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CHANCERY BAR

QUALIFIED INDEFEASIBILITY OF REGISTERED TITLE: ALTERATION, RECTIFICATION & INDEMNITY

A Paper for the Chancery Bar Association Bermuda Conference

Friday, 10 May 2019

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1. What is the point in making the move to land registration? Well, for one thing, it enables us to get a quick, complete and final answer to the question: who owns this land? To answer that same question in respect of a parcel of *unregistered* land, we must embark upon the often tricky task of considering the meaning, completeness and authenticity of the various conveyances and other title deeds proffered by the parties who lay claim to the land in order to form a view about which, if any of them, is in fact the true owner. Under a registered system, the answer is always quite simply: the person identified as the owner in the register. That person's title does *not* depend on being able to show that his or her name should have been entered onto the register – the mere fact that it is there confers title and thus ends the debate.[1]

2. But land registration does not entirely sacrifice fairness and flexibility at the altar of certainty and efficiency. Here in Bermuda, as in England and Wales, the legislation leaves some scope for changes to be made to the register: the principle of indefeasibility of title which underpins land registration is thus a qualified one. But although land registration does not offer an absolute guarantee of a registered owner's title, it offers the next best thing: a statutory indemnity which ensures that a registered owner is not left out of pocket if the system lets him or her down.

[1] See section 78 of the Land Title Registration Act 2011 which provides that: "If, on the entry of a person in the register as owner of an estate, the estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration."

3. This paper considers the provisions for alteration of the register, in Schedule 6 to the Land Title Registration Act 2011 ("the LTRA 2011"), and the correlative provisions for indemnity in Schedule 1. Those provisions have, of course, only recently been brought into force here in Bermuda[2] and are accordingly largely untested by the Courts. However, although the LTRA 2011 is by no means a carbon copy of England's Land Registration Act 2002 ("the LRA 2002"), the provisions dealing with alteration of the register and indemnity are nearly identical. Practitioners here in Bermuda will therefore find that English case law on the equivalent provisions of the LRA 2002 sheds some valuable light on the meaning and effect of Schedules 1 and 6 to the LRTA 2011.

4. This paper addresses the following questions:

Alteration of the register under Schedule 6:

(1) Who can apply to alter the register?

(2) To whom should an application to alter the register be made?

(3) What is the difference between *rectification* and *mere alteration* of the register and why does this matter?

(4) When will the register be rectified?

(5) When will the register be merely altered (ie without rectification)?

Indemnity under Schedule 1

(1) When is a Schedule 1 indemnity available?

(2) To whom should an application for an indemnity be made?

(3) What losses will the indemnity recover?

(4) Does the Land Title Registrar have any defences to an indemnity claim?

(5) If the Registrar pays out on an indemnity, can he get the money back from someone else?

[2] The provisions of Schedules 1 and 6 came into force along with the majority of the rest of the LTRA 2011 on 2 July 2018.

Alteration of the Register under Schedule 6:

(1) Who can apply to alter the register?

5. In most cases, the person making an application to alter the register will be someone who says that they are the rightful owner of the land in question or that they hold some other interest in the land (eg a lease or charge). Self-evidently, someone in either of those positions has standing to apply to have the register altered under Schedule 6 to the LTRA 2011.

6. But what about someone who does *not* assert that they are entitled to some estate, right or interest in the land: do they have standing to apply? Neither the LTRA 2011, nor the English LRA 2002 is explicit about that. After a bit of uncertainty,[3] the English Courts have mostly taken the view that there is no general requirement of standing to bring an application to alter the register.[4] The rationale for this somewhat relaxed approach to standing is that the procedural rules and powers given to the Court,[5] the Registrar[6] and the Adjudicator[7] provide an adequate means of weeding out obviously vexatious or abusive applications and there is thus no need to imply some form of statutory filter.

