proceeds of sale of the land if it is sold, the proceeds of sale or other capital money shall not be paid to or applied by the direction of fewer than two persons as trustees, except where the trustee is a trust corporation, but this subsection does not affect the right of a sole personal representative as such to give valid receipts for, or direct the application of, proceeds of sale or other capital money, nor, except where capital money arises on the transaction, render it necessary to have more than one trustee.'

Therefore, if land subject to a trust is sold and the purchase price is paid to at least two trustees, the land may be sold free of the beneficiary's interests. The interest will 'attach' to the proceeds of sale instead.

City of London Building Society v Flegg [1988] AC 54, [1987] 3 All ER 435, provides a typical scenario. Two couples occupied a property: the Maxwell-Browns were the legal owners and the Fleggs beneficial owners (on the basis of their contributions to the purchase price). The Maxwell-Browns obtained a second mortgage on the property and defaulted. When the lender sought to sell the property, the Fleggs asserted an overriding interest through actual occupation. The House of Lords ruled that, as joint owners, the Maxwell-Browns held the

property expressly on trust for themselves and impliedly on trust for the Fleggs. Since the capital monies for the mortgage had been paid to two trustees (the Maxwell-Browns), their overriding interest was overreached by the disposition to the lender.

The principle of overreaching will therefore be relevant in any case where a disposition is made by co-owners (note that the idea of a trust concurrent with co-ownership did not exist when LPA 1925 was drafted).

***Baker v Craggs*: beware the registration gap**

Mr and Mrs Charlton sold part of their farm to Mr Craggs. The sale completed on 17 January 2012. The transfer did not reserve any right of way for the retained land. The registration process was then beset by problems: the initial application was not made for nearly a month; a month after application the Land Registry spotted an omission in the annexed plan and required it to be amended; the application was then cancelled because the amendment was not done by the deadline, and had to be resubmitted. In the end Mr Craggs was not registered as the proprietor of the land until 16 May 2012.

In the meantime the Charltons exchanged and completed on the sale of the retained land to Mr and Mrs Baker in February 2012. The transfer included a right of way over the land already sold to Mr Craggs. The Bakers' title, including the right of way, was registered on 14 March 2012. When Mr Craggs' registration eventually went through in May, the Bakers' purported right of way over his land was recorded on the title. In 2015, following the usual neighbourly disputes, the Bakers issued proceedings seeking a declaration that their land enjoyed a right of way over Mr Craggs' land.

It was common ground that Mr Craggs had become the beneficial owner of the land upon completion, but that the vendors retained legal ownership until registration. If registration had been done promptly, the grant of the right of way would have been

ineffective. In the event, however, Mr Craggs had only an equitable interest at the time of the Bakers' registration. The Bakers were duly registered purchasers of a registrable estate for valuable consideration, and took the land free of all interests apart from those in Sch 3.

The key issues therefore were whether Mr Craggs' use of the right of way prior to registration constituted an overriding interest and, if so, whether the transfer of the right of way to the Bakers could overreach this interest. The important question underlying these issues is whether vendors can successfully confer rights over land they have already sold—an outcome which would be surprising to most purchasers of land.

'Actual occupation' is a question of fact, requiring 'physical presence on the land and not some entitlement in the law' (per Lord Wilberforce in *Williams & Glyn's Bank* at pp 504-5). Presence on the land may be by employees or agents, such as builders, and need not be exclusive (ie the interested party may be living elsewhere but visiting the land regularly to supervise works). There must however be some degree of 'permanence and continuity', for example fencing or storage of goods (per Arden LJ in *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] All ER (D) 319 (Feb), at [80]). The presence of possessions during a temporary absence will assist in showing actual occupation, but is unlikely to be sufficient if there is evidence that the claimant never intended to live there again. Use of an easement across neighbouring land will not constitute occupation (*Chaudhary v Yavuz* [2011] EWCA Civ 1314, [2012] 2 All ER 418), though this may need to be reconsidered for easements of parking and storage.

Mr Craggs provided evidence of occupation, including that works had been carried out on the land and he and his partner had attended almost every day to assist. Newey J accepted that Mr Craggs had been in actual occupation both before and on 20 February 2012 and therefore had an overriding interest.

The Bakers contended that Mr Craggs' interest was overreached and subordinated to the right of way, for the following reasons:

- a. Between completion and registration the vendors remained the legal co-owners of the land and held it on trust for Mr Craggs;
- b. The vendors had all the powers of an absolute owner and received the capital monies from the Bakers; and
- c. The easement was a conveyance of a legal estate in land by trustees and the monies were paid to two trustees.

The first issue was if the conveyance of the easement constituted a 'conveyance of a legal estate'. Newey J found that on the correct interpretation of s1(4) of LPA 1925 the easement was a legal estate and the transfer of the fee simple was not required for overreaching to occur. This seems to contradict the traditional principles applied to overreaching, where land that is subject to an interest is transferred by trustees and the interest attaches to the proceeds of sale. Here it was not Mr Craggs' land that was sold, but simply a right over it. This appears to be an extension of the concept to an entirely new scenario.

Mr Craggs then argued that what he had between completion and registration was not a equitable interest in the land, but an 'estate contract' as exempted from overreaching in s 2(3)(iv) of LPA 1925 ('The benefit of any contract (in this Act referred to as an "estate contract") to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option to purchase, a right of pre-emption, or any other like right'). His position was that the bare trust in favour of the purchaser during the registration gap is the *effect* of the estate contract, but this equitable estate has no legal existence of its own. It remains an 'estate contract' until registration when legal title passes. The Bakers said that while Mr Craggs may have had an estate contract during the period between exchange and

completion, he plainly had more during the registration gap. Per Lady Hale in *Mortgage Business v O'Shaughnessy* [2014] UKSC 52, [2015] 1 All ER 277 once completion occurs the purchaser has an absolute right to the legal estate. This differs from the position before completion, when the purchaser has a contractual right to acquire the estate, but might never actually get it.

The 'estate contract' argument did not succeed. Newey J concluded that where a vendor sells with full title guarantee, the purchaser will gain the benefit of certain implied covenants, but the original contract merges with the transfer upon completion. The purchaser's status during the registration gap is not the same as between exchange and completion. Thus Mr Craggs' equitable interest in his land was overreached and the Bakers got their easement.

Practical implications

Property practitioners should take *Baker v Craggs* as a timely warning of the perils of the registration gap where land is being sold by co-owners. Registration applications should be checked carefully and any queries raised by the registry responded to as quickly as possible. However anecdotal evidence suggests that the time to registration has lengthened notably in the past few years due to the under-resourcing of the Land Registry; even if everything is done correctly, there is still the possibility of significant delay. Until registration is complete, it must not be assumed that rights in the land conveyed are settled. Mr Craggs certainly did not think he was buying land subject to a right of way which did not yet exist. Particularly where vendors are selling off a plot of land in parcels, it may be worth seeking agreement that they will not grant any rights over the conveyed land after completion.

NLJ

Amy Proferes is a barrister at Serle Court
(aproferes@serlecourt.co.uk; www.serlecourt.co.uk)