Neutral Citation Number: [2018] EWCA Civ 2846

Case No: A3/2018/0708

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Miss Joanna Smith QC, Sitting as a Deputy High Court Judge
HC-06C04188

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2018

Before:

LORD JUSTICE LONGMORE
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ASPLIN

- -

Between:

TREVOR ANTHONY ANTOINE (Administrator of the Estate for Joseph Antoine, Deceased)	**Appellant**
- and -	
BARCLAYS BANK UK PLC	**1st Respondent**
CHIEF LAND REGISTRAR	**2nd Respondent**

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Mr Chima Umezuruike (instructed by **Riverbrooke Solicitors)**) for the **Appellant**
Mr Guy Fetherstonhaugh QC and Mr Greville Healey (instructed by **TLT Solicitors**) for the **First Respondent**
Ms Katrina Yates (instructed by the **Government Legal Department**) for the **Second Respondent**

Hearing date: 6th December, 2018

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Approved Judgment

Lady Justice Asplin:

1. This appeal raises the question of whether the registration of a person as registered proprietor of a property by HM Land Registry giving effect to a court order made in default of appearance and obtained by use of documents which were later held to have been forgeries, results in a "mistake" for the purposes of rectification of the Register under Land Registration Act 2002. A similar question arises in relation to a legal charge created by the registered proprietor and registered before the court order was set aside.

2. Having held that certain documents were forged, Miss Joanna Smith QC, sitting as a Deputy High Court Judge in the Chancery Division, Business List of the Business and Property Courts, declared that the order of Master Moncaster dated 12 July 2007 (the "2007 Order") which was made in reliance, amongst other things, upon the forged documents was valid and effective until it was set aside by a further order dated 10 July 2008 (the "2008 Order") and accordingly, that the registration of Mr George Taylor as proprietor of the property at 14 Mirabel Road, London SW6 7EH, (the "Property") in accordance with the 2007 Order was not a "mistake" on the Register and neither was the registration of the legal charge granted by Mr Taylor and registered in favour of the First Respondent, Barclays Bank plc, (the "Bank") on 29 February 2008 (the "Legal Charge"). The neutral citation for her judgment is [2018] EWHC 395 (Ch).

Background

3. The relevant facts are complex. I have set out only the essential facts below which I have taken from the judgment. Reference should be made to the judgment itself for a more detailed explanation of the background to this matter. The dispute relates to the registered title to the Property. It was registered in the name of Mr Antoine Joseph ("Mr Joseph") who died in February 1996. Letters of Administration to his estate were granted to his son, Mr Trevor Antoine, ("Mr Antoine") who is the Appellant and was the claimant in claim number HC-2016-002311 (the "2016 Claim") which was heard together with claim number HC-06C04188, (the "2006 Claim") to which he was a defendant.

4. The 2006 Claim involved a claim for relief by Mr Taylor in respect of the Property which he said had been used as security for a loan which he had made to Mr Joseph in 1987. He relied upon three documents and, amongst other things, sought by way of relief the transfer to himself of the leasehold and freehold interests in the Property (which were registered in Mr Joseph's name), or alternatively the payment of the sum of £11,000. An order for substituted service upon Mr Joseph or his personal representatives by advertisement in local newspapers in Grenada, St Lucia and Fulham was obtained. Mr Antoine as Mr Joseph's personal representative was not present or represented at the hearing of the 2006 Claim before Master Moncaster on 12 July 2007 when the Master made the 2007 Order.

5. By the 2007 Order it was declared that by virtue of an agreement evidenced by documents specified in the Amended Particulars of Claim, Mr Taylor was

entitled to be considered as the legal mortgagee of the freehold interest in the Property. Further, amongst other things, it was ordered that Mr Joseph pay £24,003.28, defined as the Mortgage Debt, to Mr Taylor and the Mortgage Debt be considered as charged upon the freehold of the Property. It was further declared that in default of payment of the Mortgage Debt by the specified date, Mr Taylor would be absolutely entitled to all the estate and the interest of Mr Joseph in the Property and to have a transfer thereof, to be registered as the proprietor of the freehold of the Property and that the leasehold title to the Property should also vest in him.

6. No payment and no notice of intention to redeem the mortgage having been received by the specified date, on 11 September 2007 Mr Taylor applied to HM Land Registry by form AP1 for registration as the proprietor of both the freehold and the leasehold interests in the Property pursuant to the 2007 Order. In accordance with Rule 127(2) of the Land Registration Rules 2003, a copy of the 2007 Order was lodged with form AP1. Having sent notice of the application to Mr Joseph inviting an objection but having received none, the Chief Land Registrar (the "Registrar") registered Mr Taylor as the proprietor with deemed effect from 14 September 2007.

7. The freehold and leasehold titles having been merged, in early 2008, Mr Taylor obtained a loan from a subsidiary of the Bank by way of legal mortgage which was secured on the Property by way of the Legal Charge which was registered at HM Land Registry against the freehold title with effect from 29 February 2008.

8. Later in 2008, Mr Antoine applied to be joined to the 2006 Claim and to set aside the 2007 Order obtained in default. By the 2008 Order, Master Moncaster set aside the 2007 Order albeit without prejudice to the rights of the Bank and the Legal Charge and ordered that the 2006 Claim should continue against Mr Antoine as personal representative of Mr Joseph. On the basis of the 2008 Order, HM Land Registry registered Mr Antoine, in his capacity as the Administrator of his father's estate, as the proprietor of the Property in place of Mr Taylor. The 2006 Claim was not pursued at that stage and Mr Taylor died in 2013. Payments under the mortgage to the Bank which was the subject of the Legal Charge ceased in July 2013.