7. Accordingly, there is nothing stopping the owner of Plot A applying to have the current owner of the adjoining Plot B removed from the register even though the owner of Plot A does *not* claim to own or have an interest in Plot B.[8]

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[3] In *Wells v Pilling Parish Council* [2008] EWHC 556, Lewison J held that a local authority, which did not assert that it had (or could have) an estate, right or interest adverse to, or in derogation of, the registered proprietor's title, did not have standing to apply to alter the register. The decision was interpreted by some as being supportive of a general requirement of sufficient standing to bring an application to alter the register. But, on closer inspection, the decision does not actually provide support for that proposition. The only live issue for determination in that case was whether the issue of standing was a matter of public law or alternatively private law (as Lewison J ultimately held). It was *common ground* between the parties that if it was a matter of private law, standing to apply was required.

[4] See *Mann v Dingley* [2011] EWHC (Ch) (ureported) (per McCahill QC); *Paton v Todd* [2012] EWHC 1248 (per Morgan J); *Walker v Burton & Bamford* [2013] EWCA Civ 1228 and *Balevents v Sartori* [2014] EWHC 1164 (Ch). But cf the decision in *Ewetuga v Derbyshire Home Loans* [2013] EWHC 3544 which is to the contrary effect, but it would appear that the Judge (Donaldson QC) was not referred to the decisions in *Mann v Dingley* and *Paton v Todd*.

[5] Under the Rules of the Supreme Court 1985.

[6] See, for example, the land title registrar's power to treat an objection to an application to alter as groundless in section 92(6) of the LTRA 2011.

[7] In Bermuda, it is the Adjudicator who is charged with resolving disputed applications to alter the register under Part 15 to the LTRA 2011. The Adjudicator will do so in accordance with the provisions of the Land Title Registration (Adjudication) Rules 2018 which include a power to summarily dispose of proceedings: see Rule 29.

[8] See for example *Balevents v Sartori* [2014] EWHC 1164 (Ch). But, although an applicant in these circumstances has standing to make an application to register, the fact that he or she does not claim to be the

(2) To whom should an application to alter the register be made?

8. There are two procedural routes that an application to alter the register may take.

9. First, the application can be made directly to the Court, under paragraph 2 of Schedule 6 to the LTRA 2011, and it will then be case-managed and heard in accordance with the Rules of the Supreme Court 1985.

10. Secondly, the application can instead by made to the Registrar under paragraph 5 of Schedule 6. If the Registrar then receives an objection to the application (eg. by the current registered owner), the resultant dispute will generally fall to be resolved by the Adjudicator in accordance with the provisions of sections 92 – 97 of the LTRA 2011 and the Land Title Registration (Adjudication) Rules 2018. However, both the Registrar and the Adjudicator have power to require the dispute to be determined by the Court if either of them considers that that would be more appropriate. Both the Registrar and the Adjudicator are required to send the matter off to the Court if they consider that there is a prospect that one of the parties will be entitled to an indemnity under Schedule 1.[9]

(3) What is the difference between *rectification* and *mere alteration* and why does it matter?

11. It is important to appreciate that although every change made to the register under powers conferred by Schedule 6 to the LTRA 2011 constitutes an *alteration* of the register, only some alterations will constitute *rectification* for the purposes of Schedules 1 and 6. Rectification is, in effect, a sub-species of alteration.

12. Irrespective of whether the application is made to the Court or the Registrar, Schedule 6 permits alternation "…for the purposes 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".[10]

rightful owner or otherwise interested in the land might conceivably rank as "exceptional circumstances" that justify a refusal to alter the register: *Paton v Todd* [2012] EWHC 1248. That issue is considered in paragraph 46 below.

[9] See sections 92(8) and 95(2) of the LTRA 2011.

[10] See paragraphs 2 and 5 of Schedule 6.

13. In the case of an application made to the Registrar, there is an additional ground for alteration, namely "removing a superfluous entry".[11]

14. *Rectification* is an alteration of the register "which –

    (a) Involves the correction of a mistake; and

    (b) Prejudicially affects the title of a registered owner."

