

Neutral Citation Number: [2015] EWHC 2611 (Ch)

Case No: HC-2015-001815

**IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

14/09/2015

B e f o r e :

MASTER MATTHEWS

Between:

**JAMES JULIUS ISAAKS (BY THE BANK OF
SCOTLAND PLC ACTING AS ATTORNEY) Claimant**

- and -

CHARLTON TRIANGLE HOMES LIMITED Defendant

**Nicholas Broomfield (instructed by Shoosmiths LLP) for the Claimant
The Defendant did not appear and was not represented
Hearing dates: 10 August 2015**

Master Matthews :

Introduction

1. This is a claim made under CPR Part 8, issued on 13 May 2015, seeking (i) rectification of a lease dated 28 January 2002 of the flat known as 7 Games House, Springfield Grove, London SE7 7TN, on the terms of a signed deed of rectification made on 6 November 2014 between the Claimant (acting by his attorney Bank of Scotland plc) and the Defendant, and (ii) a direction to the Chief Land Registrar to amend the land register accordingly.
2. At the hearing on 10 August 2015, the Claimant was represented by Mr Nicholas Broomfield of counsel. The Defendant did not appear and was not represented. The original lessees were not parties to the proceedings. At the end of the hearing, I indicated that I would make the order sought, but that I wished to record my reasons in writing. These are those reasons.
3. The Claimant is the immediate assignee of the original lessees Dawn Wright and Gary Wilson, having taken a transfer of the lease on purchase from them (with the aid of a loan secured by mortgage from the Bank of Scotland) on 31 March 2008. The Defendant is the original and continuing lessor. The Defendant by its solicitors filed an acknowledgement of service dated 1 June 2015 indicating no intention to contest the claim.
4. The mortgage deed entered into by the Claimant with the Bank of Scotland contained a power of attorney in wide form, enabling the bank “to act in [the Claimant’s] name and on [his] behalf and [the bank] will have the following rights”, including amongst other things “to enforce [the

Claimant's] rights, or take over [the Claimant's] right to make any claim or do anything (including bringing or continuing court or arbitration proceedings) to do with the property..." It is by virtue of that power that, in the Claimant's name and on his behalf, the bank (i) entered into the deed of rectification mentioned above and (ii) has taken these proceedings.

5. Although it was not discussed at the hearing I note in passing that the Court of Appeal held in *Gregory v Turner* [2003] EWCA Civ 183 that the holder of an enduring power of attorney not being a lawyer was not thereby entitled to conduct litigation (*ie* as if he were a solicitor) or to address the court as an advocate. But there is no question of the bank seeking to act as solicitor or advocate in this case. The bank has retained solicitors and counsel. What it has done is to give instruction to those solicitors and counsel on behalf of the Claimant to institute and prosecute these proceedings in relation to the property. That is a question simply of the width of the power of attorney given. In my judgement the power in this case is wide enough to cover the institution and prosecution of this claim.

The Error

6. The lease and lease plan describe the flat as being on the third floor of Games House. Accordingly, the land register, after stating in paragraph 1 of the property register that the subject of the registration is "The Leasehold land shown edged with red on the plan of the above Title filed at the Land Registry and being 7 Games House, Springfield Grove, London (SE7 7TN)", notes in the usual way that "only the third floor flat is included in the title."
7. Unfortunately, the flat is in fact on the *second* floor of the building. The error in the lease was discovered only after the Claimant fell into arrears with his mortgage payments and was the subject of proceedings by Bank of Scotland. On 4 April 2013 he was ordered by Woolwich County Court to give up possession to the bank. When the bailiff and a bank official arrived to take possession on 10 December 2013 it became apparent that the flat was on the second floor, not the third.
8. Correspondence then ensued between the bank and the owners of the Defendant, culminating in the Defendant signing the deed of rectification of 6 November 2014 already mentioned. By that deed it was agreed between the parties that "All references in the Lease and the Lease Plan to the property known as 7 Games House, Springfield Grove, SE7 7TN as a 'third floor flat' shall be amended to a 'second floor flat'." The Defendant's solicitors confirmed before this claim was issued that the Defendant would not contest the claim when made.