9. The 2016 Claim was commenced against the Bank and the Second Respondent, the Registrar. Mr Antoine sought a declaration that two of the three documents purportedly signed by his father and which related to the 1987 transaction upon which the 2007 Order was based, were null and void. He also sought an order pursuant to paragraph 2(1)(a) of Schedule 4 to the Land Registration Act 2002 that the Register be altered as a result of mistake, by the deletion of the Legal Charge created by Mr Taylor in favour of the Bank and an order removing from the Register a Unilateral Notice in respect of a pending land action (in respect of the 2006 Claim) that was registered in favour of Mr Taylor on 19 March 2009. Mr Taylor's widow and personal representative, Mrs Athena Taylor, the Third Respondent, was joined as the Third Defendant. It was ordered that the 2006 Claim and the 2016 Claim be heard together. The Claims were heard in February of this year and judgment was given on 2 March 2018.

Relevant Legislative Framework

10. Before turning to the Judge's reasoning, it is helpful to have the relevant legislative framework in mind. First, it is important to note, that as the Judge pointed out at [88] of her judgment, the Land Registration Act 2002, (the "2002 Act") is not merely a scheme for registering title. It is a scheme of title by registration. As the authors of *Ruoff & Roper, Registered Conveyancing* point out at para 46.001:

> "The policy of the Land Registration Act 2002 is that the register should be a complete and accurate reflection of the state of the title to the registered estate at any given time. Registration not only records the effect of transactions taking effect in the general law, but actually constitutes a registered proprietor's title to a registered estate or charge. In general, therefore, the title conferred by registration should be indefeasible. . ."

The Register is kept by the Registrar pursuant to section 1(1) of the 2002 Act and he is bound by the Land Registration Rules 2003 (the "Rules") in relation to the keeping of the Register.

11. Furthermore, section 9(1) of the Law of Property Act 1925 (the "LPA 1925") where relevant, provides that a vesting order made by any court or other competent authority:

> ". . . which is made or executed for the purpose of vesting, conveying or creating a legal estate shall operate to convey or create the legal estate disposed of in like manner as if the same had been a conveyance executed by the estate owner of the legal estate to which the order . . . relates".

A vesting order is thus a disposition by operation of law and is treated as a registrable disposition. Section 27(1) of the 2002 Act provides that:

> "If a disposition of a registered estate . . . is required to be completed by registration, it does not operate at law until the relevant registration requirements are met."

Section 27(5) provides that, subject to three exceptions which are irrelevant for the purposes of this appeal, the section applies to dispositions by operation of law. It is common ground that the 2007 Order was such a disposition.

12. Rule 161 of the Rules provides that an application to register a disposition by operation of law which is a registrable disposition must be accompanied by sufficient evidence of the disposition and where a vesting order has been made, the application must be accompanied by a copy of the order: see Rule 161(1) and (2). It was common ground before the Judge, and it was not suggested otherwise before us, that where an application is made to the

Registrar to give effect to a vesting order, the Registrar cannot look behind the order if it is valid on its face and must give effect to it.

13. Once the registration requirements have been satisfied, the entry of a person in the Register as a proprietor of a legal estate is conclusive as to title: section 58(1) of the 2002 Act. The registered proprietor of an estate has the right to exercise the ″owner's powers″ in relation to a registered estate. They include the power to charge the estate at law with the payment of money: see sections 23(1)(b) and 24 of the 2002 Act. The right to exercise owner's powers in relation to a registered estate or charge is taken to be free from any limitation affecting the validity of a disposition, so as to prevent the disponee's title being questioned but does not affect the lawfulness of a disposition: see section 26(1) and (3) of the 2002 Act.

14. The conclusiveness of the Register is subject to the powers of alteration conferred on the Registrar and the Court by section 65 and Schedule 4 to the 2002 Act. Paragraphs 1 - 3 of Schedule 4, where relevant, are as follows:

> "1. In this Schedule, references to rectification, in relation to the 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.
>
> 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 the 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.
> (4) In sub-paragraph (2), the reference to the title of the proprietor of a registered estate in land includes his title to any

> registered estate which subsists for the benefit of the estate in land."

These are the provisions with which this appeal is concerned. The Registrar's powers of alteration, including rectification, are contained in Schedule 4 paras 5 and 6.

15. It was common ground before the Judge and formed the basis for the submissions before us that an alteration of the Register only amounts to a "rectification" where there is a "mistake" on the Register which is being corrected which "prejudicially affects" the title of a registered proprietor and that the Bank's title as registered proprietor of the Legal Charge would be prejudicially affected if the Register were corrected by the removal of the Legal Charge. It was ultimately accepted before the Judge that Schedule 4 para 3(2) was not relevant. It was also confirmed before us that it is not suggested that there are "exceptional circumstances" for the purposes of Schedule 4 para 3(3). We are concerned, therefore, with whether there has been a "mistake" for the purposes of Schedule 4 para 2(1)(a).

16. Lastly, the indemnity provisions which potentially apply where the Register is rectified are contained in section 103 and Schedule 8 to the 2002 Act.

The Judge's reasoning

17. As I have already mentioned, the Judge concluded that there had been no mistake as to the registration of Mr Taylor as registered proprietor of the Property nor as to the registration of the Legal Charge and accordingly, the Register could not be rectified by the removal of the Legal Charge pursuant to Schedule 4 paragraph 2(1)(a) of the 2002 Act.

