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Baker and another v Craggs

[2016] EWHC 3250 (Ch)

Chancery Division, Bristol District Registry

Newey J

15 December 2016

Mr Thomas Talbot-Ponsonby (instructed by DWF LLP) for the Claimants

Mr Ewan Paton (instructed by John Hodge Solicitors) for the Defendant

Hearing date: 15 November 2016

Further written submissions: 29 November 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Newey :

1. As a result, it would seem, of conveyancing slips, the owners of some land first sold it to the defendant, Mr Martin Craggs, and then granted a right of way over it in favour of the claimants, Mr Paul Baker and his wife Jodi. The present proceedings are concerned with whether the grant of the right of way was effective.

Basic facts

2. The basic facts can be stated quite shortly.

3. Before the events with which I am concerned, Mr Michael Charlton and his wife Maureen owned a property called Waterside Farm in Radstock, Somerset. During 2011-2012, however, they sold most of the farm. They retained, and Mrs Charlton still lives at (her husband having sadly died), some premises now called the Old Stables.

4. The present litigation arises from certain of the sales that the Charltons entered into: to, respectively, Mr Craggs and the Bakers.

5. The sale to Mr Craggs reached completion on 17 January 2012. A transfer of that date provided for parts of the farm to be transferred to Mr Craggs for £100,000. The land so transferred (“the Farm”) included some 18 acres of fields and barns with an adjacent yard. Mr Craggs was also granted, among other things, a right of way over a driveway leading from the yard. The transfer did not reserve any right of way over the yard in favour of the Charltons.

6. In accordance with normal practice, Mr Craggs’ then solicitors had undertaken a search at the Land Registry which gave Mr Craggs the benefit of a priority period up to 28 February 2012. The transfer was first lodged for registration on 10 February, but on 22 March the Land Registry pointed out that the access route was not shown on the plan annexed to the transfer and asked for the plan to be amended and initialled by the Charltons. The Land Registry agreed to extend the time within which its requisition was to be dealt with to 9 May, but the Charltons’ solicitors had still not returned the plan by that date. The application to register the transfer to Mr Craggs was therefore cancelled and a fresh application had to be submitted, with an amended plan, on 16 May. Mr Craggs was subsequently registered as the proprietor of the Farm with effect from 16 May.

7. In the meantime, however, the Charltons had transferred land to Mr and Mrs Baker. On 9 February 2012, the Charltons contracted to sell the Bakers both the farmhouse (for £625,000) and a barn (for £35,000). The sales proceeded to completion on 20 February, when two transfers were executed in favour of the Bakers. That relating to the barn (“the Baker Barn”) purported to grant the Bakers a right of way over the driveway in respect of which Mr Craggs had been granted a similar right and, further, across the yard that had been included in the transfer to Mr Craggs. Although the Bakers’ then solicitor had had sight of the transfer to Mr Craggs, it seems clear that none of those involved with the transfer of the Baker Barn to the Bakers appreciated that it provided for the Bakers to be given a right of way over land that had already been the subject of the sale to Mr Craggs.

8. The transfer of the Baker Barn was duly lodged with the Land Registry and the Bakers were entered on the register as its proprietors with effect from 14 March 2012. The property was, moreover, recorded in the register as having the benefit of the rights granted to the Bakers by the 20 February transfer of the Baker Barn. The Land Registry also, when registering Mr Craggs as the proprietor of the Farm in May 2012, recorded the property as subject to the rights granted in the transfer to the Bakers of the Baker Barn.

9. The present proceedings were issued on 26 March 2015. They principally raise the question of whether the Bakers do indeed have the benefit of a right of way over the yard at the Farm.