15. The meaning and effect of the two limbs of the test is considered separately in the next section of this paper. But for present purposes, it is sufficient to note why the distinction between rectification and mere alteration matters. There are two quite important reasons why it does.

16. First, if the application is for *rectification* of the register and the current registered owner is "in possession" of the land to which the application relates, the cards are stacked very much against the applicant and there are only very limited circumstances in which the application can then succeed (see further paragraphs 37 – 45 below).

17. Secondly, subject to one exception,[12] the right for a disappointed applicant or indeed respondent to obtain a Schedule 1 indemnity is available in rectification cases and is *not* available in cases of ordinary alteration.

(4) In what circumstances will the register be rectified?

18. An application for *rectification* of the register requires the Court or Registrar/Adjudicator (as the case may be) to consider the following questions:

    (1) Is there a *prima facie* entitlement to have the register rectified? In other words:

        (i) Does the alteration being sought involve the correction of a "mistake";

        (ii) If made, would the alteration be one that "prejudicially affects the title of the registered owner"?

    (2) If so, is the existing registered owner "in possession" of the land such that he or she is entitled to the protection afforded by paragraphs 3(2) or 6(2) of Schedule 6 (as the case may be)?

[11] See para 5 of Schedule 6.
[12] The exception, which relates to fraud cases, is discussed in paragraph 63 below.

(3) If the answer to Question (2) above is 'yes' and the existing registered owner is not willing to consent to the alteration, then should the applicant nevertheless succeed on the basis that:

(i) the registered owner "has by fraud or lack of proper care caused or substantially contributed to the mistake"; or

(ii) it would "for any other reason be unjust for the alteration not to be made"?

(4) Irrespective of whether the answer to Question 2 above is 'yes' or 'no', are there any "exceptional circumstances" that would justify a decision *not* to alter the register in favour of an applicant who would otherwise be so entitled?

(5) If rectification is ordered, should it be retrospective in effect?

19. It is worth spending a moment considering these questions and the issues to which they give rise separately.

Question (1): Concept of "mistake"

20. In company with the LRA 2002, the LTRA 2011 does not actually tell us what is meant by a "mistake" for the purposes of paragraphs 2(1)(a) and 5(a) of Schedule 6. You may think that omission unsurprising: the ordinary meaning of the word "mistake" and recourse to the well known "elephant test" should see us through. However, working out exactly ranks as a "mistake", for rectification purposes, is something that has much exercised English lawyers and judges.

21. The up-to-date position, as a matter of English case law, is 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 would not have been 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.[13]

22. Accordingly, there is a "mistake" in the register where:

[13] See *NRAM Ltd v Evans and The Chief Land Registrar* [2017] EWCA Civ 1013.

(1) a party is registered as the owner of land:

(i) pursuant to a forged transfer;[14]

(ii) despite the fact that his or her title had been extinguished by adverse possession prior to registration;[15]

(iii) on the basis of adverse possession when, in fact, he or she had *not* been in adverse possession for the requisite period;[16]

(2) An innocent lender is registered as the holder of a charge as part of the same transaction that results in a fraudster is registered as the owner of the land;[17]

(3) A discharge of a charge is registered in circumstances where the officers of the company owner did not have authority to enter into the transaction and the monies secured by the charge had not been repaid.[18]

(4) A restrictive covenant, binding on the land under the unregistered system, is not carried through on first registration of the land;[19]

(5) A leasehold title is closed by the Registrar in the erroneous belief that it had been forfeited.[20]

23. So far, so good. But two notes of caution should be sounded at this point.

24. First, the concept of "mistake" presupposes commission of a genuine *error* that requires *correction*. So, for example, there is no "mistake" where the register, although originally correct, now needs to be altered to reflect some right or interest acquired since the land was registered.[21]

