

In this article, I shall consider the recent Court of Appeal case of *Dhillon-v-Barclays Bank plc and the Chief Land Registrar [2020] EWCA Civ 619* where Mrs Dhillon unsuccessfully sought rectification of the register arising from mortgage fraud. She sought to have a legal charge in favour of Barclays Bank (BB) removed from the register. Neither BB nor the Chief Land Register supported her application.

As Oscar Wilde (or Lady Bracknell) could have said: to have one void transfer may be regarded as a misfortune; to have two void transfers looks like carelessness. Unfortunately, such was Mrs Dhillon's lot: her husband had forged her signature on both transfers. Transfer 1 was in relation to her purported exercise of her right to buy her home from Hackney LBC; Transfer 2 was to a company, CEL, who simultaneously charged the house to BB's predecessor. The trial judge treated both transfers as void applying *NRAM Ltd v Evans [2017] EWCA 2013* which gave the example of forgeries as amounting to void dispositions.

Mistake

The question of what amounts to a mistake for rectification purposes was considered in both *NRAM* and *Antoine v Barclays Bank Plc and the Chief Land Registrar [2018] EWCA Civ 2856*. Antoine applied *NRAM* by holding that whether an entry in the register was a "mistake" had to be judged at the time the entry was made, otherwise the policy of the *Land Registration Act, 2002*, which was that the register should be a complete and accurate statement of the position in relation to legal title, subject to the powers of alteration in *Schedule 4: section 58*. The mistake had to be regarding the state of the register (and not the underlying disposition) as that it is what had to be altered or rectified. A mistake arose when a disposition was registered or deleted from the register when it should not have been or was recorded inaccurately. A void disposition is one which, in law, had never taken place and should not therefore be entered on the register, whereas in the case of a voidable transaction, the disposition was valid until set aside; hence, there was a disposition to register. Whilst a voidable transaction might subsequently be avoided, that did not render the entry a mistake retrospectively. *NRAM* at [59] "*It may be the case that the disposition was made by mistake but that does not render its entry on the register a mistake, and it is entries on the register with which Schedule 4 is concerned. Nor, so it seems to me, can such an entry become a mistake if the disposition is at some later date avoided. Were it otherwise, the policy of the LRA 2002 that the register should be a complete and accurate statement of the position at any given time would be undermined.*"

At the heart of the appeal in *Dhillon* was paragraph 3(3) of Schedule 4 of the Land Registration Act 2002 which states that the court must alter/rectify the Register “unless there are exceptional circumstances which justify its not doing so.” Before resolving that question, one may note what the Court of Appeal did not adjudicate on.

Would the removal of the legal charge be the rectification of the relevant mistake?

Coulson LJ. held there was no need for the Court to decide this issue, although he was prepared to assume that there was jurisdiction. It was argued that the removal of the BB charge would not constitute the rectification of the relevant mistake as, for it to be a mistake which justified rectification, the focus had to be on what the Registrar did, or did not do, at the point of time at which he did or did not do it: see NRAM at [46] - [52] and Antoine.

Coulson LJ. noted at [27] the following scenario where this question could be of relevance:-

- a) the person who was the registered proprietor of the land grants a charge to an innocent lender, as security for a loan;
- b) the transfer of the land to the registered proprietor was in fact void; but
- c) the application for rectification is limited to an application to remove the charge, and does not also seek to remove the registration of the title of the borrower.

Illegality

Similarly, it was unnecessary to answer the question of whether Mrs Dhillon, innocent herself, could rely on her husband’s fraud in respect of having the charge removed from Transfer 1 which benefited her as her home was mortgage-free: she would not have paid anything for it (other than her tenant’s discount). *Nasrullah v Rashid* [2018] EWCA Civ 2685 was considered in the context of *Patel-v-Mirza* where Lewison LJ. at [75] considered that the general principle of the latter could not, on the facts of *Nasrullah*, be used to override the “calibrated scheme in the Limitation Act 1980 and the Land Registration Act 2002”

Exceptional Circumstances

Mrs Dhillon failed in her appeal to rectify the register by the removal of the charge because there were no exceptional circumstances.

Section 65 introduced Schedule 4, which made provision about alteration of the Register, and Schedule 4 provides as follows:-

“Introductory

1 In this Schedule, references to rectification, in relation to alteration of the register, are to alteration 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 purpose 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

(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.

As a recent decision, Dhillon again applies the test for “exceptional circumstances” as set out in *Paton and Anor v Todd* [2012] EWHC 1248 (Ch). The test is twofold: (1) are there exceptional circumstances in this case? and (2) do those exceptional circumstances justify not making the alteration? The first of these questions requires one to know what is meant by “exceptional circumstances” and then to establish

whether such circumstances exist as a matter of fact.