Some common ground

10. Mr Thomas Talbot-Ponsonby, who appeared for Mr and Mrs Baker, and Mr Ewan Paton, who appeared for Mr Craggs, were at one on some of the legal analysis. Points on which they agreed can be summarised as follows:

i) When the Charltons transferred land to Mr Craggs on 17 January 2012, he at once became its beneficial owner (compare e.g. *Scribes West Ltd v Relsa Anstalt* [2004] EWCA Civ 1744, [2005] 1 WLR 1847, at paragraph 9(ii)). Legal ownership did not pass, however, until he was entered on the register as the proprietor of the property (see section 27(1) of the Land Registration Act 2002 and the *Scribes West* case, at paragraph 9(i)). In the meantime, the Charltons retained legal ownership as the registered proprietors;

ii) Had Mr Craggs’ initial application for registration of the transfer to him been in order, the grant to the Bakers of a right of way over the yard comprised in the transfer would have been ineffective. The property of which Mr Craggs would have become registered proprietor would not have been bound by the purported grant of the right of way;

iii) In the event, however, Mr Craggs’ first application for registration was cancelled. He is therefore to be taken to have had no more than an equitable interest when the Bakers applied for the transfer of the Baker Barn (including the right of way over the yard) to be registered;

iv) Under section 29 of the Land Registration Act 2002, a “registrable disposition of a registered estate … made for valuable consideration” (such as the transfer to the Bakers) “has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration”. As a result, Mr Craggs’ interest in the property transferred to him cannot prevail over the grant of a right of way over the yard unless it was “protected” when the transfer of the Baker Barn was registered and, on the facts, that could be so only if the interest fell within a paragraph of schedule 3 to the 2002 Act;

v) The relevant paragraph of schedule 3 to the 2002 Act for present purposes is paragraph 2, which identifies one of the rights traditionally referred to as “overriding interests”. Paragraph 2 is in these terms:

“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 (c. 18);

(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”;

vi) None of the exceptions to paragraph 2 can apply. In particular, the exception for which paragraph 2(c) provides cannot be in point given the Bakers’ solicitors’ knowledge of the transfer to Mr Craggs;

vii) It follows that Mr Craggs’ land must be bound by the right of way granted to the Bakers unless (a) Mr Craggs was in “actual occupation” of the relevant land (as he contends, but the Bakers deny) and (b) his interest was not (as the Bakers contend, but Mr Craggs denies) overreached.

The issues

11. Four issues arise:

i) Was Mr Craggs in “actual occupation” of the relevant land on the relevant date?

ii) Was Mr Craggs’ interest overreached?

iii) If the answer to (i) is “Yes” and that to (ii) is “No”, should the register be altered?

iv) If, on the other hand, the Bakers enjoy a right of way over Mr Craggs’ yard, has Mr Craggs interfered with their enjoyment of the right of way and, if so, what relief should be granted?

Issue (i): Actual occupation?

*Legal principles*

12. The authorities seem to me to support the following propositions as regards “actual occupation”:

i) The word “actual” in “actual occupation” “emphasises that what is required is physical presence, not some entitlement in law” (*Williams & Glyn’s Bank Ltd v Boland* [1981] AC 487, at 505, per Lord Wilberforce);

ii) The nature of the relevant property can matter. “Occupation”, Lord Oliver explained in *Abbey National Building Society v Cann* [1991] AC 56 (at 93), is a “concept which may have different connotations according to the nature and purpose of the property which is claimed to be occupied”. In a similar vein, Arden LJ observed in *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] Ch 216 (at paragraph 80), “What constitutes actual occupation of property depends on the nature and state of the property in question”;

iii) “Occupation” involves “some degree of permanence and continuity which would rule out mere fleeting presence” (to quote again from Lord Oliver in *Abbey National Building Society v Cann*, at 93). Lord Oliver went on to say (at 93), “A prospective tenant or purchaser who is allowed, as a matter of indulgence, to go into property in order to plan decorations or measure for furnishings would not, in ordinary parlance, be said to be occupying it, even though he might be there for hours at a time”. On the other hand, “[r]egular and repeated absence” can be consistent with “actual occupation”: see *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 WLR 783, at 788;

