Neutral Citation [2021] EWHC 1343 (Ch)

Claim No: F30BS790
Appeal No: None allocated

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
Appeals (ChD)

On appeal from the County Court at Bristol
Order of Mr Recorder Hyam, QC dated 19 March 2020

Sitting remotely at: Bristol Civil Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 21 May 2021

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

RITA BRENDA KNIGHT

Appellant
(Claimant in the proceedings below)

-and-

(1) MICHAEL FERNLEY
(2) LESLEY FERNLEY

Respondents
(Defendants in the proceedings below)

- -

- -

Mr James Howlett (instructed by **DGR Law**) appeared for the Appellant
Mr Simon Williams (instructed by **Humphries Kirk Solicitors**) appeared for Respondents

Hearing date: 4 May 2021

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

A. INTRODUCTION

1. This is an appeal from the order of Mr Recorder Hyam, QC (the "Judge") dated 20 March 2020 (the "Order"). By his Order, and for the reasons given in his judgment (the "Judgment"), the Judge refused the Appellant's application for an order altering the proprietorship register of a plot of land registered at Her Majesty's Land Registry under Title Number WT157289 so as to substitute the Appellant's name for that of the Respondents. The Appellant sought a declaration as to ownership of this property to similar effect, which was also refused by the Judge.

2. The Judge refused permission to appeal. Permission was given by order of Murray J dated 15 May 2000, and the appeal was heard by me on 4 May 2021. I reserved my judgment, and this is that judgment.[1]

B. THE FACTS

3. The facts of this case are largely uncontroversial and are adopted by me (with gratitude) from the careful Judgment of the Judge and from the documents in the trial bundles that were before the Judge.

4. This appeal concerns the development and sale of a plot of land registered at Her Majesty's Land Registry under Title Number WT157289. The land is situate in Marlborough, and is more precisely described below.

5. The developers of the land were Morteza Pourzadeh and Sepehr Izadpanah trading as "Pars Developments" (which is how I shall refer to Messrs Pourzadeh and Izadpanah). The land being developed comprised in substance three dwelling houses, built by Pars Developments, and described in the contracts for their sale as "Plot 1", "Plot 2" and "Plot 3".

6. The Appellant, Mrs Knight, was the purchaser of Plot 1. The contract of sale (dated 20 August 2015) describes the property as "Plot Number 1, 1A London Road, Marlborough SN8 1PH to be known as 3 Wye Lane, Marlborough SN8 1PH and shown edged red on plan 1". The land being developed by Pars Development was in the shape of a capital "T". The T's cross-bar comprised Plot 2 (to the left) and Plot 1 (to the right) abutting Wye Lane and becoming, respectively, 2 and 3 Wye Lane. Plot 3 formed the T's downstroke.

7. As with many developments, not all of the land was used for Plots 1, 2 and 3. There were various what I shall term "off-cuts" – effectively useless pieces of land, of no development potential. One of these off-cuts is of central importance to this appeal, and it is referred to as "Plot A". Plot A is a small, parallelogram or perhaps rectangular shaped piece of land, about 2 metres by 1 metre in size. Plot A does not, in any way, abut Plot 1,

[1] The delay between the granting of permission to appeal and the hearing of the appeal is essentially due to the delay in producing proper bundles for the appeal by the Appellant. The history does not matter, but there are various orders regarding procedural aspects of the appeal concerned with its forward management.

but sits next to, and to the left of, Plot 3. Plot 3 lies between and separates Plot 1 from Plot A.

8. The land to the left of the T is not open space. There are six properties comprising the land to the left of the T, and these properties are known as numbers 1 to 6 London Road. Numbers 1 to 6 London Road abut the development and (on their other side) abut London Road. Plot A sits between 6 London Road and Plot 3.

9. Pars Development succeeded in selling all three of Plots 1, 2 and 3. All three plots were part of the same parcel of registered land, registered (as I have said) under Title Number WT157289. In order to convey the relevant part of this registered title, Pars Development (as transferor) executed in favour of the purchasers of each of Plots 1, 2 and 3 (as transferees) a form "TP1", which is the form used to transfer part of a registered title. It is the practice of Her Majesty's Land Registry, when registering transfers such as this, to allocate a new title number to the part of the land being transferred. The territorial extent of the old registered title is diminished to that extent, although the title number of that remaining portion remains the same.