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[14] See *Argyle Building Society v Hammond* (1985) 49 P&CR 148 (CA) (a case under the Land Registration Act 1925).
[15] See *Chowood Ltd v Lyall (No 2)* [1930] 2 Ch 156 (a case under the Land Registration Act 1925).
[16] See *Baxter v Mannion* [2011] EWCA Civ 120; see further *Balevents v Sartori* [2014] EWHC 1164 (Ch).
[17] See *Gold Harp Properties Ltd v McLeod* [2014] EWCA Civ 1084 at [79-81] per Underhill LJ; see also *Dhillon v Barclays Bank plc* [2019] EWHC 475 (Ch). In these circumstances, there is some debate as to whether the registration of the charge is a freestanding "mistake" or alternatively is a consequence of the original mistake (viz. registration of the fraudster as the owner of the land) (see *Ruoff & Roper: Registered Conveyancing*, at para 46.029) but, in practice, it matters little which is correct as the result is the same.
[18] *Knightsbridge Property Development Corp (UK) Ltd v South Chelsea Properties Ltd* [2017] EWHC 2730 (Ch).
[19] *Rees v Peters* [2011] EWCA Civ 836.
[20] *Gold Harp Properties Ltd v McLeod* [2014] EWCA Civ 1084.
[21] See para 10.7 of the English Law Commission's reports: "*Land Registration for the Twenty-first Century*".

25. Secondly, and relatedly, the question of whether there has been a "mistake" falls to be judged *at the time of registration* – not with the benefit of hindsight. Two recent English decisions illustrate the significance of that distinction:

    (1) In *NRAM Ltd v Evans and The Chief Land Registrar* [2017] EWCA Civ 1013, a bank mistakenly discharged its registered charge when labouring under the misapprehension that the whole of the loan it secured had been repaid by the borrowers. On realising its error, the bank rescinded the instrument effecting the discharge on the grounds of mistake (in the equitable, rather than land registration, sense of the word[22]). The Court of Appeal held that deletion of the charge from the register had *not* been a "mistake" (in the land registration sense) because the instrument that the Registrar had acted upon when deleting the charge was *voidable*, not *void*, and the right to rescind it had not yet been exercised by the bank by the time the Registrar made the deletion. Accordingly, when the bank later did exercise its right to rescind, it was entitled to have the register *altered* – so as to *bring it up to date* by restoring the charge – but that was not rectification because no *mistake* had been *corrected*. This made no odds to the bank (which had merely sought to restore its charge), but it did matter to the borrowers because it meant that they were unable to obtain an indemnity under Schedule 8 to the LRA 2002.

    (2) In *Antoine v Barclays Bank UK Ltd* [2018] EWCA Civ 2846, the Court of Appeal held that the Registrar had not made a "mistake" in registering a party as owner of the land pursuant to a Court order which had been obtained using forged documents and that similarly there had been no mistake made when a subsequent charge, securing funds advanced to the fraudster, had been registered. The order in question was liable to be set aside, but until that happened, it was a binding on the Registrar and the position was therefore analogous to registration under a voidable disposition (see *NRAM* above).

26. By parity of reasoning, it would seem that where a party is registered as owner pursuant to a transfer that is voidable on the grounds of misrepresentation, duress, undue influence or incapacity that would *not* represent a "mistake" for these purposes.

27. But what about someone who is registered on the basis of a transfer that is liable to be rectified – in the *equitable* (rather than land registration) sense of the word – and who would fall to be removed from the register once the transfer is rectified: is that a case of rectification or alteration to bring the register up to date? There is no

[22] See *Snell's Equity* (33rd edn) at para 15-006.

English authority directly on point. By analogy with the approach taken in *NRAM* and in *Antoine v Barclays Bank*, the English Courts would no doubt say there is *no* "mistake" in such circumstances. Until such time as the Court grants the equitable relief of rectification, the transfer has effect according to its original terms and the Registrar can proceed accordingly without committing any "mistake".