18. She came to her conclusion in relation to the registration of Mr Taylor as the registered proprietor on the basis that: the 2007 Order itself effected a disposition in the title to the Property independently of the forged documents (see judgment at [116.2]); at the time the 2007 Order was made, it was valid and effective albeit being susceptible to being set aside (see judgment at [116.3]); the majority in *Firman v Ellis* (*Pheasant v Smith)* [1978] 1 QB 886 (CA) did not decide that the order in that case was a nullity simply because it had subsequently been set aside (see judgment at [116.4]); the 2007 Order was "akin to a voidable transaction for the purposes of the analysis of whether it amount[ed] to a mistake under LRA [2002 Act] Schedule 4, para 2(1)(a)" and the principles as to the distinction between void and voidable transactions in *NRAM v Evans & Anr* [2018] 1 WLR 639 apply either directly or by analogy (see judgment at [116.5]); when determining whether a "mistake" has been made, it is clear from *NRAM v Evans* that one can only have regard to the point in time that the entry on the Register was made (see judgment at [116.8]); and accordingly, the registration of Mr Taylor as the proprietor of the Property was not a "mistake" at the time, or at all (see judgment at [116.9]).

19. As [116.4] has been the subject of particular criticism I will set it out in full:-

> "116.4 The reasoning of Lord Denning MR in *Firman v Ellis* was not the reasoning of the majority of the Court of Appeal (albeit that there was no disagreement as to the outcome). Geoffrey Lane LJ agreed with the reasoning and conclusions of Ormrod LJ at page 917, which reasoning was different from that of Lord Denning MR. Importantly, it was not Ormrod LJ's view that the order in that case was a nullity simply because it had subsequently been set aside. Further, albeit that *Firman v Ellis* was not cited to the Privy Council in *Isaacs v Robertson* it is plain that their Lordships in the latter case would not have agreed with the approach adopted by Lord Denning MR, which is also not consistent with the statements of principle in the other cases referred to in para 111 above. I reject Mr Umezuruike's submission that the terms "void" and "voidable", when used to describe an order of the court are to be viewed in the context of the facts of the relevant case and that whilst there is no question in this case that the July 2007 Order had to be obeyed, it was nevertheless "a nullity". I do not believe this is a finding that I can properly make in light of the clear statements of principle to contrary effect."

20. The Judge's conclusion in relation to the status of the registration of the Legal Charge, in summary, was that the registration of the Legal Charge at a time when the 2007 Order had not yet been set aside and Mr Taylor was the registered proprietor, could not be a mistake (see [121] of the judgment). Her reasons were: as registered proprietor, Mr Taylor was entitled to exercise the owner's powers pursuant to section 24 of the 2002 Act which includes the power to charge the freehold with the payment of money and Mr Taylor was exercising that power in granting the Legal Charge (see judgment at [121.1], [121.2] and [121.3]); section 26(3) of the 2002 Act precludes the title of a disponee under the owner's powers from being questioned on the basis that some limitation would otherwise affect the validity of the disposition and accordingly, it cannot be said that the creation of the Legal Charge or that its entry on the Register was a "mistake" (see judgment at [121.4] and [121.5]).

21. The Judge went on to note that, had she found that the original registration of Mr Taylor as the proprietor of the Property was a mistake, she would have gone on to hold that the registration of the Legal Charge was a consequence of that mistake and that the court had power to order its removal from the Register. She also noted that this was conceded by counsel for the Bank. See judgment at [128].

Grounds of Appeal and Respondent's Notice

22. The sole ground of appeal for which permission was granted is that the Judge was wrong to hold that the 2007 Order was not void for the purposes of the 2002 Act despite holding that the documents upon the basis of which the 2007 Order was obtained were null and void having been held to be forgeries. As a

consequence, it is said that the Judge erred in law in holding that the registration of Mr Taylor as proprietor on the register of title of the Property was not a mistake at the time or at all and that the registration of the Legal Charge was not a mistake.

23. By its Respondent's Notice, the Bank seeks to withdraw the concession recorded at [128] of the judgment and to argue in the alternative, that if Mr Taylor's registration as proprietor was a mistake, then the registration of the Legal Charge was neither a mistake in its own right nor a consequence of the earlier mistake. By a further Respondent's Notice, the Registrar seeks to uphold the Judge's order for the reasons given and if necessary, for additional and/or alternative reasons.

24. I should mention at this stage that the Third Respondent, Mrs Athena Taylor, was neither represented before us, nor did she appear in person.

Discussion – "mistake" and "void/voidable" distinction

25. Was the registration of Mr Taylor as proprietor of the Property and, as a result, the subsequent registration of the Legal Charge created by him pursuant to his "owner's powers" a "mistake" for the purposes of Schedule 4 paragraph 2(1)(a) of the 2002 Act? Although Mr Umezuruike on behalf of Mr Antoine accepts that the Registrar was under a duty to register Mr Taylor as proprietor of the Property as a result of the combination of 2007 Order, section 27 and Schedule 4 para 2(2) of the 2002 Act, he says that the Judge should have come to the conclusion that the registration was a mistake because she should have found that the 2007 Order (which had been set aside in 2008) was, nevertheless, void and not "akin to a voidable transaction", (see [116.5] of the judgment). He submits that it was void because it was based upon the documents which she found to be forgeries. He says that there is no justification for treating the 2007 Order differently from the underlying transaction and that had registration taken place on the basis of the documents themselves, there would have been no dispute that the transaction was void and accordingly, that the registration made as a result, was a mistake. He prayed in aid section 9 of the LPA 1925 which he says makes clear that a vesting order should be treated in the same way as a conveyance. Accordingly, as the underlying documents were forgeries the 2007 Order itself was void and made as a result of a mistake; if the Registrar had known the true facts in 2007 the registration would not have been made; and accordingly, there was a mistake for the purposes of Schedule 4 para 2(1)(a).

