

Don't get caught out

Fraud James Styles and Rachel Wevill offer a useful reminder of some basic precautions to avoid falling victim to property and land registration fraud

The Law Society's publication on property and registration fraud, published in October 2010, (the guidance) begins: "Fraud is on the increase and there is a rising incidence... of fraudsters targeting the properties of both individuals and companies." Property registration itself is a much legislated area, which has given rise to a high volume of case law since land registration was codified in 1925. Add to that the potential for cyber-forgery inherent in the online iteration of the process, not to mention old-fashioned fraudulent transfers, and it is little wonder the Law Society was prompted to issue the guidance.

Registration matters

Real estate lawyers will be familiar with the so-called "registration gap", as epitomised by *Brown & Root Technology Ltd v Sun Alliance and London Assurance Co Ltd* [1997] 1 EGLR 39. The principle is that before a registrable lease or transfer is "perfected by registration" at the Land Registry, only the beneficial title to the property is transferred. The registration must be completed in order to vest the legal title.

Fitzwilliam v Richall Holdings Services Ltd [2013] EWHC 86 (Ch); [2013] PLSCS 28 deals with the opposite side of the coin. Here, a fraudster forged a power of attorney enabling him to transfer Fitzwilliam's (F) residential property to Richall (R). The transfer was successfully registered.

The High Court had to consider section 58(1) of the Land Registration Act 2002 (LRA 2002), which states: "If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be vested in him as a result of the registration."

The court construed this provision narrowly to imply that registration only serves to vest the legal title, and the beneficial interest remains with the former owner. The register was to be altered to show F as the proprietor. F was ordered to reimburse R for the money it had paid to redeem F's mortgage and R to account to F for the rents it had received.

The court applied the case of *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151; [2002]

PLSCS 46 in reaching its conclusion. That case decided that section 69 of the LRA 1925 (the precursor to section 58 of the LRA 2002) vested only the bare legal estate in the new registered proprietor. As the transfer in *Malory* was also fraudulent, the Court of Appeal decided that it would not amount to a "disposition".

While these decisions may be morally commendable, they do not necessarily provide a proper reflection of the underlying law. Section 58 does not consider how the equitable interest passes. Rather, the legislation seems to imply that whatever the register says, then so it is.

Although the Land Registry's purpose is to give an accurate snapshot of property ownership, it must be remembered that human beings enter the data onto it and the register itself is a record of that registration, rather than land law gospel.

With that caveat in mind, the Land Registry does of course offer rectification and indemnity where the register is inaccurate. This wasn't considered in *Malory* and the judgment for that reason, among others, has been questioned.

It is by no means inevitable that the statutory indemnity will always be available. Schedule 8 of the LRA 2002 expressly carves out the requirement to pay an indemnity where loss is suffered wholly as a result of the claimant's lack of proper care, and any indemnity that is payable is reduced to the extent "as is fair having regard for [the claimant's] share in the responsibility for the loss."

Fraud in property transactions

So, pity the poor practitioner, carrying out due diligence on a prospective purchase. There is no certainty that the register is accurate, and even if it is, perhaps the latest transfer of the property was fraudulent and the beneficial interest actually lies with another party. If the register is inaccurate, there is a risk that a court may decide that a lack of proper care has been taken, and the statutory indemnity will not be available.

Add to the concern that TRIs or powers of attorney may have been forged the possibility that solicitors themselves may be fraudulent (see *Lloyds TSB Bank plc v Markandan & Uddin* [2012] EWCA Civ 65; [2012] PLSCS 27, where solicitors

who had unwittingly paid mortgage money to fraudsters were held to have acted in breach of trust), and it is all looking like a bit of a minefield.

In brief, here's how the guidance suggests guarding against fraudulent transactions:

Know your client

A term familiar to all legal practitioners, but ensuring this is really done is a good prophylaxis against fraud. The Money Laundering Regulations 2007 require the solicitor to:

- identify and verify the client by independent means;
- identify and, on a risk-sensitive approach, verify any beneficial owners; and
- obtain information on the purpose and intended nature of the business relationship.

If an entry on the register indicates the address for service has been changed, this may be as a precursor to fraud, so check with the client to clarify that the change was made legitimately.

Everything may not be as it seems

For a busy practitioner, it can be tempting to assume that having carried out the appropriate searches, the job is done, but a little investigation into the results may reveal hidden anomalies:

- Where the registered proprietor is a company, does a search at Companies House indicate that the company was incorporated after the registered proprietor was registered as the owner?
- Have the original identity documents been seen?
- Is the registered proprietor's date of birth consistent with their being the owner?
- Has the solicitor met the client face to face?

The guidance cites one notable registration fraud involving the impersonation of an overseas company by the incorporation of a UK company with the same name. If a search at Companies House indicates that the UK company was incorporated after the date of registration of the property in that company's name, further enquiry should be made.

None of this is rocket science, but it is helpful to be reminded of some basic precautions. Occasionally, human error can lead to mistaken entries on the register and fraudsters can also procure erroneous entries.

So, everything may not always be as it seems and we may have to look behind the search results to check that all is as it should be.

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