The Land Registry's view

9. The bank by its solicitors thereupon applied on 21 November 2014 to the Land Registry to amend the entry in the register. The form of the application was not in evidence before me. But the Land Registry responded by a letter dated 26 November 2014 (which was) to the effect that the application was rejected as defective and could not proceed as a rectification of a lease. Instead, said the Land Registry, it would be necessary for the lessee to surrender and the lessor to grant a fresh lease. The bank was unwilling to do this, principally because of the effect on its security. If granted, rectification normally has retrospective effect. A surrender and regrant however would be prospective only. There was apparently a telephone conversation between the Land Registry and the solicitors on 27 November 2014, but evidently nothing came of that.
10. The bank's solicitors wrote again on 23 March 2015 to inform the Land Registry that the bank intended to issue court proceedings for a declaration as to the error in the lease which required rectification, and to ask whether the Land Registry wished to be a party. The Land Registry replied by letter dated 9 April 2015, saying that the original application had been reviewed, and that its decision to reject the application was considered still to have been correct. I will return

to the reasoning later. For present purposes the point is that the Land Registry's position was unchanged.

11. The letter also said that there was no need for the Registry to be joined, because rule 127 of the Land Registration Rules 2003 made appropriate provision. In fact, as the solicitors pointed out in a letter of 17 April 2015, what rule 127 does *not* provide for is for the Registrar to be bound by the order of the court. But that is because paragraph 2(2) of Schedule 4 to the Land Registration Act 2002 *does* so provide, as noted in the Registry's letter in reply of 6 May. As already stated, these proceedings were issued on 13 May 2015.

Jurisdiction

12. Prior to 6 April 2015 it would not have been appropriate for a master to deal with this application. Paragraph 5.1 (g) of CPR Practice Direction 2B provided that a master in the Chancery Division might not without the consent of the Chancellor of the High Court deal with a claim for rectification, except for alteration or rectification of the land register in plain cases. Whether this was a plain case or not, it includes a claim to rectify a lease, which is outside the paragraph. But on 6 April 2015 Practice Direction 2B was amended. Paragraph 5 was completely removed, and (so far as concerns masters) replaced by paragraph 7B.1, which prohibits a master from dealing only with (i) claims to indemnity in derivative actions by minority shareholders, and (ii) certain orders in Patent Court proceedings. So there is now jurisdiction for the master to hear and determine a claim for rectification of a lease, as well as of the land register (and, for the latter, no jurisdictional requirement that it be a plain case).

The Law

13. There are two matters to consider: (1) the rectification of the lease, and (2) the amendment of the land register. As to the former, and although it was not cited to me, *Snell's Equity*, 33rd edition 2015, para 16-001, says that "where the terms of a written instrument do not accord with the true agreement between the parties, equity has the power to reform, or rectify, that instrument so as to make it accord with the true agreement." It is trite law that leases in writing, like other written contracts and multiparty documents, can be rectified. The standard of proof in a claim for rectification is the ordinary civil standard, but the cases speak of the need for 'strong, irrefragable evidence' of the misrecording of the parties' common intention (*Snell*, para 16-022). This is to overcome the weighty assumption that, if parties go to the trouble of entering into a formal written document which they sign, they really meant what they said.
14. As to the amendment of the land register, the rules relevant to the present case are contained in Schedule 4 to the Land Registration Act 2002 and rules 126 and 127 of the Land Registration Rules 2003. Paragraph 2 provides that:

"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,
 - (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 on him a duty to give effect to it."

It will be noted that paragraph 2(1)(a) refers only to 'correcting a mistake'. It does not refer (as the equivalent provision of the Land Registration Act 1925, s 82(1)(h), referred) to an 'error or omission *in the register*' (emphasis supplied). I come back to this below.