28. But should Bermuda necessarily follow the same path as the English Courts on this issue? Arguably not. Where the remedy is equitable in character, it generally operates retrospectively. So, for example, once rectified by the Court, a transfer falls to be treated as if it had been *originally* executed in that form.[23] That also means that other transactions with third parties that were entered into in the intervening period that were ineffective and of no effect at the time they were entered into are, by equitable magic, brought into life once rectification is ordered.[24] If even third parties are retrospectively saddled with the effect of rectification, should the Registrar be treated any differently? Retrospectivity, albeit by statutory rather than equitable magic, is by no means unknown to the system of land registration.[25] The impact of retrospectivity does not seem to have been given much thought in taken in *NRAM* and in *Antoine v Barclays Bank*. Although, in the writer's view, the better answer is that the concept of "mistake" within the LTRA 2011 falls to be considered at the time the Registrar takes action and that an entry in the register cannot, retrospectively, become a mistake, the converse is not unarguable and might be worth a go when the point first arises in this jurisdiction.

Question 1: Prejudicially affecting the title of the registered owner

29. Intuitively, one would think that a registered owner's title is *prejudicially affected* whenever the result of the application to alter the register is that his or her title is either lost altogether or blemished by some lesser incumbrance.

30. To a very large extent, that instinct holds true. But there is one important exception. Alteration of the register so as to give effect to an "overriding interest" under either Schedules 2 or 5 of the LTRA 2011 does *not* "prejudicially affect" the title of the existing registered owner.[26] The rationale here is that the existing owner originally acquired his or her title subject to any interests that override first registration or a subsequent registrable disposition (as the case may be) and the existing owner is

[23] *Craddock Bros Ltd v Hunt* [1923] 2 Ch. 136 at 151 per Lord Sterndale MR.
[24] See the authorities discussed in *Hodge on Rectification* (2nd edn) at 1-78.
[25] See s.90 of the LRTA 2011 the effect of which is that once an application to register a person as owner of property has been processed by the , they are deemed, by statutory magic, to have been registered since the date upon which they *applied* to be registered.
[26] See *Swift 1st Ltd v The Chief Land Registrar* [2015] EWCA Civ 130.

not therefore prejudiced when the register is updated so as expressly reflect or give effect to such interests.

31. Certain leases[27], certain private easements and profits[28] and public rights[29] will rank as overriding interests under the LTRA 2011. But the most important category of overriding interest for our purposes are the interests of "a person in actual occupation".[30] If, for example, a squatter, who had successfully extinguished the title of the paper owner of the land following 20 years' adverse possession under the Limitation Act 1984, remained in actual occupation when the paper owner was erroneously registered as owner on first registration of the land, correction of that "mistake" would *not* "prejudicially affect" the latter's title because he acquired his registered title subject to the squatter's overriding interest.

32. Another important example is a defrauded owner of property who remains in actual occupation of the property when, unbeknownst to him, a fraudulent transfer and/or charge is being registered. In England, he too will have an overriding interest – either a beneficial one under a constructive trust[31] or, in cases where the transferee is *innocent* of the fraud, relying on the statutory right to apply for alteration of the register[32] – such that putting all that right will constitute mere alteration and not rectification of the register.

33. There is an interesting point of departure between the English and the Bermudian legislation here. Unlike the equivalent provisions in the LRA 2002, paragraph 2 of Schedule 2 and paragraph 2(a) of Schedule 5 to the LRTA 2011 both specifically exclude "a beneficial interest under a trust" from the classes of interests that may rank as an interest of a person in actual occupation. However, in the writer's view at least, this distinction is unlikely to make much difference, in practice, because the statutory right to obtain rectification of the register is *not* excluded by Schedules 2 and 5 and that statutory right could, in an appropriate case, constitute an interest of a person in actual occupation which overrides a first or subsequent registration, even though the equitable interest that that person also holds would not have done so.