iv) “Occupation” does “not necessarily … involve the personal presence of the person claiming to occupy” (Lord Oliver in *Abbey National Building Society v Cann*, at 93). In the *Cann* case, Lord Oliver expressed the view (at 93) that a “caretaker or the representative of a company can occupy … on behalf of his employer”. In *Lloyds Bank plc v Rosset* [1989] Ch 350, Nicholls LJ (in the Court of Appeal) considered that “the presence of a builder engaged by a householder to do work for him in a house is to be regarded as the presence of the owner when considering whether or not the owner is in actual occupation” (see 378). In *Kling v Keston Properties Ltd* (1983) 49 P&CR 212, Vinelott J considered the plaintiff to have been in “actual occupation” of a garage in which his wife’s car had been confined because the door was blocked and thought that the result would probably have been the same even if the car had not been physically trapped: the plaintiff, Vinelott J suggested (at 219), “should be treated as being in continuous occupation of the garage while he was using it in the ordinary course for the purpose for which the licence was granted, that is, for garaging a car as and when it was convenient to do so”;

v) In contrast, “actual occupation” by a licensee on his own behalf does not represent “actual occupation” by the licensor (see *Strand Securities Ltd v Caswell* [1965] Ch 958, at 980-981 and 984, and *Lloyd v Dugdale* [2001] EWCA Civ 1754, [2002] 2 P&CR 13, at paragraph 45). Nor does receipt of rents and profits now suffice to give protection. Section 70(1)(g) of the Land Registration Act 1925, the predecessor of paragraph 2 of schedule 3 to the 2002 Act, referred to the rights of a person “in actual occupation of the land *or in receipt of the rents and profits thereof*”. Nothing comparable to the italicised words is to be found in the 2002 Act;

vi) Even in the case of a house, “occupation” need not involve residence. In *Lloyds Bank plc v Rosset*, Nicholls LJ said (at 377) that he could “see no reason, in principle or in practice, why a semi-derelict house … should not be capable of actual occupation whilst the works proceed and before anyone has started to live in the building”. See too *Thomas v Clydesdale Bank plc* [2010] EWHC 2755 (QB);

vii) Occupation needs to be distinguished from mere use. In *Chaudhary v Yavuz* [2011] EWCA Civ 1314, [2013] Ch 249, use of a metal staircase and landing for the purpose of passing and repassing between some flats and the street was held not to amount to “actual occupation”. Such activity, Lloyd LJ said (at paragraph 30), is “use, not occupation”;

viii) As Mummery LJ observed in *Link Lending Ltd v Hussein* [2010] EWCA Civ 424 (at paragraph 27), when determining whether a person is in “actual occupation”:

“The degree of permanence and continuity of presence of the person concerned, the intentions and wishes of that person, the length of absence from the property and the reason for it and the nature of the property and personal circumstances of the person are among the relevant factors”;

ix) An interest belonging to a person in “actual occupation” will be protected only if and so far as it relates to land of which he is in actual occupation. This is evident from the wording of paragraph 2 of schedule 3 to the 2002 Act, which in this respect differs significantly from that of section 70(1)(g) of the Land Registration Act 1925;

x) The date on which a person must have been in “actual occupation” to rely on paragraph 2 of schedule 3 to the 2002 Act is the date of the disposition, i.e. completion.

13. Another case to which I was taken, *Goodger v Willis* [1999] EGCS 32, concerned a plot on part of which a shed and a toilet had stood. Believing that they owned the entire plot, the plaintiffs had demolished the shed and toilet and laid a concrete base in their place. They were held to have been in occupation of the land as a result by Mr Stephen Silber QC, sitting as a Deputy High Court Judge. Only a summary of the judgment is, however, available.