10. Of course, if the TP1 is not registered, no new registered title is created, although the transferee holds that part beneficially, with the transferor as trustee of that beneficial interest. In this case, on the sale of Plots 2 and 3, TP1s were duly executed and registered, and (on registration) new registered titles of the legal estate were carved out of the old registered title. That left Plot 1 and Plot A:

(1) The Appellant completed the purchase of Plot 1 on 21 August 2015 when a form TP1 was executed in her favour by Pars Developments. The form identifies the title number out of which the property was transferred (i.e., Title Number WT157289) and identified Plot 1 by reference to an attached plan. The consideration paid by the Appellant for Plot 1 was £309,000.

(2) Unfortunately, the form TP1 was never registered by the Appellant's solicitors. This was clearly a mistake and (for the purposes of this judgment) I proceed on the basis that it was a negligent mistake, in breach of the Appellant's solicitors' duty of care owed to the Appellant, such that the Appellant has a good cause of action against those solicitors so as to hold her harmless against any losses that the solicitors' negligence might occasion.

(3) It was common ground between the Appellant and the Respondents that this failure to register meant that the Appellant only ever had an equitable interest in Plot 1. Thus, section 27 of the Land Registration Act 2002 provides:

> "(1) If a disposition of a registered estate or registered charge is required to be completed by registration, it does not operate at law until the relevant registration requirements are met.
>
> (2) In the case of a registered estate, the following are the dispositions which are required to be completed by registration –
>
> (a) a transfer…"

This transaction was a disposition falling within section 27(2)(a) and so it could not operate at law until the relevant registration requirements were met, and they

were not.[2] However, pending registration, the Appellant held an equitable interest in Plot 1 – but, to be clear, that interest will have extended only to Plot 1 as defined, and not to any other part of the land registered under Title Number WT157289.[3]

(4) The Respondents, Mr and Mrs Fernley, were – at this time – the owners of 6 London Road. Unsurprisingly, they were interested in purchasing the (otherwise useless) Plot A in order to extend the rear of their property. They agreed with Pars Developments to purchase Plot A for £2,500 and this sale was effected by a transfer under form TR1 dated 7 December 2015. It is important to be very clear about the findings that the Judge made in relation to this transaction:

(a) There was no intention – on the part of either the Respondents or Pars Developments – to transfer more than Plot A.

(b) The reason form TR1 was used – which, unlike form TP1, concerns the transfer of the whole of a registered title – is because the parties proceeded on the basis that Plot A and the land registered under Title Number WT157289 were co-extensive.

(c) That was an entirely reasonable assumption, and one that would have been correct, had the Appellant's solicitors registered the transfer of Plot 1 as they should have done.

(5) The effect of this combination of events was that the Respondents became registered proprietors of all of the land registered under Title Number WT157289, which comprised (at that time) Plot A and Plot 1.

(6) The Appellant has, since discovering this state of affairs, sought to correct it. But Her Majesty's Land Registry have declined to do so unilaterally; and the Respondents have declined to consent to any change in the proprietorship register to reflect the Appellant's interest (such as it may be) in relation to Plot 1. The details of the Appellant's dealings with Her Majesty's Land Registry and those of her dealings with the Respondents, to the extent they are known,[4] are matters that it is unnecessary to explore. It is sufficient to note that the Respondents became the proprietors of the land registered under Title Number WT157289 on registration of the form TR1 dated 7 December 2015 that I have described above.

(7) In the Judgment, the Judge noted that 6 London Road "has now been sold".[5] The circumstances are of relevance, as they affect the extent of the land now registered under Title Number WT157289. Under a form TR5 – which concerns the transfer

[2] See section 6(1) and section 7(1) of the Land Registration Act 2002.

[3] Section 7(2)(a) of the Land Registration Act 2002; *Scribes West Ltd v. Relsa Anstalt (No 3)*, [2004] EWCA Civ 1744 at [9] (*per* Carnwath LJ).

[4] Quite clearly, the position could have been corrected by consent between the Appellant and the Respondents. No such consent has been forthcoming. The details of communications between the parties on this point have not been provided to me (no doubt because they are protected by the without prejudice privilege) and (despite both parties' elliptical reference to these negotiations in the course of submissions) it seems to me that I must disregard any questions as to why consent could not be reached.

[5] Footnote 1 of the Judgment.

of a portfolio of titles (whether in whole or in part) – dated 28 January 2019, the Respondents transferred to a transferee (whose identity is immaterial):

(a) The property under Title Number WT227692, this being 6 London Road.