[27] See paragraph 1 of Schedules 2 and 5.
[28] See paragraph 3 of Schedules 2 and 5.
[29] See paragraph 4 of Schedules 2 and 5.
[30] Paragraph 2(a) – (d) of Schedule 5.
[31] *Rashid v Nasrullah* [2018] EWCA Civ 2685.
[32] *Swift 1st Ltd v The Chief Land Registrar* [2015] EWCA Civ 130 in which the Court of Appeal decided that the much maligned decision in *Mallory Enterprises Ltd v Cheshire Homes Ltd* [2002] EWCA Civ 151 (a case under the LRA 1925) was *per incuriam* and impliedly overruled *Fitzwilliam v Richall Holdings Services Ltd* [2013] EWHC 86 (Ch).

Question 2: Owner "in possession"

34. In rectification cases (but not in other alteration cases), a registered proprietor will enjoy additional protection if he or she is "in possession" of the land at the time his or her title is under attack. A registered proprietor will be "in possession" if the land is physically in his or her possession or physically in the possession of one of the following persons:

    (1) Someone else who is entitled to be registered as the owner of the land (eg. a trustee in bankruptcy, personal representatives of a deceased registered proprietor or a beneficiary under a bare trust);[33]

    (2) The registered proprietor's tenant, charge, licensee or beneficiary.[34]

35. The concept of "physical possession" goes beyond mere occupation: it is co-extensive with the concept of factual possession in adverse possession cases.[35]

36. Neither the LRA 2002 nor the LTRA 2011 makes clear at what point in time at the question of "possession" falls to be judged. Of the two available candidates – the date of the application to rectify and the trial of the application – the former has generally been favoured by English judges.[36] Adopting the latter of those two dates would raise the alarming spectre of applicant and respondent seeking to barge each other off the land the day before trial so that they could report to the judge the next day that they were "in possession" at the critical moment.

Question 3: Fraud or lack of proper care

37. If the existing registered proprietor is "in possession" of the land and does not consent to the application, the applicant's life is then much complicated by the need to establish one or other of the two disqualifying grounds (the burden of proof being on the applicant[37]) failing which the application for rectification will fail.

38. The first of the disqualifying grounds is that the registered owner "has by fraud or lack of proper care caused or substantially contributed to the mistake". As the statutory language makes clear, the registered proprietor's conduct need not be the

[33] Section 4(5) of the LTRA 2011.
[34] See the deeming provisions in section 4(6) of the LTRA 2011.
[35] *Paton v Todd* [2012] EWHC 1248.
[36] See *Paton v Todd* [2012] EWHC 1248 and *Fitzwilliam v Richall Holdings Services Ltd* [2013] EWHC 86 (Ch).
[37] *Sainsbury's Supermarkets Ltd v Olympia Homes Ltd* [2005] EWHC 1235 (Ch); see further *Baxter v Mannion* [2011] EWCA Civ 120.

only cause of the mistake – the Registrar will often have had a hand in it – but it must still be an operative cause.

39. The concept of "fraud" presents no real difficulty: the LTRA 2011 unsurprisingly does not offer protection to those who have acquired their registered title by fraudulent means.

40. The concept of "lack of proper care" requires a little more explanation. The English Courts have tended to take the view that carelessness on the part of an agent should be attributed to the registered principal for these purposes.[38] It is therefore both the registered owner and his conveyancing solicitor who must survive the statutory negligence scrutiny. The standard to be attained by solicitors in this context is that of "an ordinary competent solicitor undertaking work of [this] type".[39]

41. In the English decided cases, registered proprietors have been found to fail that test where:

    (1) The registered proprietor had procured the transfer that led to her registration by means of undue influence on the previous owner;[40]

    (2) The registered proprietor had made inaccurate statements to the Land Registry and also to his own solicitor at the time of the application which had caused the mistake which was made.[41]

Question 3: For any other reason unjust not to register

42. Whereas the first ground (fraud/lack of proper care) is obviously quite a high bar for an applicant to get over, the second ground sounds like broad discretion; a power for the Court or Registrar (as the case may be) to weigh the competing claims for the property in question and to do what is right in the particular circumstances. But regrettably for those seeking to dislodge a registered owner in possession, that is not the right way of looking at it.