15. Paragraph 1 of the Schedule defines *rectification* of the register as an alteration which involves the correction of a mistake but which *also* prejudicially affects the title of a registered proprietor. This definition feeds into paragraph 3, which limits the court's power to order rectification in cases where the registered proprietor in possession does not consent. But in my judgement we do not need to deal with that, because what is sought here is an alteration of the property register of Flat 7 (changing "third" to "second") which does not prejudicially affect the title of the registered proprietor of the lease of that flat. That title is to the property known as Flat 7. Flat 7, however, is wherever it is. What the register provides is some incorrect information as to where Flat 7 is located. It does not give title to a different flat on the third floor, because that would be a property known as a flat with a different number. (I note in passing that the Land Registry appears to have reached the same conclusion, since it referred in correspondence to rule 127 of the 2003 Rules, which deals with alteration rather than to rectification.)
16. Even if I were wrong, and the alteration *did* prejudicially affect the title of the registered proprietor (of Flat 7), the limitation on rectification of the register in paragraph 3 would not apply, either because the registered proprietor is no longer in possession, or because he has given his consent (indeed, is making the application).
17. In addition, rules 126 and 127 of the Land Registration Rules 2003 provide as follows:

"Alteration under a court order – not rectification

126. – (1) Subject to paragraphs (2) and (3), if in any proceedings the court decides that –

- (a) there is a mistake in the register,
- (b) the register is not up to date, or
- (c) there is an estate, right or interest excepted from the effect of registration that should be given effect to,

it must make an order for alteration of the register under the power given by paragraph 2(1) of Schedule 4 to the Act.

- (2) The court is not obliged to make an order if there are exceptional circumstances that justify not doing so.
- (3) This rule does not apply to an alteration of the register that amounts to rectification.

Court order for alteration of the register – form and service

127. – (1) An order for alteration of the register must state the title number of the title affected and the alteration that is to be made, and must direct the registrar to make the alteration.

- (2) Service on the registrar of an order for alteration of the register must be made by making an application for the registrar to give effect to the order, accompanied by the order."

18. Unlike paragraph 2(1)(a) of Schedule 4 to the Act, rule 126(1)(a) of the Rules expressly refers to mistake 'in the register'. But it is hard to see what the mistake in paragraph 2(1)(a) can be, if it is not a mistake in the register. It might be thought that the broader formulation in the Act is needed to cover the case of the transfer that is void (*eg* because of a forged signature), and which is registered. There is nothing wrong in the registration process, and there is nothing on the face of the register to show that there was a mistake. But in law there was nothing to

register in the first place. Yet even this still results in a mistake *in* the register, because the very entry itself is only there by mistake.

19. At all events, the difference between the two statutory provisions is this. In the former case, the court *may* make an order for the alteration of the register, whereas in the latter case, if the court is satisfied that there is a mistake *in the register*, the court *must* make an order for alteration of the register, subject only to the provisions of paragraphs (2) (exceptional circumstances) and (3) (cases of rectification). As will be seen below, in my judgement there are no exceptional circumstances here, and this is not a case of rectification of the register.

The facts

20. The evidence before me consisted of a witness statement, together with one exhibit, from Ross Wilson, a solicitor employed by the bank's solicitors. It sets out most of the facts stated earlier in these reasons for judgement, and I accept it as truthful. After the hearing I was also sent, at my request, a copy of the Land Register relating to the lessor's title. It is obvious that the vendors of Flat 7 and the Claimant knew very well which flat they were contracting to buy and sell, and, as a result of that and the witness statement, I am satisfied (well beyond the balance of probabilities, if that mattered) that the common intention of the original lessees and the Defendant lessor, demonstrated by strong and irrefragable evidence, including the deed of rectification of 6 November 2014 (admittedly between the Claimant and the Defendant), as parties to the sale and purchase was to contract in relation to Flat 7 on the second floor, and not in relation to any flat on the third floor. The lease fails to record correctly that intention, and, subject to any possible defences, should therefore be rectified at the instance of anyone with standing.
21. As to that, I should mention specifically the fact that the original lessees were not parties either to the deed of rectification or to these proceedings. It is after all a question of *their* intention as well as that of the Defendant lessor with which I am concerned. But in the circumstances it is inconceivable that they could have had a different intention from the Defendant. They bought and paid for the lease to Flat 7. For some five or six years after their original purchase they owned and no doubt occupied the flat. They then sold it to the Claimant. Flat 7 was what the original lessees intended to buy. That was what they did buy. If they had suggested in these proceedings that, although they had been living in Flat 7 on the second floor for several years, they actually intended at the outset to buy a flat on the third floor, the suggestion would have been rejected out of hand. The documentation available and the reality on the ground make plain the intention of the original lessees and the Defendant lessor.
22. Once I am satisfied, as I am, of the factual position, I do not think that the non-joinder of the original lessees matters, either on procedural or on substantive grounds. As to procedure, they are potential witnesses only. The bank has no need for them to be bound by the order of the court. But as vendors of Flat 7 I think they would be in some difficulty in arguing otherwise, because it was what they promised to sell. As to substance, the original lessees were able to sell and transmit their equity of rectification as part and parcel of their estate in the land to the Claimant (*cf* Law of Property Act 1925, s 62). The contract of sale and purchase was not in evidence before me. But in the absence of evidence that this equity was excluded from the sale and purchase (something which would make no commercial sense at all) I consider I am entitled to proceed on the basis that it was included.