(b) Part of the property under Title Number WT157289. The form describes the part so transferred in the following terms:

> "Part of the land known as 1A London Road, Marlborough, Wiltshire, which comprises the landlocked courtyard area to the rear of 6 London Road, Marlborough, shown shaded pink on the attached plan."

Thus, 6 London Road plus what I am referring to as Plot A have been transferred by the Respondents to the new proprietor. Plot A, being a part of a larger title, Title Number WT157289, will of course receive a fresh title number. The result is that Title Number WT157289 now only describes what I call Plot 1.

C. THE JUDGE'S DECISION AND THE GROUNDS OF APPEAL

11. The Judge found that:

(1) The Appellant had been in actual occupation of Plot 1 since she purchased it in August 2015,[6] and so had been in actual occupation of the entirety of Plot 1 as at the date of the transfer to the Respondents on 7 December 2015.[7] These findings, which were essentially ones of fact, were not challenged on appeal, and rightly so. The Judge carefully considered the evidence, and his conclusions on this point are unassailable. Thus, as at the date of the transfer to the Respondents, the Appellant had *(i)* an equitable interest in Plot 1, buttressed by *(ii)* actual occupation over that property. The Judge thus concluded that the Appellant had an "overriding interest" in Plot 1 at the time of the transfer.[8]

(2) The Appellant's overriding interest had been "overreached" pursuant to section 2(1) of the Law of Property Act 1925. In other words, the Judge concluded that the price paid by the Respondents, which they (and the vendors, Pars Developments) regarded as the price for Plot A, was in fact the price for Title Number WT157289, comprising Plot A and Plot 1. The purchase price of £2,500 was for the property described under Title Number WT157289, and the Appellant's overriding interest in Plot 1 transferred to the purchase monies paid by the Respondents for the property described under Title Number WT157289. Thus, the Respondents took free of the Appellant's overriding interest.[9] This conclusion was challenged by the Appellant and the various points advanced by the Appellant in this regard are considered later on in this judgment. However, one point – made with some force before the Judge, but not before me – must be considered because it appears to have

[6] At [23] of the Judgment.

[7] At [25] of the Judgment.

[8] At [20](a) and [25] of the Judgment.

[9] Judgment at [26] to [36].

had a significant distractive effect on the third matter considered by the Judge, namely the question of "mistake". As to this:

(a) Having concluded that the Appellant's overriding interest was overreached, the Judge went on to consider the question of "mistake". Mistake was, in fact, the primary contention in the pleadings before him.[10] However, it was expressly asserted that:[11]

> "For the avoidance of doubt, the [Appellant] avers that the alteration of the register sought above is not rectification for the purposes of paragraph 3 of Schedule 4 of the Act…"

(b) Section 65 of the Land Registration Act simply provides that Schedule 4 to the Act has effect. Schedule 4 itself relevantly provides:

> "*Introductory*
>
> 1. In this Schedule, references to rectification, in relation to alteration of the register, are to alterations which –
>
> (a) involves the correction of a mistake, and
>
> (b) prejudicially affects the title of a registered proprietor.
>
> *Alteration pursuant to a court order*
>
> 2. – (1) The court may make an order for alteration of the register for the purposes of –
>
> (a) correcting a mistake,
>
> (b) bringing the register up to date, or
>
> (c) giving effect to any estate, right or interest excepted from the effect of registration.
>
> (2) An order under this paragraph has effect when served on the registrar to impose a duty on him to give effect to it.
>
> 3. – (1) This paragraph applies to the power under paragraph 2, so far as relating to rectification.
>
> (2) If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 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] See paragraph 10 of the Particulars of Claim.

[11] Paragraph 11 of the Particulars of Claim, emphasis supplied.

(b) it would for any other reason be unjust for the alteration not to be made.

(3) If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so."

(c) It is not completely clear whether the Appellant was contending that there was a mistake altogether independent of Schedule 4 or whether this was simply a case falling outwith the statutory definition of "rectification" in paragraph 1 of Schedule 4. Whatever the argument, the Judge was referred to and considered cases of contractual mistake[12] and regarded the issue before him as follows:[13]

"The crucial issue is therefore whether this was a void disposition for fundamental mistake. If not, then following Kitchin LJ's expression of the law at [59] of *NRAM*,[14] I do not consider that there was a "mistake" and the proper course is not alteration but rectification as summarised in the letter from the Land Registry:

> "No doubt it was not intended by the parties to the Transfer dated 7 December 2015 that it have the effect of transferring to Mr and Mrs Fernley the land comprised in the Transfer to your client [the Appellant].
>
> However, it is a transfer of the whole of the "parent" title WT157289; it has no plan. Whatever the intention, it appears that the December transfer can only be interpreted as having transferred the whole of the parent title at that date, including the land in your client's transfer.
>
> If it could be shown that the December transfer was completely void, application could be made to alter the register to show the registered proprietors of the parent title WT157289 as [Pars Developments] again. However, I think it would be difficult to show that the December transfer was void since it did achieve what it was intended to (namely, the transfer to Mr and Mrs Fernley of the land to the rear of their existing property).
>
> It therefore appears that steps will have to be taken to obtain rectification of the December transfer, either by the parties to it, or by application to the court or, if appropriate, to the Land Registration Division of the Property Chamber, First Tier Tribunal."

(d) What is curious is that despite the proceedings before the Judge and their outcome, the Appellant appears to have persisted in contending that this was not a case of rectification but exactly the case which the Land Registry had rejected, namely a case where the disposition was void. The Judge rejected the argument when put in these terms:[15]

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[12] See [37 to [45] of the Judgment.

[13] Quoting from [45] of the Judgment.

[14] This was a reference to the decision of the Court of Appeal in *NRAM Ltd v. Evans*, [2017] EWCA Civ 1013.

[15] At [46].

> "Having considered the matter carefully, and well aware of the apparent windfall benefit which this decision confers on the [Respondents], the responsibility for which lies firmly with the failure of the [Appellant's] conveyancing solicitors promptly to register the transfer of 21 August 2015, in my judgment there was no fundamental or common mistake requiring alteration and the claim for declaratory relief and alteration must fail."

(3) Thus, it is clear that the Judge rejected the argument on mistake as it was put to him. The argument before me proceeded on a rather different basis. There was very little suggestion that the disposition was void,[16] and much more emphasis placed on the jurisdiction under paragraph 2 of Schedule 4 of the Land Registration Act 2002.

12. Thus, the appeal against the Order was made on two broad grounds:

(1) First, it was contended that the Judge erred in holding that the Appellant's overriding interest in relation to Plot 1 had been overreached.

(2) Secondly, it was contended that the Judge erred in not exercising the jurisdiction under Schedule 4 of the Land Registration Act 2002. Here, however, it seems to me that I must proceed with caution, because it seems to me that even on appeal the Appellant may have been "pulling her punches" in not contending that the register should be rectified (as opposed to altered in a manner not amounting to rectification).

13. These points are considered in turn below. However, before I do so, it is necessary to consider the nature of the Appellant's overriding interest.

D. THE APPELLANT'S OVERRIDING INTEREST

14. There was no dispute about the Judge's findings in this regard, and there can be no question of my re-visiting those findings on appeal. However, because the nature of the Appellant's overriding interest is relevant to the question of overreaching, it is as well to spell out exactly the nature of that interest:

(1) Under the rules of priority set out in the Land Registration Act 2002, a registered disposition of a registered estate – which the transfer from Pars Developments to the Respondents unequivocally was – takes effect subject to certain unregistered interests which are specified to "override" the disposition.[17]

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[16] This contention constituted Ground 3 of the grounds of appeal. However, Ground 3 was elided with Ground 4, which more broadly pleads:

"The [Judge] erred in law in concluding that, had the Registrar known the true state of affairs at the time of the completion by registration of the transfer dated 7 December 2015, he or she would still have made the entry showing the [Respondents] as the registered proprietors of the Subject Property [i.e., Plot 1]".

I was not taken to any law regarding the "voidness" of the disposition to the Respondents, and the point was essentially not argued.

[17] See section 29(1) and 29(2)(a)(ii) of the Land Registration Act 2002.

(2) These unregistered overriding interests are set out in Schedule 3 of the Land Registration Act 2002. Paragraph 2 of Schedule 3 identifies the following interests as interests which override registered dispositions:

> "*Interests of persons in actual occupation*
>
> An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for –
>
> (a) an interest under a settlement under the Settled Land Act 1925;
>
> (b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so;
>
> (c) an interest –
>
> (i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and
>
> (ii) of which the person to whom the disposition is made does not have actual knowledge at that time;
>
> (d) a leasehold estate in land granted to take effect in possession after the end of the period of three months beginning with the date of the grant and which has not taken effect in possession at the time of the disposition."

(3) As I have noted, the Appellant had an interest in property (the equitable interest described in paragraph 10(3) above), buttressed by the actual occupation found by the Judge to exist.