26. He accepts, however, that the Judge was right that pursuant to Rule 161 the Registrar had only to satisfy himself that the 2007 Order had been made and that a copy was enclosed with application form AP1 and that it was not for him to explore the validity of the 2007 Order: [116.7] of the judgment. He submits, nevertheless, that the fact that the 2007 Order had to be complied with is irrelevant because it was void and not voidable and the Judge should have followed the decision of the Court of Appeal in *Firman v Ellis.* He says that the Judge was confusing the concept of nullity and "voidness" at [116.4] of the judgment.

27. There is no definition of "mistake" for the purposes of the 2002 Act. However, the concepts of "mistake" and an "update" of the Register for the purposes of Schedule 4 para 2(1) have been considered recently by the Court of Appeal in *NRAM Ltd v Evans* [2018] 1 WLR 639 which was relied upon by the Judge both in relation to the distinction to be drawn between void and voidable transactions for the purposes of land registration and in relation to the time at which it must be determined whether a mistake has been made.

28. In that case, a bank advanced a loan which was secured as a legal charge over the borrowers' property. Subsequently, a second mortgage loan was advanced from which the first was redeemed. No amendment was made to the Register. A decade later the borrowers' solicitors wrote to the bank seeking the removal of the charge from the register because the first loan had been redeemed. The bank then inadvertently submitted an e-DS1 discharge to the Land Registry which duly removed the charge from the Register. On discovery of the second loan, the bank applied for rescission of the e-DS1 on the grounds of mistake and an order pursuant to Schedule 4 of the 2002 Act that the Register be altered by re-registration of the charge against the property. Having found that the charge had been effective to secure the second loan and that the e-DS1 had been submitted by mistake, the judge ordered that the discharge of the charge be rescinded and that the register be "altered and/or brought up to date" by re-registration of the charge against the title to the property as if it had the priority which it originally held.

29. One of the issues on the appeal was whether the subsequent re-registration of the charge constituted the rectification of the Register by the correction of a mistake or simply an update to the Register. Kitchin LJ (as he then was) with whom Richards LJ and Henderson LJ agreed, considered the matter at [47] – [59] of his judgment and decided that a mistake had not been made. At [48] Kitchin LJ noted that the term "mistake" is "generally understood to have a broad if somewhat uncertain scope and to encompass a wide range of circumstances, including, for example, the accidental registration of particular land in two different titles." At [49] - [51], he noted the discourse on the nature of a mistake which appears in *Megarry & Wade: The Law of Real Property* 8th ed (2012) and *Ruoff & Roper, Registered Conveyancing* loose leaf edition as follows:

> "49. Despite the scope and largely undefined nature of the term "mistake" in this context, the Law Commission noted in its 2016 Consultation Paper No. 227 entitled "Updating the Land Registration Act 2002" at 13.79 to 13.80 that a degree of consensus appeared to be emerging as to its boundaries. In that regard the Law Commission referred to *Megarry & Wade, The Law of Real Property* 8th ed. whose editors observe at 7-133 that:
>
> > "What constitutes a mistake is widely interpreted and is not confined to any particular kind of mistake. It is suggested therefore that there will be a mistake whenever the registrar would have done something different had he known the true

> facts at the time at which he made or deleted the relevant entry in the register, as by:
> (i) making an entry in the register that he would not have made or would not have made in the form in which it was made;
> (ii) deleting an entry which he would not have deleted; or
> (iii) failing to make an entry in the register which he would otherwise have made." (footnotes omitted)

50. The editors of *Megarry & Wade, The Law of Real Property* go on to provide various examples of mistakes, the first of which is the case where a person has been registered as proprietor pursuant to a void disposition, such as a forged transfer, or where the transfer was of land which the seller had already sold. Interestingly, the editors note that there is no mistake where the registrar registers a transfer that is voidable but has not been avoided at the date of registration.

51. The Law Commission also referred to *Ruoff & Roper, Registered Conveyancing* loose leaf ed. The authors of this work adopt, at 46.009, very much the same formulation as that of the editors of *Megarry & Wade, The Law of Real Property*:

> ""Mistake" is not itself specifically defined in the 2002 Act, but it is suggested that there will be a mistake whenever the Registrar (i) makes an entry in the register that he would not have made; (ii) makes an entry in the register that he would not have made in the form in which it was made; (iii) fails to make an entry in the register which he would otherwise have made; or (iv) deletes an entry which he would not have deleted; had he known the true state of affairs at the time of the entry or deletion. The mistake may consist of a mistaken entry in the register or the mistaken omission of an entry which should have been made. Whether an entry in the register is mistaken depends upon its effect at the time of registration…. "

30. Kitchin LJ noted that both formulations focus on the point in time that the entry or deletion was made and stated: ". . . That, so it seems to me, must be right. If a change in the register is correct at the time it is made it is very hard to see how it can be called a mistake". See [52] of his judgment. He then went on to consider the distinction between void and voidable dispositions in this context, as follows:

> "53. . .. a distinction must be drawn between a void and a voidable disposition. On this analysis, an entry made in the register of an interest acquired under a void disposition should not have been made and the registrar would not have made it had the true facts been known at the time. By contrast, a change made to the register to reflect a transaction which is merely

> voidable is correct at the time it is made. The same distinction is drawn by the authors of *Ruoff & Roper, Registered Conveyancing* who say, again at 46.009:
>
> > "… So the entry of an estate or interest purportedly arising under a void disposition is a mistake. The entry made in the register does not reflect the true effect of the purported disposition when the entry was made. However, the entry of a person as having acquired an estate or interest under what proves to be a voidable disposition is not a mistake. Unless it had been rescinded at the date of registration, the disposition would be valid and it would not be a mistake to enter the disponee as the proprietor of the estate or interest under it…."

