

How to right a wrong

Property fraud In their second article, Jayne Elkins and Karen McGinley consider the remedies available to victims

While *Frustrating Property Fraud* (EG, 25 October 2015) considered safeguards against fraudulent land transactions, here we look at remedies for victims of property fraud, such as application for rectification at the Land Registry; compensation if rectification is not permitted; and, where mortgagees have inadvertently financed a fraudulent purchase, a claim for breach of trust by their solicitors.

Rectification and indemnity

According to Land Registry Practice Notes, fraud is treated like a mistake, although there will be additional requirements as to proof – for example, a handwriting expert’s evidence as to the forging of a signature. The basic principles for an application to correct the register are set out in the box along with a summary of when an indemnity might be available to a party suffering loss caused by a mistake in the register or by rectification of a mistake in the register.

The law on the impact of forged property deeds in this area is currently unclear, as illustrated by two recent cases.

Swift 1st Ltd v Chief Land Registrar [2014] PLSCS 40 dealt with the registration of a forged charge that the Land Registry later cancelled, leading the chargee to seek an indemnity from the Land Registry for the loss suffered due to the rectification. The court found that the 2002 Act presumed a person claiming in good faith under a forged property deed could rely on the indemnity provisions. The chargee suffered a loss on correction of the register and an indemnity was therefore payable.

In *Fitzwilliam v Richall Holdings Services Ltd* [2013] EWHC 86 (Ch); [2013] 02 EGLR 183, a property deed executed under a forged power of attorney was found to transfer the legal title only. The equitable title remained with the original registered proprietor who could call for the property to be transferred back to him.

The court found that although this would entail a correction, no rectification occurred because the transferee’s title would not be prejudicially affected. The correction simply matched the legal ownership with the beneficial ownership and no indemnity was available as there was no mistake.

The contrasting outcomes for innocent parties muddy the waters in understanding how the 2002 Act’s indemnity provisions apply. In principle, *Swift* seems to be the fairer outcome, but on the facts the claimant was lucky not to be held to have contributed to its loss.

CORRECTING THE REGISTER

- Under Schedule 4 of the Land Registration Act 2002 (the “2002 Act”) the register can be altered to correct a mistake.
- If the registered proprietor is in possession of the property, the register can only be altered if they agree, unless either the registered proprietor has caused or substantially contributed to the mistake because they have been fraudulent or not exercised sufficient care, or it would be unjust not to correct the mistake.
- An application for the register to be corrected is by an AP1 with full details of the mistake, the correction required and why.
- Notice of the application will be given to the registered proprietor of the land or charge affected by the proposed change, or anyone who is entitled to an interest protected by a notice which might be affected.

Under Schedule 8 of the 2002 Act a person is entitled to be indemnified by the Land Registry if they suffer loss as a result of:

- the rectification of the register;
- a mistake in the register that could have been rectified but was not; or
- a mistake in the register before it was rectified.

Most applications for indemnity are settled by agreement with the Land Registry but a claimant can ask the court to decide whether they are entitled to an indemnity and, if so, how much. There is no right to compensation if any part of the loss has been caused by the claimant’s own fraud and the indemnity may be lost or reduced if the claimant’s lack of proper care has contributed to their loss.

Trustee Act 1925 (the “1925 Act”)

In the absence of rectification or compensation, an innocent victim might have a claim for breach of trust against the solicitor they instructed on the fraudulent transaction.

Two mortgage fraud cases provide useful commentary on how relief operates under section 61 of the 1925 Act, which gives the court powers to grant relief to a trustee who has acted honestly and reasonably.

In *Santander UK plc v RA Legal Solicitors* [2014] EWCA Civ 183; [2014]

EGILR 26 the court found numerous examples of unreasonable conduct by RA, including submitting a certificate of title without fully examining the title, not returning the mortgage advance to Santander when completion became delayed and relying on unsatisfactory replies to requisitions, including absence of mortgage discharge undertakings.

The court considered that “some element of causative connection” of the loss to the conduct should normally be shown but “completely irrelevant or immaterial” poor conduct should normally not be taken into account. Here the court did not grant relief under section 61 due to RA’s failure to obtain satisfactory replies to requisition and undertakings.

In *Davisons Solicitors v Nationwide Building Society* [2012] EWCA Civ 1626; [2013] 1 EGLR 73, the court granted relief to the lender’s solicitors under section 61. It found that adoption of the Law Society’s Code for completion by post amounted to obtaining an undertaking to discharge a charge. The case also considered whether the solicitor’s failure to obtain an enforceable legal charge breached the lender’s instructions under the CML Handbook, and the court found that the handbook imposed a duty to act with reasonable skill and care rather than an absolute obligation.

Impersonation of law firms

Impersonating genuine law firms is increasing; the SRA has warned recently that firms falling victim to fraudsters who set up bogus practices in their name could be accountable if they do not have effective systems in place to prevent third parties fraudulently using their identity.

Firms should carry out regular internet searches for mentions of their firm or staff and be alert to suspicious circumstances.

Given the SRA’s comments and the heightened awareness of the problem, innocent third parties suffering loss as a result of dealing with a bogus firm may in the future seek redress from a genuine firm who has not been sufficiently vigilant.

A timely reminder

The main problem facing the Land Registry and the courts in unpicking fraudulent land transactions is that they will often need to weigh up the competing interests of two or more innocent parties. As will be seen from the discussion above, how an innocent party, or rather its solicitors, have acted can significantly affect the outcome. This is a timely reminder to all conveyancers to observe with utmost care professional regulations, CML Handbook instructions and best conveyancing practice.

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