15. In these circumstances, the disposition by Pars Developments to the Respondents took subject to the Appellant's overriding interest. That is the plain meaning of section 29 of the Land Registration Act 2002; but this conclusion is subject to the question of overreaching, to which I now turn.

E. OVERREACHING OF THE APPELLANT'S OVERRIDING INTEREST

16. The Judge found that the Appellant's overriding interest was overreached.

17. The concept of overreaching concerns the translation of interests in property into equivalent interests in the purchase price of that property. The concept was described by Lord Oliver in *City of London Building Society v. Flegg*,[18] a case I will have to return to, and is helpfully summarised in *Gray & Gray*:[19]

> "The 1925 legislation accordingly confirms the existence of a device – commonly known as 'statutory overreaching' – which neatly resolves much of the tension between the requirement of facility for purchasers and the countervailing requirement of protection for certain lesser kinds of interest in land. Provided that a disposition of a freehold or leasehold estate is made in the statutorily authorised manner, the Law of Property Act 1925 allows the disponee to *overreach* (i.e., to deflect or take free of) several kinds of pre-exisiting equitable interest. The legal title

[18] [1988] AC 54 at 83, 91.

[19] Gray and Gray, *Elements of Land Law*, 5th ed (2009) at [1.7.35].

taken by the disponee is effectively cleared or unburdened by the translation of these otherwise binding rights into an exactly equivalent value in money form. In short, the disponee is accorded a substantial immunity from adverse interests in the subject land, whilst these same interests surivive the transaction concerned and live on in permutated guise in the money proceeds of the disposition."

18. Section 2 of the Law of Property Act 1925 provides (so far as is material):

> "(1) A conveyance to a purchaser of a legal estate shall overreach any equitable interest or power affecting that estate, whether or not he has notice thereof, of –
>
> …
>
> (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 subsection (2) of this section or independently of that subsection, and the requirements of section 27 of this Act respecting the payment of capital money arising on such conveyance are complied with…"

As to this:

(1) "Trustees of land" is a term inserted into the 1925 Act by paragraph 4(2)(a)(ii) of Schedule 3 to the Trusts of Land and Appointment of Trustees Act 1996.

(2) Section 1 of the Trusts of Land and Appointments of Trustees Act 1996 provides:

> "(1) In this Act –
>
> (a) "trust of land" means (subject to subsection (3)) any trust of property which consists of or includes land; and
>
> (b) "trustees of land" means trustees of a trust of land.
>
> (2) The reference in subsection (1)(a) to a trust –
>
> (a) is to any description of trust (whether express, implied, resulting or constructive), including a trust for sale and a bare trust, and
>
> (b) includes a trust created, or arising, before the commencement of this Act.
>
> (3) The reference to land in subsection (1)(a) does not include land which (despite section 2) is settled land or which is land to which the Universities and College Estates Act 1925 applies."

(3) This is a case of a bare trust of property consisting of land, the trustees being Messrs Pourzadeh and Izapanah.[20] These trustees have the broad powers described in section 6(1) of the Trusts of Land and Appointment of Trustees Act 1996, but are, by virtue of section 6(9), subject to the duty of care under section 1 of the Trustee Act 2000.

[20] It is important for overreaching purposes that there be two trustees. I remind myself that Pars Developments was simply the trading name of these two individuals.

(4) This is therefore a case where the power to overreach arises not by virtue of section 2(2) of the Law of Property Act 1925, but "independently of that subsection" by virtue of the Trusts of Land and Appointment of Trustees Act 1996.

19. Section 2 of the Law of Property Act 1925 requires that the provisions of section 27 of the same Act are complied with. Section 27 provides (so far as is material):

> "(1) A purchaser of a legal estate from trustees of land shall not be concerned with the trusts affecting the land, the net income of the land or the proceeds of the sale of the land whether or not those trusts are declared by the same instrument as that by which the trust of land is created.
>
> (2) 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…"

Hence the importance of there being two trustees in this case.

20. *Prima facie*, it seems to me that the overreaching provisions of the Law of Property Act 1925 apply, and that the Appellant's equitable interest in Title Number WT157289 was, as the Judge found, overreached:

(1) The Appellant's interest was an equitable interest in the property described under Title Number WT157289.

(2) The property was regularly disposed of by the trustees of that trust (the owners of the legal estate described by Title Number WT157289) to the purchasers of that legal estate.

(3) The consideration for the disposition was paid to two trustees.