43. The second disqualifying ground must be seen in context, both in terms of the overarching principle that registered title should generally be indefeasible and the particular protection that registered owners who are "in possession" are expected to enjoy. It has been said that the double negative – "*unjust* for the alteration *not* to be

[38] See *Prestige Properties Ltd v Scottish Provident Institution* [2003] Ch 1 and *Walker v Burton & Bamford* [2013] EWCA Civ 1228.
[39] *Walker v Burton & Bamford* [2013] EWCA Civ 1228.
[40] *Re Leighton's Conveyance* [1936] 1 All ER 667.
[41] *Balevents v Sartori* [2014] EWHC 1164 (Ch).

made – is a reflection of those same underlying policy considerations.[42] The English Law Commission has also suggested that the "unjust" requirement represents a materially higher bar than the "exceptional circumstances" ground for refusing an application to alter the register (as to which see paragraph 46 below).[43]

44. The fact that the registered owner in possession must have been aware that a mistake had been made on registration and was now seeking to take unfair advantage of the mistake or obtain an illegitimate windfall is a common theme running through a number of the English cases in which the Courts found for the applicant on the basis of the second disqualifying ground.[44]

45. If, during the period of his or her registration, the owner in possession has spent money on the property, the prospects of the applicant establishing injustice will of course become remoter still.[45]

Question 4: "Exceptional Circumstances"

46. Once the Court or Registrar/Adjudicator has decided that the applicant has a *prima facie* right to rectify and, where applicable, that the registered owner "in possession" is *not* immune from rectification (because one or other of the disqualifying grounds exists), the register must be rectified "*unless* there are exceptional circumstances that justify not doing so".

47. Exceptional circumstances means what it says: there needs to be something "… out of the ordinary course, or unusual or special, or uncommon … it cannot be one that is regularly or routinely or normally encountered".[46] The issue must be approached in a structured way by asking two questions: (1) are there exceptional circumstances? and (2) do they justify *not* making the alteration?[47]

48. You could be forgiven for thinking that the residual "exceptional circumstances" power *not* to rectify the register is something of a dead letter in cases where the application is against a registered owner "in possession". Surely, there could never be "exceptional circumstances" that justify the retention, rather than defenestration, of a registered owner who has been guilty of fraud/lack of proper care or whose

[42] *Horrill v Cooper* (1999) 78 P&CR 336, at 346 (per HHJ Colyer QC); see also *Bakrania v Lloyds Bank and Souris* [2017] UKFTT 364 at [89] (per Tribunal Judge McCallister).
[43] (2018) Law Com No. 380 para 13.49.
[44] See *Horrill v Cooper* (1999) 78 P&CR 336, *Sainsbury's Supermarkets Ltd v Olympia Homes Ltd* [2005] EWHC 1235 (Ch) and *Rees v Peters* [2011] EWCA Civ 836.
[45] See *Hodges v Jones* [1935] Ch 657.
[46] *Paton v Todd* [2012] EWHC 1248 per Morgan J at [67].
[47] *Paton v Todd* [2012] EWHC 1248 per Morgan J at [66].

continuation would be "unjust"? But, actually, we have just witnessed such a paradox in English case law.

49. In *Rashid v Nasrullah* [2018] EWCA Civ 2685 the Court of Appeal held that an application for rectification brought by a defrauded owner against the current registered owner failed even though the latter was complicit in the original fraud against the former. Why? As a result of the fraud, the current registered owner had only ever acquired *legal* title to the land which he then held on trust for the defrauded owner. Having remained in possession of the property for the full 12 period for adverse possession that applies under the English Limitation Act 1980 and section 75 of the Land Registration Act 1925, the beneficial interest of the defrauded owner had been extinguished.[48] It followed that if the register was rectified against the current registered owner, he could immediately respond by applying for rectification of the register, in *his* favour, relying on adverse possession. Temporary rectification in favour of the defrauded owner would thus serve no useful purpose and the Court of Appeal declined to do so relying on the residual "exceptional circumstances" power.