*Facts*

14. As I have mentioned, Mr Craggs’ purchase was completed on 17 January 2012. He had already agreed to allow the property to be used in connection with a funeral that took place on 18 January. The hearse was to be a horse-drawn carriage and the plan was for the horses and carriage to be brought by motorised transport and then unloaded and harnessed up on Mr Craggs’ newly-acquired land. In the event, while the horses were fed and watered from facilities of Mr Craggs, the transport was unable to reach Mr Craggs’ yard and so the horses and carriage were unloaded on the driveway. In any case, the funeral was a one-off event. I do not think, therefore, that it lends much support to Mr Craggs’ case.

15. Much more important is the work that was undertaken in one of the barns on the land Mr Craggs had bought (“the Craggs Barn”). There was a structure standing inside this when Mr Craggs purchased. In the weeks that followed, Mr Craggs, with help from his brother and others, demolished the existing structure, removed the waste, dug new footings, laid a damp-proof course, put concrete on top of it and constructed some stables. Photographs show that the original structure had been taken down by 29 January, that footings had been dug (in part with the help of an excavator hired on 2 February) and the damp-proof course laid by 5 February, that concrete was put down (with the assistance of an improvised slide) on 11 February and that the stables had been completed by 19 February. Mr Craggs said, and I accept, that he was on site almost every day while this work was being carried out. Mr Craggs’ then partner (now fiancée) would also attend more or less daily.

16. By 20 February 2012, when the sale of the Baker Barn proceeded to completion, a Mr and Mrs Denning and a Ms Stott were keeping horses at the Farm under a “DIY livery” arrangement. Under such an arrangement, the owner of a horse may store feed and tacking in the relevant premises and use water and electricity supplies, but will himself look after his horse. Until February, Mr and Mrs Denning and Ms Stott kept their horses in the Old Stables. The Charltons, however, wished to convert this building and so it was agreed that Mr Craggs would provide accommodation instead. Very shortly before the sale of the Baker Barn was completed, the Dennings and Ms Stott moved their horses into the stabling that Mr Craggs had put up. The Dennings and Ms Stott have confirmed that they saw Mr Craggs and/or a member of his family at the Farm on an everyday basis while the Craggs Barn was being fitted out as stables.

17. Neither Mr Craggs nor any member of his family appears to have visited the Farm on 20 February 2012, when the Bakers’ purchase was completed. Mr Baker explained that, although he spent a number of hours at the Baker Barn that day, he saw nothing to suggest that it was occupied. For his part, Mr Craggs said in evidence that he was not aware of having been at the Farm on 20 February.

18. In July 2012, Mr Craggs brought onto the Farm a herd of cattle that he had purchased. Mr Baker said that it was only at this stage that he and his wife became aware of Mr Craggs occupying the Farm. In contrast, Mr Craggs maintained in cross-examination that there had been a great deal to do before the cattle arrived (notably by way of re-fencing) and that he was not aware of having visited the Farm significantly less between 20 February 2012 and July of that year than he had before the former date.

19. The reality probably lies somewhere in the middle. The chances are that Mr Craggs was not at the Farm as much once he had finished constructing the stabling, but that he was still there often.

20. In my view, Mr Craggs must have gone into “actual occupation” of the yard at the Farm soon after completing his purchase and remained in “actual occupation” up to at least 19 February 2012. Over a period of a month or so, he carried out quite substantial works in the Craggs Barn and visited the Farm more or less daily. His presence was neither “fleeting” nor just preparatory to going into occupation. It is true that he was not sleeping at the property, but that cannot matter when there was no residential accommodation there. Of course, the focus of Mr Craggs’ efforts will have been the Craggs Barn (where he was constructing the stabling) rather than the yard itself, but the Craggs Barn is immediately adjacent to the yard and can only be reached through it. Mr Craggs (and his fiancée and others) will have been passing through the yard, parking there and bringing materials and equipment onto it. Where, say, someone buys and moves into a house with a drive, he can plainly be in “actual occupation” of the drive as well as the house even though he does not spend much time on the drive itself or keep possessions on it. *Mere* use of an access may not amount to occupation (as *Chaudhary v Yavuz* shows), but, where the person using a drive owns it and the house it serves, it may be proper to consider him to be occupying both house and drive as an owner-occupier. Similarly, it seems to me that Mr Craggs will have come to be in “actual occupation” of the yard as well as the Craggs Barn.