21. It therefore seems to me to be unanswerable that the Appellant's equitable interest in Title Number WT157289 transferred to the £2,500 received by Pars Developments from the Respondents. To hold the contrary would be to disregard an authority binding on the Judge and binding on me, namely the decision of the House of Lords in *City of London Building Society v. Flegg*.[21] Matters would have been different if the purchase monies had been paid to a single trustee: had that been the case, then the combination of section 27 of the Law of Property Act 1925 and the fact that the Appellant's interest was an overriding one would have ensured that the Respondents took subject to the Appellant's rights. But that is not this case.

22. The Appellant contended that there were three reasons why her overriding interest was not overreached:

(1) It was suggested that the manifest inadequacy of the consideration paid by the Respondents rendered it impossible for the Appellant's interest to be overreached. I entirely accept that a payment of £2,500 for property worth in excess of £300,000 is manifestly inadequate. But no authority was cited in support of the proposition that the adequacy of consideration is a factor relevant to the question of

[21] [1988] AC 54.

overreaching , and it is significant that the relevant legislation contains no reference at all to the adequacy of payment for the land being disposed of. It is easy to see why not: if it were possible to contend that an equitable interest was not overreached because the consideration paid was, in some way, inadequate, then much of the security of title created by the scheme of land registration in this jurisdiction would be lost. There is good reason why a beneficiary under a trust such as the present is limited to a claim against the trustees if the property has been disposed of at an undervalue.

(2) It was suggested that the property disposed of by Pars Developments to the Respondents was not the property comprised under Title Number WT157289, but rather Plot A. I am afraid I regard that proposition as unarguable. What was being conveyed was unequivocally the property comprised under Title Number WT157289. I accept that both Pars Developments and the Respondents were under the false impression that the property comprised under Title Number WT157289 was Plot A and not Plot A plus Plot 1. But the transfer unequivocally refers to the legal title which can only be defined by reference to the title number.

(3) It was suggested that the beneficial interest that the unregistered TP1 created in the Appellant constituted an "estate contract" within the meaning of section 2(3)(iv) of the Law of Property Act 1925. The term "estate contract", it was suggested, was sufficiently wide to embrace the present case. I do not need to consider the meaning of this provision at all, for it constitutes an exception to section 2(2) of the Law of Property Act 1925. Section 2(2) makes express provision for certain types of trustee (individuals appointed by the court or a trust corporation) to overreach, and section 2(3) lists a number of equitable interests (including estate contracts) that are excepted from the operation of section 2(2). These provisions are simply irrelevant in the present case: as I have described, this is not a case where the basis for overreaching is section 2(2).[22]

23. Accordingly, I find that the Judge was correct to conclude that the Appellant's overriding interest in the legal estate described by Title Number WT157289 was overreached.

F. ALTERATION OF THE REGISTER

24. The relevant provisions of Schedule 4 to the Land Registration Act 2002 are set out at paragraph 11(2)(b) above. Schedule 4 draws a clear and important distinction between the alteration of the register and its rectification. Clearly, any system concerned with the recording of transactions involving ownership of and dispositions in land will require entries on the register to change, without their necessarily being any mistake. But, of course, mistakes will be made, and will have to be corrected. Schedule 4 deals with both types of change, differentiating between:[23]

[22] See above. In this regard, the Appellant placed considerable reliance on the decisions of Newey J and the Court of Appeal in *Baker v. Craggs*, [2016] EWHC 3250 (Ch) and [2018] EWCA Civ 1126. For the reasons I have given, this decision simply does not apply in the present case, being concerned with entirely different facts. The Appellant could not – indeed, did not – explain how her contentions in this regard could be reconciled with the decision of the House of Lords in *Flegg*.

[23] Quoting from Harpum and Bignell, *Registered Land*, 1st ed (2004) at [22.3].

> "…those changes to the register that are necessary to keep the register up to date and the correction of mistakes. The basic concept employed by the Act is that of *alteration* of the register and that term covers all types of alteration that may be made in the register. *Rectification* is one form of alteration, namely one which:
>
> (a) involves the correction of a mistake; and
>
> (b) prejudicially affects the title of a registered proprietor."
>
> This is the definition of "rectification" contained in paragraph 1 of Schedule 4.

25. Rectification is a form of alteration that is subject to the special conditions set out in paragraph 3 of Schedule 4. In short, whereas alterations are more easily made under the rules in Schedule 4, rectification can only occur:

(1) With the proprietor's consent;

(2) Where the proprietor has by fraud or lack of proper care caused or substantially contributed to the mistake; or

(3) Where it would for any other reason be unjust for the alteration not to be made.

