No overreaching by the grant of an easement: "Legal estates in land" under the Law of Property Act 1925

Baker v. Craggs **[2018] EWCA Civ. 1126**

16th May 2018

The Court of Appeal, in *Baker v. Craggs*, has in allowing an appeal from the decision of Newey J. [[2016] EWHC 3250 (Ch.)] re-asserted the orthodox understanding of "overreaching" under the Law of Property Act 1925, from which many commentators (and the writer) considered Newey J. had departed in his first instance decision.

The case was a right of way dispute between neighbours, of a familiar kind save for the unusual conveyancing and land registration chronology which gave rise to the legal issue before both courts. Common vendors (the Vs) first sold part of their land ("the Farm") to Craggs, but in doing so failed to reserve a right of way over its yard to a barn ("the Barn") which they proposed to sell afterwards. In the 'gap' between the transfer to Craggs and registration of him as proprietor, the Vs then sold the Barn to the Bakers, purporting in doing so to grant a right of way over the Farm previously sold by them.

In the ordinary course of things, the purported grant by a vendor, during the 'registration gap', of an adverse right over other land just sold by him would not ultimately burden that land or cause his previous purchaser any difficulty. That purchaser would usually have the protection given over intervening adverse entries, pending registration, by a Land Registry "official search with priority". Such a search, regularly renewed, was obtained for Craggs in this case. The twist came when the Land Registry somewhat surprisingly, after a minor delay in the provision by the Vs (not Craggs) of a correctly coloured plan, cancelled outright Craggs' application for registration as proprietor, requiring him to apply again. By the time he

did so, the Bakers' subsequent application for registration as proprietors of the Barn, and noting of the right of way over the Farm yard purportedly granted to them, had 'overtaken' the Craggs application in point of time, and the easement was duly noted on the Craggs title.

The analysis of the dispute advanced at trial for Craggs was that this was a case of *competing priority* as between the pending Craggs title and the Baker easement, which once the former's protection afforded by the priority search had been lost was to be resolved by application of the priority rules under sections 28 and 29 Land Registration Act 2002. In that particular contest, Craggs had started ahead by his transfer being first in time of *creation*, but had then potentially lost that priority when the Bakers overtook him after the unexpected cancellation, thus getting their title and right *registered* first. The Craggs priority would, however, be protected and preserved by section 29(2)(a)(ii) if his interest fell "within any of the paragraphs of Schedule 3" of the Act, which includes the interest of a person "in actual occupation" of the relevant land. This is a slightly less common application of the "actual occupation" overriding effect, which is more usually deployed in aid of an assertion of a right over someone else's land. On the facts at trial, Craggs won on this issue: he was found to have moved into actual occupation of his Farm and its yard shortly after his transfer and at the time of the Baker transfer and easement grant.

That would have resolved the case wholly in Craggs' favour, but for the Bakers' argument that because the Baker easement was granted by joint vendors, it was an *overreaching conveyance* by two trustees within the Law of Property Act 1925, which "subordinated" Craggs's interest in his own property to their easement. At first instance Newey J. agreed, placing reliance on the apparent definition of "legal estates" in section 1(4) Law of Property Act 1925 as including easements, and holding that the grant of the easement was therefore a "conveyance to a purchaser of a legal estate in land" within section 2(1) of that Act, thus overreaching Craggs' interest in his own property to the extent that it was inconsistent with the Bakers' right.

Many commentators (and the writer) considered this not just novel, but intuitively odd and wrong. The usually reserved editors of *Emmet on Title* and *The Conveyancer* called it, respectively, “an extraordinary conclusion” and “a startling interpretation”. The argument and decision raised many questions and puzzles. Isn’t overreaching concerned just with equitable interests *in* the land of which P takes a “conveyance of a legal estate in land”? How could Craggs’ interest *in his own property* (of which he was later registered as proprietor, and was sole legal and beneficial owner) be “overreached” or “subordinated”, even partially, and be transmuted into an unquantified amount of “easement proceeds of sale”? Why has every overreaching case involved either a sale, lease or mortgage, but never an easement?