21. Had the position changed by the crucial date, 20 February 2012? Mr Talbot-Ponsonby argued that it had. If, he submitted, Mr Craggs went into “actual occupation” while installing the stabling in the Craggs Barn, he was nevertheless no longer in “actual occupation” by 20 February. He pointed out that, not only was Mr Craggs not at the Farm on that day, but he had finished the work in the Craggs Barn. He further said that the presence on the Farm of the Dennings and Ms Stott and their horses could not assist Mr Craggs since the Dennings and Ms Stott were using the property for their own purposes, not Mr Craggs’.

22. On balance, however, it seems to me that Mr Craggs was still in “actual occupation” of the yard on 20 February 2012. He had finished the work in the Craggs Barn only very recently: probably, in fact, just the previous day. While, moreover, he happened not to visit the Farm on 20 February, he continued to go there frequently, albeit often in connection with activities (fencing, for example) in parts of the Farm other than the Craggs Barn.

23. In short, I find that Mr Craggs was in “actual occupation” of the relevant land on 20 February 2012. That means that he will not be bound by the right of way granted to the Bakers unless his interest was overreached (to which issue I shall now turn).

Issue (ii): Overreaching?

24. Overreaching conventionally involves the transfer of an interest in property from the property itself to any money or asset acquired in exchange for the property. The key effect for present purposes is the subordination of the interest overreached.

25. Overreaching is provided for by section 2 of the Law of Property Act 1925 (“the LPA”). So far as relevant, this states:

“(1) A conveyance to a purchaser of a legal estate in land shall overreach any equitable interest or power affecting that estate, whether or not he has notice thereof, if—

…

(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 a conveyance are complied with ….

(2) Where the legal estate affected is subject to a trust of land, then if at the date of a conveyance made after the commencement of this Act by the trustees, the trustees (whether original or substituted) are either—

(a) two or more individuals approved or appointed by the court or the successors in office of the individuals so approved or appointed; or

(b) a trust corporation,

any equitable interest or power having priority to the trust shall, notwithstanding any stipulation to the contrary, be overreached by the conveyance, and shall, according to its priority, take effect as if created or arising by means of a primary trust affecting the proceeds of sale and the income of the land until sale.

(3) The following equitable interests and powers are excepted from the operation of subsection (2) of this section, namely—

…

(iv) The benefit of any contract (in this Act referred to as an ‘*estate contract*’) to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option to purchase, a right of pre-emption, or any other like right ….”

26. Section 27 of the LPA, to which there is reference in section 2(1)(ii), requires proceeds of sale of land subject to a trust to be paid to no fewer than two trustees except where the trustee is a trust corporation.

27. The term “legal estate”, which features more than once in section 2 of the LPA, is explained in section 1. While section 1(1) states that an “estate in fee simple absolute in possession” and a “term of years absolute” are the “only estates in land which are capable of subsisting or of being conveyed or created at law”, section 1(4) explains that the “estates, interests, and charges” authorised to subsist or to be conveyed or created at law by the section are referred to in the Act as “legal estates”. The definition thus extends to the various interests “capable of subsisting or of being conveyed or created at law” specified in section 1(2). These include an “easement, right, or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute” (section 1(2)(a)).

28. The word “conveyance”, which is also used in section 2 of the LPA, is defined in section 205(1)(ii) of the Act. This states that “conveyance” includes “a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will”.