In *Paton v. Todd* [2012] EWHC 1248 (Ch), Morgan J. said at [67] of “exceptional circumstances”:-

“Exceptional” is an ordinary, familiar English adjective. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual or special, or uncommon; to be exceptional a circumstance need not be unique or unprecedented, or very rare but it cannot be one that is regularly, or routinely, or normally encountered: see R v Kelly [2000] 1 QB 198 at 208 C-D (a decision from a very different context but nonetheless helpful as to the ordinary meaning of “exceptional circumstances”). Further, the search is not for exceptional circumstances in the abstract but those which have a bearing on the ultimate question whether such circumstances justify not rectifying the register.”

In applying the exceptional circumstances test, Coulson LJ. rejected reliance on the Law Commission Consultation Report 2016 (Updating the Land Registration Act 2002) noting that judges had to apply the existing law. He went on to apply the test to the facts of *Dhillon* and found that there were exceptional circumstances:-

- Mrs Dhillon had never been the freehold owner of the property (a factor in *Paton v Todd* which on its own was enough to constitute an exceptional circumstance in that case) and she could never have afforded to buy the property. The best she could have done was buy it with a mortgage and then sell it, realising the equity that may have accrued because she could have bought the property at a discount because of the Right to Buy legislation.
- Mrs Dhillon could never have been in a better position than CEL since the title vested in her was the title which was vested in CEL.
- Mrs Dhillon’s claim for rectification had to rely on the void Transfer 1, namely the transfer from Hackney LBC to her. This would have the extraordinary consequence that she was seeking to obtain the property free of charge by relying on a document which she did not see and did not sign, and which was the first stage of a fraud about which she had no knowledge.
- the loss or potential loss of a charge in favour of a lender in good faith would be wholly exceptional for such a loss to occur in circumstances where the occupier never owned the freehold of the property; paid nothing towards the property; could never have afforded to buy the property without immediately selling it; where the original conveyance to the occupier was void because it was procured by fraud; and that, if the Register was rectified, the occupier would become the owner of the unencumbered freehold as a result of that fraud.

- Having found that the above bullet points amounted to exceptional circumstances, Coulson LJ. found that they justified the non-rectification of the Register because:
- Rectification would create a windfall for Mrs Dhillon by giving her the unencumbered freehold of a million-pound property she had never owned and could never have afforded.
- Mrs Dhillon's indirect attempt to rely on fraudulent Transfer 1 must at least be a relevant factor when considering whether the non-rectification of the Register is justified.
- If the Register is not rectified then Mrs Dhillon would be in much the same position as she would have been in had she exercised her right to buy. In 2002, she would have had to have bought the property with a mortgage and then sold it, leaving her with an equity of redemption. That is the position now, with the additional factor (in her favour) that the equity of redemption in 2002 would have been worth nothing like the £350,000 odd which it is now estimated to be. Non-rectification therefore is amply justified: it is a just and proportionate outcome.

Coulson LJ., whilst noting that Mrs Dhillon has been in occupation of the property, rejected the notion that it could give rise to some sort of overriding interest; certainly, not to an interest that somehow trumps all the other exceptional circumstances and justified rectification.

The availability of the indemnity to amount to an exceptional circumstance had not been pleaded; but Coulson LJ. doubted the merits of this argument saying at [83-84]:-

"I consider Mrs Dhillon's belated reliance on the possible existence of an indemnity, where its existence is or may be in dispute, to be questionable in principle and certainly over-stated. It would be curious if a detailed investigation of the disputed contingent rights as between B (BB in the present case) and C (the CLR) had to be undertaken and decided before the primary rights as between A (Mrs Dhillon) and B were determined. On one view, the possible existence of the indemnity should be irrelevant to Mrs Dhillon: it is res inter alios acta."

In any event, it must be wrong to suggest that, even if it were found that BB was entitled to an indemnity, this would somehow mean that exceptional circumstances could not arise, or the rectification of the Register was automatically justified. The possibility of an indemnity from the CLR to the mortgagee cannot short-circuit the court's full consideration of whether there are exceptional circumstances and whether they justified the non-rectification of the Register. That must be the case: otherwise, the detailed provisions in Schedule 4 would be self-defeating because, instead of the two-stage test outlined in Paton v Todd, all

that would matter would be whether or not the person suffering the loss was entitled to an indemnity from the CLR. That is emphatically not the law.

At best the availability of the indemnity may form part of the two stage test for exceptional circumstances. As Dhillon makes clear, reliance on such an argument requires proper pleading and argument. Besides the last point, Dhillon provides an example of the current approach to applying the exceptional circumstances test and which will be of increasing relevance in so far as mortgage fraud increases.

Matthew Haynes

St Ives Chambers

16 July 2020



Whilst every effort has been taken to ensure that the law in this article is correct, it is intended to give a general overview of the law for educational purposes. Readers are respectfully reminded that it is not intended to be a substitute for specific legal advice and should not be relied upon for this purpose. No liability is accepted for any error or omission contained herein.