Having noted at [54] the different approach of this Court in *Baxter v Mannion* [2011] 1 WLR 1594 in which at [31] Jacob LJ reserved his position as to whether the authors of *Ruoff & Roper* were right in the distinction they drew between void and voidable dispositions, Kitchin LJ went on to record the position taken by the authors of *Emmett & Farrand on Title* loose leaf edition vol. 1 at 9.028 where they point out that the effects of the distinction between void and voidable transactions has been described as "outrageous". He went on as follows:

> "56. Nevertheless, the distinction is, in my view, principled and correct and it derives further support from the decision of the Court of Appeal in *Norwich and Peterborough Building Society v Steed* [1993] Ch 116. In that case, a transfer of a property, induced by the fraud of the transferees, was voidable but not void. An innocent building society advanced a sum of money to the transferees on security of a charge which the transferees executed and which was registered in the charges register. The question to which the case gave rise was whether the court had power under s.82 of the Land Registration Act 1925, the predecessor of the LRA 2002, to order the rectification of the register by deletion of the building society's registered charge. Section 82(1)(h), described by the Law Commission as a "catch-all", provided that the register might be rectified "in any other case where, by reason of any error or omission in the register, or by reason of any entry made under a mistake, it may be deemed just to rectify the register."
>
> 57. Scott LJ (as he then was), with whom Butler-Sloss and Purchas LJJ agreed, concluded it could not. He said this at page 135:
>
> > "Paragraph (h) is relied on by Mr Lloyd. But in order for the paragraph to be applicable some "error or omission in the register" or some "entry made under a mistake" must be shown. The entry in the charges register of the building society's legal charge was not an error and was not made

> under a mistake. The legal charge was executed by the Hammonds, who were at the time transferees under a transfer executed by Mrs Steed as attorney for the registered proprietor. The voidable transfer had not been set aside. The registration of the Hammonds as proprietors took place at the same time as the registration of the legal charge. Neither registration was an error. Neither entry was made under a mistake. So the case for rectification cannot be brought under paragraph (h)."

58. It is to be emphasised that this was the position in relation to a voidable transfer. The decision would have been different had the transfer been void: see, for example, *Argyle Building Society v Hammond* (1985) 49 P&CR 148 (CA).

59. In my judgment, the registration of a voidable disposition such as that with which we are concerned before it is rescinded is not a mistake for the purposes of Schedule 4 to the LRA 2002. Such a voidable disposition is valid until it is rescinded and the entry in the register of such a disposition before it is rescinded cannot properly be characterised as a mistake. 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. In this connection, I believe the authors of *Ruoff & Roper Registered Conveyancing* put it very well at 46.009 in saying:

> "An entry cannot retroactively become a mistake. It cannot be argued therefore that the rescission of a voidable transaction retroactively makes the entry which recorded the disposition - being an entry made at a time while the disposition was still effective - a mistake. That would undermine the policy of the 2002 Act that the register should be a complete statement of title at any given time. Consequent upon such rescission, application may be made for an order for alteration of the register to reflect the rescission. This would, however, be an alteration for the purposes of bringing the register up to date … rather than for the purposes of correcting a mistake. . ."

31. Albeit in another context, (the effect for the purposes of the Limitation Act 1975) the status of an order which had been made without jurisdiction and set aside was considered by the Court of Appeal in *Firman v Ellis* to which the Judge referred at [116.4] of her judgment. She concluded that Lord Denning MR's reasoning in that case was not that of the majority and that

"[i]mportantly, it was not Ormerod LJ's view that the order in that case was a nullity simply because it had subsequently been set aside" and that the Privy Council in *Isaacs v Robertson* ([1985] 1 AC 97), to whom *Firman v Ellis* had not been cited, would not have agreed with the approach adopted by Lord Denning MR. As a result, she rejected Mr Umezuruike's submission that "whilst there is no question in this case that the July 2007 Order had to be obeyed, it was nevertheless, 'a nullity'": see judgment at [116.4]. As I have already mentioned, Mr Umezuruike says that the Judge was wrong because their Lordships did not disagree on their reasoning or the outcome.

32. *Firman v Ellis* is the title for a number of conjoined appeals including *Pheasant & Ors v S.T.H. Smith (Tyres) Ltd & Anr*. *Pheasant v Smith* concerned an application for joinder of a party, made outside the limitation period. The proposed party agreed to the application for joinder in relation to a summons with a return date which was within the limitation period. As a result of a clerical error, the application was not made on the return date but was made on another date, one day out of time. The registrar granted leave to amend in order to join the proposed defendant by an Order dated 11 July 1973. That Order was made in the absence of the proposed defendant and without its consent. The proposed defendant applied successfully to another registrar to have the Order set aside and on appeal, on 11 February 1974, Rees J set aside the 1973 Order on the basis that amongst other things, there was no power to add a defendant after the limitation period had expired.

