

THE PRINCIPLES OF LAND LAW

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Rashid v Nasrullah [2018] EWCA Civ 2685

Rashid v Nasrullah represents an important update to the discussion surrounding multiple registered titles and the correct approach to be taken in cases such as *Parshall v Hackney*.

Facts

In this case, the registered proprietor of a site was deprived of his title, following a forgery, in 1989. The new registered proprietor had transferred title to his son by way of gift in the same year. The son was complicit in the fraud. Upon an application for rectification of the register by the original proprietor, the question for the Court was whether the application for rectification could be defeated by a claim for adverse possession by the son. It is important to note that the salient facts of this case all occurred under the 'governance' of the LPA 1925, and so the adverse possession

rules, in particular, are very different to those in operation under the LRA 2002.

Decision

Whilst the facts of the case do disclose some complexities around whether or not there was adverse possession, in essence it was established that there was possession which, all else being equal, would have been sufficient to generate a freehold title to the land. However, the Court highlights that in this case there was a 'hiccup' for the 'adverse' possessor. Similar to *Parshall*, the possessor was also registered proprietor. The question was whether this was significant to the claim in adverse possession. This, in turn, depended upon whether *Parshall* was correctly decided.

The Court of Appeal held that in so far as *Parshall* held that it was not

possible to be in adverse possession of land to which you had title, then it was wrong. The approach in *Parshall*, in the Court of Appeal's opinion, could not be reconciled with the earlier House of Lords decision in *Pye v Graham*. In light of this, the Court of Appeal concluded that it was entirely possible to be in adverse possession of land to which you have registered title.

Separation of Equitable and Legal Title

The Court also dealt with the question of the separation of legal and equitable title – an issue raised by the decision in *Malory v Cheshire Homes* and which has been the subject of sustained criticism. In *Rashid*, the Court reasoned that as a starting point it must be recognised that the mere fact of a fraud does not mean that there is necessarily a 'separation' of legal and equitable

This case relates to the discussion of mistake and registered land in chapter 5, and adverse possession in chapter 6.

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title. This is because fraud will not necessarily generate a trust. Rather, the Court of Appeal distinguishes between fraudulent takings (where the thief may hold their possessory title on trust for the original owner) and a fraudulently-induced transfer, where the question is one of rescission. In the latter case, no trust can arise prior to rescission.

What of the former case? Did the decision in *Swift 1st* mean a trust would not be generated in cases involving registered land? The judge reasons as follows:

“Since this was an outright taking of MR2’s property wholly without his consent (or even his knowledge); and there was no disposition for valuable consideration, I consider that it falls into the first of the two categories identified by Snell. In my judgment, therefore, there are good grounds for inferring a separation of the legal and beneficial interests in the property. It has the effect, as Mr Gardner proposes in the article to which I have referred, of “engineer[ing] a replica of voidness” in the context of the land registration regime. It follows, in my judgment, that upon registration MR1 acquired no more than the legal estate, leaving MR2 as beneficial owner. It is also consistent with Professor Cooke’s view in the cited article that a constructive trusteeship imposed as a result of a person’s conduct in acquisition can be accommodated within the system of registration”. [58]

Analysis

This decision is difficult. In respect of the correctness of *Parshall*, it is welcome and clearly right. The very essence of relative title is that it is possible for two titles to exist in relation to land simultaneously. The adverse possessor obtains a title as soon as they go into possession. Thus, an adverse possessor is *always* in possession of ‘their own’ land. It should make no difference to their relationship vis-à-vis another



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Adverse possession and registered title

registered proprietor who is genuinely entitled to the land following a void transfer, no transfer at all, or a mistake, that the adverse possessor happens to be registered. There is still adverse possession vis-à-vis the ‘true’ owner. In *Parshall*, however, there was an important fact: the ‘true’ owner was *also* registered. The ‘true’ owner definitely had title to land, because they were registered with title.

In *Rashid* the Court needed to assess not only whether a person with title could be in adverse possession, but also whether, on the facts, the ‘true’ owner had any right to the land which could have been extinguished by the adverse possession. It is here that we encounter a difficulty. If the basis of the decision is simply that a trust arose upon receipt of the title by the son, following his complicity in the fraud, then whilst we may question the precise facts etc, the principle seems ok. The personal conduct of the transferee generated a constructive trust.

If however the reason for the trust is the mere fact of a ‘wrongful’ transfer, then we are back in *Swift 1st* and *Malory* territory. The fact that Court does not seem wholly convinced by criticisms of *Malory*, therefore, may mean that there is life yet in the ‘separation’ of legal and equitable title to which *Malory* referred.