Another question: when did you last read section 1 of the Law of Property Act 1925? You may remember being taught as a law student that::-

a) section 1(1) LPA 1925 kicks off the Act by telling us that “**the only estates in land which are capable of subsisting or being created at law are…(a) an estate in fee simple absolute in possession [and] (b) a term of years absolute**”; and that

b) section 1(2) then defines five other things, including easements, as “**interests in or charges over land**”

Why does the hitherto obscure section 1(4) then blithely say that all the “**estates interests or charges**” authorised by this section to be conveyed or created at law are to be referred to as “**legal estates**”? It was this somewhat confusing terminology which had enabled counsel for the Bakers, and Newey J., to link the grant of an easement to the overreaching provisions of section 2(1).

The historical answer (for which I am grateful to Dr. Juanita Roche of the University of

Manchester and her extensive Hansard research) may be that section 1(4) was simply a mistake, and a leftover from previous drafts and versions of what became section 1 of the 1925 Act, in that it retained an older 'umbrella' formulation of "legal estates" without regard for the more precise taxonomy of two "estates in land" and five "interests in or charges over land" spelled out by the new sections 1(1) and (2).

The Court of Appeal did not ultimately need to delve into Hansard to solve the problem and allow the appeal. Giving the only substantive judgment, Henderson LJ accepted the argument that the answer lay in the clear language of section 1(1), "the first building block of the entire 1925 property legislation" (paragraph 24). That subsection clearly stated that there could only be two "legal **estates in land**" – the fee simple and the lease. The expression "conveyance to a purchaser **of a legal estate in land**" in section 2(1):

"..is naturally read as a reference to a conveyance of one of the two types of estate in land which section 1(1) has just told us are capable of being conveyed at law." (paragraph 27)

It was not a tenable interpretation, in this context, to break this down further into component parts of "legal estates" [as per s1(4)] and "land". It was a single phrase, following and echoing the phrase of the immediately preceding section.

The clear distinction between the two legal "estates in land" and the separate group of "interests in or charges over land" had been recognised judicially elsewhere, most recently by Lord Neuberger PSC in *Edwards v. Kumarasamy* [2016] AC 1334 at paragraph 23. Further, in response to the following argument - if a charge by way of legal mortgage, one of the other "interests in or charges over land" in section 1(2), could overreach (as in cases such as *City of London BS v. Flegg* [1988] AC 54), why not also easements? - Henderson LJ held (at paragraph 29) that this was explicable by section 87 LPA 1925 deeming such charges to take effect as if they were mortgages by way of demise or sub-demise of a term

of years i.e. a conveyance of one of the two legal estates in land.

The Court's conclusion was at paragraphs 31 and 32 "…reinforced by some of the conceptual difficulties to which the judge's analysis would give rise", including Craggs' lack of any "equitable interest..**affecting that estate**" (meaning the estate conveyed to the Bakers, even if that was taken as the easement granted) capable of being overreached under s2(1), and the "conceptual impossibility" of identifying some part of the Baker sale proceeds to which his interest could somehow have attached.

The brief but clear judgment therefore restores the orthodox view of the Law of Property Act 1925, the classic division between legal "estates in land" and "interests in land", and the nature and scope of overreaching. The argument and research surrounding the appeal did, however, reveal to a surprising extent the occasionally confusing and inconsistent terminology of an Act long regarded as the linchpin of the 1925 legislation. In addition to the mysterious section 1(4) itself, there are several other examples in the Act where the usage oscillates between "legal estate in land" and "legal estate" without explanation.

Viscount Haldane said presciently when the legislation was being passed in 1925:

" it would pass the wit of man to say whether, in the form which these Bills have finally assumed, they cover everything, or are free in all respects from error.." (Hansard HL Deb 11th February 1925, vol. 60 col. 208).

It is nevertheless surprising that it took 92 years for the particular 'wrinkle' exposed in *Baker v. Craggs* to be ironed out.

Ewan Paton
Guildhall Chambers
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(who appeared for Mr. Craggs at first instance and on appeal, instructed by John Hodge Solicitors, Weston-super-Mare))