29. The relationship between overreaching and overriding interests was considered in *City of London Building Society v Flegg* [1988] AC 54. This case concerned a charge executed by the co-owners of a house in which the parents of one of them, who were in “actual occupation” of it, also had interests. The House of Lords held that the parents’ interests had been overreached. In other words, as Emmet & Farrand on Title puts it (at paragraph 5.118), “‘overriding’ does not defeat ‘overreaching’”. Lord Oliver explained (at 91):

“Section 70(1)(g) [of the Land Registration Act 1925] protects only the rights in reference to the land of the occupier whatever they are at the material time - in the instant case the right to enjoy in specie the rents and profits of the land held in trust for him. Once the beneficiary’s rights have been shifted from the land to capital moneys in the hands of the trustees, there is no longer an interest in the land to which the occupation can be referred or which it can protect. If the trustees sell in accordance with the statutory provisions and so overreach the beneficial interests in reference to the land, nothing remains to which a right of occupation can attach and the same result must, in my judgment, follow vis-à-vis a chargee by way of legal mortgage so long as the transaction is carried out in the manner prescribed by the Law of Property Act 1925, overreaching the beneficial interests by subordinating them to the estate of the chargee which is no longer ‘affected’ by them so as to become subject to them on registration pursuant to section 20(1) of the Land Registration Act 1925.”

30. The Bakers contend that the present case is comparable. The argument can be developed on the following lines. Despite executing a transfer of the Farm in favour of Mr Craggs, Mr and Mrs Charlton remained the registered proprietors of the property and, hence, its legal owners until Mr Craggs was entered on the register with effect from 16 May 2012. In the meantime, the Farm, like the Baker Barn (up to the point title passed to the Bakers), was subject to a “trust of land” within the meaning of the Trusts of Land and Appointment of Trustees Act 1996 (albeit that the Charltons presumably held the Baker Barn on trust for themselves while the Farm will have been held on bare trust for Mr Craggs) and the Charltons will therefore have had “all the powers of an absolute owner” as regards the Farm under section 6 of the 1996 Act. When, moreover, they granted the Bakers an easement crossing the Farm, the proceeds of sale (as part of the purchase price of the Baker Barn) were paid to two trustees. The requirements of sections 2 and 27 of the LPA were therefore satisfied: there was a “conveyance to a purchaser of a legal estate in land” (for relevant purposes, the easement) “made by trustees of land” (namely, the Charltons) and the proceeds of sale were paid to two trustees (again, the Charltons). Accordingly, Mr Craggs’ equitable interest in the Farm will (so it is said) have been overreached and subordinated to the easement.

31. Mr Paton submitted that Mr Talbot-Ponsonby’s contentions to this effect are misconceived. Overreaching, he argued, is the process by which equitable interests under a trust of land are converted to interests in the sale proceeds when *that land* is sold to a third party purchaser for consideration. It has nothing to do (he said) with whether an easement over Mr Craggs’ property (the Farm) for the benefit of the Bakers’ property (the Baker Barn), created during the “registration gap” after the Farm had been transferred but before title was registered, could bind Mr Craggs when he was registered as the Farm’s proprietor.

32. It has to be remembered, however, that, for the purposes of section 2 of the LPA, “legal estate” is defined in such a way as to include an easement. It is, moreover, easy enough to envisage circumstances comparable to those of the present case in which common sense would suggest that overreaching should occur. Suppose, for example, that the Farm were held on express trusts and that its trustees were persuaded that it was in the interests of the beneficiaries that, in return for a payment, they should grant the (on this assumption, unconnected) owners of the Baker Barn an easement over the Farm. The easement should plainly, as it seems to me, prevail over the beneficial interests in the Farm, while the beneficiaries should have corresponding interests in the proceeds of the transaction. I do not think, therefore, that Mr Talbot-Ponsonby’s case can be discounted simply on the basis that the Charltons were purporting to grant a limited interest (viz. an easement) rather than to transfer the fee simple.