33. On trial of the preliminary issues, the defendants claimed that the action could not be allowed to proceed and that the plaintiffs could not rely upon the retrospective provisions of section 3 Limitation Act 1975 which had subsequently come into force and included a discretionary power to disapply the limitation period, because the order of Rees J setting aside the amended writ and joinder of the proposed defendants was a "final order or judgment" within the meaning of section 3(2) Limitation Act 1975 and/or the matter was res judicata or was barred by issue estoppel.

34. Lord Denning MR dealt with the status of the 1973 Order and that of Rees J in the following way at 908C-G:

> "Void or voidable.
> This raises a nice question as to the status of the order of Mr. Registrar Morris Jones on July 11, 1973, when he gave leave to amend and join the Smiths as defendants. Was it a nullity and void ab initio? For in that case everything that followed from it was also a nullity and void: and no action had been "commenced" against the Smiths. Or was it good when it was made and only voidable? For in that case everything that followed was good until it was set aside: and an action would have been "commenced" against the Smiths and then dismissed by Rees J. in a "final" order. I think that the order of July 11, 1973 was a nullity and void ab initio for two reasons: (i) it was made under a fundamental mistake in that the registrar was told and believed that the Smiths had agreed to it, when they had not: and (ii) it was made contrary to the rules of natural justice,

> because no notice of appointment had been given to the Smiths' solicitor. Such failures make the order a nullity and void ab initio: see Anisminic Ltd. v. Foreign Compensation [1969] 2 A.C. 147, 171 by Lord Reid and at p. 195 by Lord Pearce. It is true, of course, that the Smiths might have waived their right to complain of it. They might have entered an unconditional appearance. But they did not waive it. They entered a conditional appearance and got it set aside. On being set aside, it is thereupon shown to have been a nullity from the beginning and void. So after some vacillation, I would adopt the meaning of "void" and "voidable" given by Professor Wade in his Administrative Law, 4th ed. (1977), pp. 300, 450. Seeing that it was a nullity, it follows that in point of law, no action had been "commenced" against the Smiths. So section 3 applies. The Act of 1975 operates retrospectively so as to enable Mr. Pheasant to bring an action against the Smiths-provided always that he can persuade the court to exercise its discretion so as to override the time limit".

35. Ormrod LJ addressed the matter at 914E-H as follows:

> "In my judgment, the order and the amended writ were void in the sense that the appellants were entitled ex debito justitiae to have both of them set aside. Essentially this was a case of non-service: see Craig v. Kanssen [1943] K.B. 256. Alternatively, there was a fundamental mistake on the part of the court making the order. R.S.C, Ord. 2, r. 1 does not apply. That is not, however, to say that the order or the amended writ was a nullity. Each was a document emanating from the court and good on its face. Such orders or documents must be acted upon until declared void by the court; see per Diplock J. in O'Connor v. Isaacs [1956] 2 Q.B. 288, 303. Consequently, if the appellants had not challenged the order or the amended writ, the subsequent proceedings would have been validly constituted: but as they did challenge them, the court had no option but to declare them void as Rees J. in effect, did in holding that the registrar had no power to give leave to amend. Neither was voidable in the sense that the court had a discretion to allow them to stand. (See the judgment of Sir George Baker P. in Dryden v. Dryden [1973] Fam. 217 and also the judgment of this court In re F. (Infants) [1977] Fam. 165, where the point was fully considered).
>
> In these circumstances the plaintiffs cannot be said to have "commenced an action" because the whole proceedings were void ab initio and there is no res which could found an estoppel."

At 917B, Geoffrey Lane LJ stated that he agreed with Ormrod LJ's "reasoning and conclusions" in relation to the questions arising on the *Pheasant v Smith* appeal.

36. In *Isaacs v Robertson* the Privy Council held that an order made by a court of unlimited jurisdiction, such as the High Court of St Vincent, had to be obeyed by the person against whom it was made unless and until it had been set aside by the court. Further, Order 34, r 11 of the RSC (West Indies Associated States) (1970 rev.) which provided that a cause or matter be deemed to have been abandoned in certain circumstances, did not render an interlocutory injunction an order which the court was obliged upon its own initiative to treat as having never been made but merely entitled the defendant to apply for an order setting it aside. Accordingly, the defendant was in contempt of court in disobeying the injunction.

37. Lord Diplock who delivered the judgment of the Board noted, obiter, that "in relation to orders of a court of unlimited jurisdiction, it is misleading to seek to draw distinctions between orders that are "void" in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are "voidable" and may be enforced unless and until they are set aside." See 102H. He went on at 102H – 103E as follows:

> "…Dicta that refer to the possibility of there being such a distinction between orders to which the descriptions "void" and "voidable" respectively have been applied can be found in the opinions given by the Judicial Committee of the Privy Council in the appeals *Marsh v. Marsh* [1945] A.C. 271, 284 and *MacFoy v. United Africa Co. Ltd.* [1962] A.C.152, 160; but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall into a category of court orders that can simply be ignored because they are void ipso facto without there being any need for proceedings to have them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind; what they do support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex debito justitiae the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.

> The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it upon application to that court; if it is regular it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies."