Consequences

23. I mentioned above the question of possible defences to the claim for rectification. None was claimed, or even suggested, in the papers or during the hearing. I see none on the evidence. There was no significant delay, once the point was appreciated, and in any event no prejudice to anyone because of it, no relevant third party rights have intervened, and the Claimant is not

guilty, so far as I can judge, of any conduct which would disqualify him from seeking the assistance of the court. In my judgement this is as plain a case for rectification as there could be. At the hearing I therefore ordered rectification of the lease, so that all references in the lease and the plan which it contains to the flat as being a 'third floor flat' should be amended to references to a 'second floor flat'.

24. I turn then to alteration of the land register. The letter from the Land Registry dated 9 April 2015, referred to earlier, says that the view of the Land Registry was that, even if "the original lease was incorrectly drafted, there [was] no error in the register itself". This was apparently because "[t]he registration was completed correctly in accordance with the lease". In other words, the Land Registry had simply and faithfully copied over what was in the lease (which happened to be wrong).
25. I am conscious that the Registry is not a party to this claim, and I am relying simply on what its officials said in correspondence. However, if and to the extent that that is what the Registry considered, then in my judgement that view was itself mistaken. The lease was in error in describing the flat as being situated on the third floor of the building, and the register was equally mistaken in referring (in both the leasehold and the freehold titles) to the third floor only as being included in the title. Those are mistakes contained in the register. The fact that the error was not the Registry's fault, because it copied over what the parties had wrongly stated in the lease, and it made no mistake in any of the registration procedures, does not make what is stated in the Register to be any the less a mistake. (It is clear from *Lannion v Baxter* [2011] EWCA Civ 120, for example, that 'mistake' for this purpose is not limited to official mistakes in the course of dealing with an application.)
26. Such a mistake does not only confer jurisdiction on the court to alter the register, under paragraph 2(1) of Schedule 4 to the 2002 Act. By virtue of rule 126(1), being a 'mistake in the register', it *requires* the court to make such an order, subject to the exceptional cases mentioned in rule 126(2), (3) (which do not apply in the present case). Even if it were somehow not a 'mistake in the register' within rule 126(1), it would still be a 'mistake' within paragraph 2(1)(a) of Schedule 4, for the purpose of correcting which the court has power (though no obligation) to order alteration of the register. The exercise of that power would be a matter of judicial discretion, but having ordered rectification of the lease it would make no sense not to order alteration of the register to conform with the lease, and I would have done so had it been necessary. In any event, it would also have been compulsory under rule 126 (1)(b) to alter the register to bring it up to date after the rectification of the lease.
27. At the hearing I was satisfied that it was proper to order that the Land Register be altered to reflect the correct position, that is, (1) in relation to the leasehold title, that only the second floor was included in that title, and that the deed of rectification be noted, and (2) in relation to the freehold title, that the Schedule of Notice of Leases be corrected to show the flat as a second floor flat, and a note inserted of the deed of rectification (as for example there already is under entry 9).