33. Mr Paton suggested that, were Mr Talbot-Ponsonby’s contentions correct, the Charltons would have been able to grant an easement binding the Farm even if the first application to register its transfer to Mr Craggs had been in order. I do not, however, see why that should be so. Had the original application proceeded to registration, Mr Craggs would have become the registered proprietor of the Farm with effect from the date it was lodged. On that basis, the Charltons would no longer have been the registered proprietors, legal owners or trustees of the Farm by the time the easement in favour of the Baker Barn was purportedly granted.

34. A question remains as to what (if any) impact section 2(3)(iv) of the LPA has. As already mentioned, this excepts from overreaching under section 2(2):

“The benefit of any contract (in this Act referred to as an ‘*estate contract*’) to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option to purchase, a right of pre-emption, or any other like right”.

Is Mr Craggs to be regarded as having had an “estate contract” during the “registration gap”?

35. Mr Talbot-Ponsonby said not. He relied in support of his submissions on a passage from the judgment of Baroness Hale in *Mortgage Business plc v O’Shaughnessy* [2014] UKSC 52, [2015] AC 385. Baroness Hale said this (at paragraph 113):

“There is a gap between any transaction and its registration…. Until registration, the purchaser (and indeed the mortgagee) have only equitable interests. This might suggest that rights granted by the purchaser to an occupier could not be ‘fed’ until registration. However, this is machinery, not substance. Assuming that all relevant registration requirements are met, the purchaser has now acquired an absolute right to the legal estate (and the mortgagee an absolute right to the charge). Her interest is of a different order from that of a purchaser before completion, who has the contractual right to have the property conveyed to her but may never in fact get it.”

Mr Talbot-Ponsonby emphasised that Baroness Hale spoke of the post-transfer interest being “of a different order from that of a purchaser before completion”. While, he argued, Mr Craggs will once have had the benefit of an “estate contract”, his interest matured into something else when the transfer was executed and, subject only to the formality of registration, he was the sole legal and beneficial owner of the property.

36. In *Jerome v Kelly* [2004] UKHL 25, [2004] 1 WLR 1409, Lord Walker said (at paragraph 32) that, if a contract for the sale of land proceeds to completion, “the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full”. Once the purchase price has been paid on completion, the purchaser can be regarded as the sole beneficial owner and as having (as Baroness Hale noted) an interest “of a different order from that of a purchaser before completion”.

37. Mr Paton, however, argued that the “bare trust” in favour of the purchaser that exists in the registration gap is the interim consequence of an “estate contract”. The equitable estate that a purchaser acquires pending registration of the transfer has, Mr Paton contended, no independent existence outside the contract which generated it and so remains an “estate contract” until it merges when legal title finally passes on registration.

38. Mr Paton relied in support of his submissions on *Lloyds Bank plc v Carrick* [1996] 4 All ER 630. In that case, Lloyds Bank had brought possession proceedings in respect of a maisonette, title to which was unregistered, which Mrs Carrick had contracted to buy from her brother-in-law. In the course of his judgment, Morritt LJ (with whom Beldam LJ and Sir Ralph Gibson agreed) explained (at 637):

“At the time it was made the contract was valid but, as provided by s 40 of the Law of Property Act 1925, unenforceable for want of a memorandum in writing or part performance. It became enforceable when in or about November 1982 Mrs Carrick paid the purchase price to Mr Carrick and went into possession. One consequence of the contract becoming enforceable was that it was specifically enforceable at the suit of Mrs Carrick. Accordingly Mr Carrick became a trustee of the maisonette for Mrs Carrick. Normally such trusteeship is of a peculiar kind because the vendor himself has a beneficial interest in the property as explained in *Megarry and Wade on The Law of Real Property* (5th edn, 1984) p 602. But in this case as Mrs Carrick had paid the whole of the purchase price at the time the contract became enforceable Mr Carrick as the vendor had no beneficial interest. Thus he may properly be described as a bare trustee (cf *Bridges v Mees* [1957] 2 All ER 577 at 581, [1957] Ch 475 at 485). It follows that at all times after November 1982 Mrs Carrick was the absolute beneficial owner of the maisonette and Mr Carrick was a trustee of it without any beneficial interest in it.”