26. Rectification is subject to these special conditions *(i)* because a proprietor is, generally speaking, entitled to rely on the accuracy of the register and *(ii)* because, for that reason, where there is rectification, which prejudicially affects the title of the registered proprietor, the proprietor is generally (although not always) entitled to an indemnity under Schedule 8 to the Land Registration Act 2002.

27. As I have noted, the Appellant has specifically pleaded that this is not a case of rectification, but one of alteration other than by way of rectification.[24] That plea has shaped the nature of the Appellant's contentions before the Judge. Specifically, the Appellant has (through her own choice) decided to contend that the mistake in this case does not prejudicially affect the title of the registered proprietors, the Respondents. That is, on the face of it, a difficult contention, for the Respondents are registered as the proprietors of Title Number WT157289, and the Appellant, by this claim, seeks to deprive them of that proprietorship by substituting herself for them.

28. This explains why the Appellant, before the Judge, sought to contend that the very disposition from Pars Developments to the Respondents was void for mistake. The contention was that there was a mistake so fundamental that the disposition was of no effect. If so, then of course the Respondents' title would not prejudicially be affected because they would have no title.

29. Before the Judge, therefore, the Appellant quite deliberately forced herself into contending for a much narrower form of mistake than is recognised under the 2002 Act, simply in order to avoid contending that the register needed to be rectified. That submission failed before the Judge, and rightly so.[25] It seems to me extremely difficult to identify in the disposition between Pars Developments and the Respondents (or in the

[24] See paragraph 11(2)(a) above.

[25] Judgment at [37] to [45].

contract underlying that disposition) the elements necessary to establish common mistake as described by the Court of Appeal in *Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd*.[26] Indeed, the Appellant did not, on appeal, particularly seek to persuade me that the Judge had erred in this regard. The Judge was, plainly, right in the conclusion he reached in relation to the points articulated before him.

30. That brings me to the grounds of appeal in relation to the Judge's conclusion in this regard. It is important to set them out in full:

> "3. The Recorder erred in law in concluding that the transfer dated 7 December 2015 to the [Respondents] was not void for mistake in that the subject matter of the transaction which the parties to that transfer intended to make was Plot A and not the Subject Property [i.e., Plot 1]. The Subject Property was an entirely separate property from Plot A. The parties to the transfer dated 7 December 2015 did not have the Subject Property in their contemplation and the Subject Property was fundamentally different in kind from the intended subject matter of the transfer.
>
> 4. The Recorder erred in law in concluding that, had the Registrar known the true state of affairs at the time of the completion by registration of the transfer dated 7 December 2015, he or she would still have made the entry showing the [Respondents] as the registered proprietors of the Subject Property."

31. Ground 3 is, of course, the point considered in paragraphs 27 to 29 above. It was, as I have indicated, not pressed before me (albeit not overtly conceded). However, for the reasons given both by the Judge and by me in paragraph 29, the point must be dismissed. There was no mistake as between Pars Developments and the Respondents: both sought the transfer of the legal estate under Title Number WT157289, and that disposition is precisely what was achieved. The fact that both parties (wrongly) understood that Title Number WT157289 comprised no more than Plot A is not material for common mistake.[27]

32. Ground 4 contends that the Judge erred in taking too narrow an approach in articulating a mistake that would justify altering the register. That is to completely misunderstand both the Appellant's own case before the Judge, and the Judge's reasoning. The Judge, as I have described, was considering what sort of mistake could justify an alternation to the register that was not a rectification and – in my judgment rightly – he concluded that the sort of mistake that could void (as opposed to render voidable) a disposition was very narrow and not here established.

33. The Judgment says nothing about rectification, because the point was not put in that way. As I have noted, rectification was expressly abjured in the Particulars of Claim, despite both the Land Registry and the Judge suggesting that this was, indeed, a case of rectification.

34. The Judge dismissed the Appellant's claim "well aware of the apparent windfall benefit which this decision confers on the [Respondents]".[28] That, if anything, understates the

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[26] [2002] EWCA Civ 1407.

[27] Where there is a mistake that does not go to the terms of the transaction between the parties, it has been clear since *Smith v. Hughes*, (1870-71) LR 6 QB 597 that the mistake is an irrelevant one for purposes of "common mistake".