38. Mr Umezuruike also referred us to *In re F. (Infants) (Adoption Orders: Validity)* 1977 Fam 165 per Ormrod LJ at 171B-D:

> "…When the word "void" is used in relation to orders which are good on their face it must, therefore, have a more restricted meaning than it has in relation to marriages, contracts, and other transactions inter partes. It can only mean that when an application is made to a court to set it aside the court has no option or discretion in the matter and must do so. The most obvious examples are provided by cases where, in Sir George Baker P.'s phrase in *Dryden v. Dryden* [1973] Fam. 217, 237: "…the irregularity is such that it undermines the adversary procedure for the entire proceedings," e.g., where there has been a total failure to comply with the rules relating to service: see also *Craig v. Kanssen* [1943] K.B. 256 and *Woolfenden v. Woolfenden* [1948] P. 27. In such cases, the applicant is entitled ex debito justitae to have the order set aside, but it is not accurate to say that the order is a nullity, because it is good on its face and valid until set aside. There are other classes of case in which the court is bound to set aside the order in question, i.e., the relevant provision is "imperative," either because Parliament has expressly so provided as in section 41 (3) of the Act of 1973 or because, as a matter of construction, the court so holds."

Conclusions:

39. I have concluded that there was no "mistake" for the purposes of Schedule 4 of the 2002 Act for a number of reasons, and that therefore the Judge was correct. Firstly, as Ms Yates on behalf of the Registrar pointed out, and Kitchin LJ recorded at [59] of his judgment in *NRAM v Evans*, it is important to bear in mind that the policy of the 2002 Act is that the Register should be a complete and accurate statement of the position in relation to title at any given time and that as a result of section 58 of the 2002 Act, subject to the powers of alteration in Schedule 4, the Register is conclusive as to legal title. Secondly, and by way of corollary, whether an entry in the Register is a "mistake" must be judged at the time that the entry is made: see *NRAM v Evans* at [52]. As

Kitchin LJ pointed out, ". . . if a change in the register is correct at the time it is made it is very hard to see how it can be called a mistake." Were that not the case, the policy of the 2002 Act would be undermined.

40. Thirdly, schedule 4 paras 1 and 2(1) are concerned with the alteration of the Register involving the correction of a mistake. The mistake must be as to the state of the Register. The focus therefore, is upon the Register and not the underlying disposition in relation to the property.

41. Fourthly, there is a mistake when, amongst other things, a disposition is registered or deleted from the Register when it ought not to have been or it is recorded in a way which is inaccurate. Such a bland statement requires further explanation. In *NRAM v Evans*, Kitchin LJ recorded with approval the formulation of the nature of a mistake set out in *Megarry & Wade: The Law of Real Property, 8th ed* at *7-133* and *Ruoff & Roper, Registered Conveyancing* at *46.009*. Both of those passages had been referred to by the Law Commission in its 2016 Consultation Paper *Updating the Land Registration Act 2002* (Law Com No 227) in which it had noted that a degree of consensus appeared to be emerging as to the boundaries of mistake. The Law Commission Report 2018 *Updating the Land Registration Act 2002* (Law Com No 380) also mentions those passages and the decision in *NRAM v Evans* itself: see paras 13.15 and 13.16. In the same passage, reference is also made to the distinction between a transfer which is void at common law and therefore, of no effect rendering its registration a mistake and a voidable transfer which is not a mistake if it is registered before the transfer is set aside. The same distinction is drawn in *NRAM v Evans* at [53] and [56] – [59] of Kitchin LJ's judgment.

42. In the passages quoted in *Megarry & Wade* at *7.133* and *Ruoff & Roper* at *46.009*, set out at [49] and [51] of Kitchin LJ's judgment in *NRAM v Evans* respectively, and in [53] of the judgment itself, emphasis is placed upon the knowledge of the Registrar at the time an entry is made or deleted. It seems to me that the reference to knowledge may easily be misunderstood. The suggestion that there will be a mistake whenever the Registrar would have done something different had he known the true facts at the time at which he made or deleted the relevant entry in the Register, or made the omission complained of, might suggest that the question of whether there is a mistake turns upon the subjective knowledge of the Registrar or the extent of his ability to make enquiries or to obtain relevant documents. It seems to me that that was neither the intention of the textbook writers nor the ratio of Kitchin LJ's judgment. It is not being suggested that the Registrar has some duty to investigate or that the state of his knowledge about an underlying disposition is relevant. As a result of the provisions and structure of the 2002 Act and the Rules, if the relevant requirements are met (and subject to limited powers to raise requisitions) the Registrar is required to register a disposition (in this case, by operation of law) and does so as an administrative act.

43. As Ms Yates on behalf of the Registrar and Mr Fetherstonaugh on behalf of the Bank pointed out, and Mr Umezuruike accepts, in this case the Registrar was under a duty to enter Mr Taylor upon the Register pursuant to the 2007 Order which was a vesting order and directed alteration of the Register. The only

documentation which was required and in fact, the only documentation supplied, was the 2007 Order itself, which was valid on its face.

44. It seems to me that the distinction made by the textbook writers and by Kitchin LJ between a void and a voidable transaction is made because a void disposition is one which, in law, never took place and therefore, should not be entered on the Register. This is consistent with the approach in *Argyle Building Society v Hammond* (1985) 49 P & CR 148 (CA) which was decided under the Land Registration Act 1925 and was a case in which there was a forged transfer. It was approved in the context of the 2002 Act by Kitchin LJ at [58] of his judgment. It is in this context that reference is made to the knowledge of the Registrar in an entirely abstract sense. Had the Registrar known that at common law the disposition did not take place at all, and accordingly there was no disposition for him to register, in his administrative capacity, he would not have done so. There was a mistake at the time of the registration because in law, there was no disposition to register.