Morritt LJ went on to reject a submission that Mrs Carrick had acquired an interest “separate and distinct from the contract as soon as the purchase price was paid in full” (see 637-638). He said (at 638):

“The source and origin of the trust was the contract; the payment of the price by Mrs Carrick served only to make it a bare trust by removing any beneficial interest of Mr Carrick. Section 4(6) of the [Land Charges Act 1972] avoids that contract as against the bank. The result, in my judgment, must be that Mrs Carrick is unable to establish the bare trust as against the bank for it has no existence except as the equitable consequence of the contract.”

39. The present case, unlike *Lloyds Bank plc v Carrick*, concerns registered land, but I do not think that of itself makes the decision irrelevant. *Bridges v Mees* [1957] Ch 475, which Morritt LJ cited, also involved registered land.

40. The key distinction between this case and *Lloyds Bank plc v Carrick* is, as it seems to me, that no conveyance or transfer had been executed in the latter. A contract for the sale of unregistered land normally merges in the conveyance when it is executed, and the better view appears to me to be that a contract for the sale of registered land likewise merges in a transfer (see e.g. *Knight Sugar Co Ltd v Alberta Railway & Irrigation Co* [1938] 1 All ER 266 and Barnsley [1991] Conv 15, at 24). Where, as happened in the present case, a vendor sells with “full title guarantee”, the purchaser will gain the benefit of implied covenants pursuant to the Law of Property (Miscellaneous Provisions) Act 1994 (including a covenant for “further assurance”), but the original contract will generally be spent or, in other words, the purchaser will no longer have the benefit of an “estate contract”.

41. In the circumstances, it seems to me that Mr Craggs no longer had the benefit of an “estate contract” by the time the Bakers were granted the right of way over the Farm; that section 2(3)(iv) of the LPA was therefore inapplicable; and that Mr Craggs’ rights will accordingly have been overreached and subordinated to the easement. In short, the Farm is bound by the right of way.

Issue (iii): Alteration?

42. In the light of the conclusions I have arrived at above, this issue does not arise. Since the Baker Barn does indeed have the benefit of a right of way across the Farm, the entries in the register for the properties are correct.

Issue (iv): Interference?

43. It is not in dispute that on a number of occasions during 2014 Mr Craggs placed obstructions in front of the Barn to prevent the Bakers from accessing it via the Farm. He did so, as he explained in cross-examination, on the basis that he was not bound by the right of way purportedly granted to the Bakers. In the event, I have concluded that the Farm is subject to the right of way. That being so, the Bakers are entitled to be awarded damages for interference with their easement. Since, however, no specific loss is alleged, Mr Talbot-Ponsonby rightly accepted that the damages should be modest. In my view, the appropriate sum is £250.

44. Mr Talbot-Ponsonby also asked me to grant an injunction restraining Mr Craggs from interfering with the right of way in the future. Mr Paton, however, argued that, if the Bakers succeeded in establishing that the Farm was bound by the right of way, there would be no need for injunctive relief: Mr Craggs, he said, would anyway abide by the Court’s decision. In the light of these submissions, it seems to me that I should grant declaratory rather than injunctive relief. I have not been persuaded that an injunction is warranted.

Conclusion

45. In my view, Mr Craggs was in “actual occupation” of the yard at the Farm on 20 February 2012, but his rights have been overreached and subordinated to the right of way granted in favour of the Baker Barn. I shall therefore grant declaratory relief to that effect and damages of £250 for interference with the right of way. I do not, however, consider it necessary or appropriate to grant an injunction against Mr Craggs.

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