[28] Judgment at [46].

position. The fact is that – by reason of the circumstances I have described – the Respondents have acquired for £2,500 the legal and beneficial title to Plot 1, which the Appellant has occupied since she purchased it for £309,000. They have not consented to an alteration of the register to reflect the Appellant as the proprietor of Plot 1, even though it would be very easy to do so, as the Respondent's sale of 6 London Road and Plot A shows. Instead, the Respondents have sold 6 London Road and Plot A, but – by splitting Title Number WT157289 – have retained that which in all justice they should not have, namely Plot 1, which is now co-extensive with Title Number WT157289.

35. It is, of course, a judge's sworn duty to "do right to all manner of people after the laws and usages of this realm", and I am very conscious that hard cases make bad law. Nevertheless, I indicated, in the course of argument, that I felt very uncomfortable about where the submissions of the Appellant and the Respondents seemed to leave me, and indeed where those submissions had left the Judge.[29] These feelings of discomfort are in no way ameliorated by two points articulated by the Respondents:

(1) First, that the Appellant will have a claim for damages against her former instructing solicitors for failing to register the TP1 in relation to Plot 1. I accept that such a case would appear to be very strong, but the fact is that, even if successful, the Appellant will lose her home to the Respondents who, in justice, have no claim to it.

(2) Secondly, that I should not infer that the Respondents have been entirely unfeeling about the Appellant's predicament. As I said earlier, both parties referred (necessarily elliptically) to the without prejudice communications that have passed between them, and which were – self-evidently – not before the court. It seems to me that I can derive nothing from these communications beyond that I am left with a situation where the parties' failure to reach agreement appears to be resulting in the unsatisfactory outcome I have described. I cannot attach any weight to the propostion that – if I were to be able to read the without prejudice communications – I would be able to conclude that one, or the other, or all of the parties had behaved unreasonably. Without prejudice communications may very well be relevant to costs: but they should not otherwise influence the substantive outcome of a case.

36. If the law compelled the outcome I have described, then (like the Judge) I would through gritted teeth have to accept it. But, having considered the pleadings and the arguments before the Judge with some care, it seems to me that the outcome has been compelled less by the law, and more by the manner in which the Appellant has put her case. Although, ordinarily, the way in which a party chooses to put his or her case dictates the way in which the case is decided, a court can invite, in terms amounting closer to an instruction, a party to take a point not previously taken.[30] In this case:

(1) The problem is that the Appellant has expressly contended that this is not a case of rectification of the register.[31] The Appellant's decision to confine the case to one of alteration but not rectification of the register has narrowed the range of relevant

[29] So much so, that I even raised the question of a statute being used as an instrument of fraud: *Rochefoucault v. Boustead*, [1897] 1 Ch 196.

[30] See, for example, *Fearn v. The Board of Trustees of the Tate Gallery*, [2020] EWCA Civ at [29].

[31] See paragraph 11 of the Particulars of Claim, quoted above.

mistakes that can be contended for to, in effect, common mistake. For the reasons given by the Judge and by me no such mistake exists in this case.

(2) In my judgment, the Appellant should be permitted to amend her Particulars of Claim – if so advised – so as to plead rectification of the register. This is obviously a case of rectification not so much because it involves the "correction of a mistake" (although obviously that would be the Appellant's contention) but because the amendment "prejudicially affects the title of a registered proprietor" (which, obviously, it does because the contention would be that the Appellant should be substituted for the Respondents as the proprietor of Title Number WT157289).

(3) It would then be open to contend that there had been a mistake requiring correction and that one or other of the requirements of paragraph 3(2) of Schedule 4 had been met.

(4) It does not seem to me to be appropriate to go further than this, without hearing from the parties. I invite the Appellant in short order to frame an appropriate amendment application and to submit (at the same time) written submissions in support of a claim to rectify the register, to which the Respondents can reply. It seems to me that this issue of rectification is a point of law arising out of facts already before the court. I make clear that whilst I would (as with any application) hear an application for the admission of new evidence, I can at the moment see no need for this, and certainly would struggle to see how the requirements of *Ladd v. Marshall* could be satisfied.

37. I invite the parties to agree a timetable for submissions and to fix a time with my clerk within the next month at which this additional point, should the Appellant choose to pursue it, can be considered.

38. If the Appellant does not wish, for whatever reason, to make the application to amend, this appeal is dismissed. It goes without saying that the question of whether the point I am inviting the Appellant to take is good or bad or even permissible is an open one, for consideration at this hearing.