45. However, in the case of a voidable transaction, the disposition itself is valid until set aside. There is a disposition to register. This is consistent with the approach in *Norwich and Peterborough Building Society v Steed (No 2)* [1993] Ch 116 at 133-134 which was decided under the Land Registration Act 1925 but approved in the context of the 2002 Act in *NRAM v Evans*. In those circumstances, the Registrar makes no mistake when taking the appropriate administrative action when making the entry on the Register. The voidable transaction may subsequently be avoided but that does not render the entry in the Register a mistake retrospectively. The Registrar would still have taken the administrative act which he did at the time because he was faced with a disposition which was valid at the time and which he was, subject to the relevant registration requirements being met, under a duty to register.

46. Fifthly, in this case, the Judge was dealing with a different and novel situation. As she held, as a result of s.9 LPA 1925 and s.27(5) 2002 Act the registration of Mr Taylor as registered proprietor of the Property was based upon the 2007 Order alone, and the 2007 Order effected the disposition and conferred title upon Mr Taylor independently of the underlying documents. See [116.1] and [116.2] of the judgment. The Registrar was under a duty to register the disposition by operation of law. The 2007 Order was valid and effective even if irregular and susceptible to being set aside.

47. It seems to me that in such circumstances, the Judge was right to conclude as she did at [116.5] of her judgment, that registration on the basis of a valid court order is "akin" to the position in relation to a voidable transaction. As Kitchin LJ held in *NRAM v Evans*, the fact that a voidable transaction is subsequently rescinded does not make the entry on the Register made before the rescission a mistake: see *NRAM v Evans* at [52], [53] and [59].

48. This should not be taken to equate the position in relation to a court order, which is valid on its face and is a vesting order, too closely with that of a voidable transaction. As the Privy Council pointed out in *Isaacs v Robertson*, the concepts of "void" and "voidable" belong to the realm of the law of contract and therefore, in the context of Land Registration are applicable when

one is concerned with a registration based on the transaction itself. They are not apposite in relation to court orders. Court orders are either "regular" and can only be overturned on appeal or "irregular" and may be set aside by the court that made them upon application to that court. Even if a party is entitled to have an order set aside as of right, and it is "void" in the sense that the court would have no alternative but to do so, it must be obeyed until it is set aside: *Isaac v Robertson* as followed in *Hillgate House Ltd v Expert Clothing Service & Sale Ltd* [1987] 1 EGLR 65 per Browne-Wilkinson VC at 66L.

49. The fact that Mr Umezuruike says that the order is "void", therefore, does not assist him. The order remains valid until it is set aside: *In re F. (Infants) (Adoption Order: Validity)* and *Pheasant v Smith* per Ormrod and Lane LJJ at 914 E-H and 917 B. Accordingly, there is no mistake at the time of registration. The vesting order is valid. I should add that it seems to me that the Judge was right to hold that the reasoning of Lord Denning MR was not that of the majority of the Court of Appeal in the latter case (albeit that there was no disagreement as to the outcome). See [116.4] of the judgment. Ormrod LJ with whom Geoffrey Lane LJ agreed, concluded that although the appellants were entitled to have the order and the amended writ set aside as of right, they were not a nullity from the start. The Order was good on its face until declared void by the court. It might never be challenged and be set aside. However, once declared void, the whole proceedings were void ab initio. Lord Denning MR, on the other hand, held that the order in that case was a nullity or void from the very beginning.

50. At the date upon which the Registrar fulfils his duty and alters the Register in order to reflect the terms of a vesting order made by a court of competent jurisdiction, the order is valid on its face and all parties and the Registrar are required to give effect to it. He makes no mistake in doing so. The court order, which is valid and must be complied with, has yet to be set aside. In fact, as Ormrod LJ noted in *Pheasant v Smith*, it may never be set aside. There is a valid disposition by operation of law at the time of the registration. The fact that the court order is later set aside as of right and is declared at that stage to be void does not render the Registrar's administrative act at the time he completed it, a mistake. The Registrar properly gave effect to a valid court order vesting the Property in the name of Mr Taylor. Unlike the situation in which the disposition itself is void and therefore, never existed, albeit that it is only declared void after registration, in this case, there was an effective disposition by operation of law by means of a valid court order at the time of the registration.

51. Even if one couches the question in what might appear to be subjective terms, the Registrar would have fulfilled his duty by making the registration, had he known the true facts at the time because he was under a duty to act upon a valid court vesting order which might never have been set aside. If the position were otherwise, not only would the rule of law be undermined but as Kitchin LJ pointed out in *NRAM v Evans*, the integrity of the Register and the system of title by registration would be compromised.

52. Sixthly, I agree with the Judge that section 9 LPA 1925 is of no assistance to Mr Umezuruike. The provision is designed to ensure that a vesting order

(amongst other things) operates as a conveyance by the estate owner. It does not require or enable the Registrar to look behind the court vesting order to the underlying transaction and to determine whether the disposition as a result of the transaction was itself void or voidable.

53. Seventhly, as the registration of the 2007 Order was not a mistake, neither was the registration of the Legal Charge. It follows that the question of whether the Legal Charge was properly registered even if Mr Taylor's registration as proprietor was a mistake does not arise. As we did not hear full argument on this further question, I express no opinion upon it.

54. Eighthly, in the light of my conclusions it is not necessary to consider whether there is also something to be said for Mr Fetherstonaugh's submission that Schedule 4 of the 2002 Act cannot be used to alter or rectify the Register in relation to an entry which has long since ceased to exist in any event.

55. I accept that the outcome, from Mr Antoine's perspective, is unfortunate. However, for all the reasons set out above, I would dismiss the appeal.

Lord Justice Peter Jackson:

56. I agree.

Lord Justice Longmore:

57. I also agree.