Question 5: Retrospective Rectification?

50. There will inevitably be a hiatus between the date on which a mistake is made in the register and the date on which it is rectified. It sometimes happens that an interest affecting the land (eg. a lease, restrictive covenant or right of way) is created, perfectly lawfully, during the intervening period. When rectification later takes place, who takes priority – the newly reinstated registered owner or the owner of the derivative interest created during the hiatus?

51. Paragraph 8 of Schedule 6 to the LTRA 2011 provides that the Court's and the Registrar's powers "extend to changing for the future the priority of any interest affecting the registered estate or charge". In England, we initially had some uncertainty about whether that additional power really helped with the situation contemplated above because the words "for the future" would seem to suggest that the relevant powers are *prospective*, not *retrospective* in character.

52. However, the decision of the Court of Appeal in *Gold Harp Properties v McLeod* [2014] EWCA Civ 1084 has since sorted that problem out for us. In that case, the title to a registered lease granted to Party A was closed on the erroneous assumption that the lease had now been forfeited. A new lease, to Party B, was

[48] Alternatively, the beneficial interest was not extinguished, but was not held on trust for the existing registered proprietor. Lewison LJ said it mattered little which analysis was correct because they both lead to the same ultimate conclusion: [61].

then granted and registered before the order for rectification was made in favour of Party A. Could Party A's lease be given priority over Party B's lease? If so, would Party A's lease be deemed never to have been removed from the register at all such that he could sue Party B for damages for the period of Party B's unlawful occupation? The Court of Appeal said that the answer to the first question is 'yes', but the answer to the second was 'no'. The words "for the future" do not prevent the Registrar from giving the applicant priority over an interest created before rectification occurred, but they do serve to prevent a damages claim relating to the earlier period.

(5) In what circumstances will the register be altered *without rectification?*

53. Alteration which does *not* involve rectification can be made for any of the other purposes referred to in paragraphs 12 and 13 above.

54. Alteration for the purpose of "bringing the register up to date" may be ordered to give effect to an overriding interest[49], to reflect the rescission of a voidable transfer or instrument[50] or to take account of rights and interests that have been created or otherwise come into being since registration took place.

55. Alteration for the purposes of "giving effect to any estate, right or interest excepted from the effect of registration" is not a reference to overriding interests under Schedules 2 and 5 to the LTRA 2011; it instead refers to those estates, rights or interests that are excepted, pursuant to section 28(5) of the LTRA 2011 when the Registrar concludes that an applicant for first registration should be given only provisional title. The person so registered always takes subject to excepted estates, rights and interests and, accordingly, when effect is later given to them, it amounts to mere alteration, rather than rectification.

56. The Registrar may also alter the register to "remove a superfluous entry" – removal of expired leases or discharged mortgages are the obvious examples.

57. In any case where the applicant is *prima facie* entitled to ordinary alteration, the Court or Registrar/Adjudicator has the same residual power to elect *not* to do so if "exceptional circumstances" exist as it has in rectification cases: see paragraphs 47-49 above.

[49] See paragraph 32 and 33 above.
[50] See paragraph 25 and 26 above.

Indemnity under Schedule 1:

(1) When is a Schedule 1 Indemnity Available?

58. Section 10 of the LTRA 2011 makes provision for the establishment of the Land Title Registration Indemnity Fund which is intended to service claims made under section 11 and Schedule 1. Paragraph 1 of Schedule 1 provides that a right of indemnity by the Registrar is available to any person who "…suffers loss by reason of —

(a) rectification of the register;
(b) a mistake whose correction would involve rectification of the register;
(c) a mistake in an official search;
(d) a mistake in an official copy;
(e) a mistake in a document kept by the registrar which is not an original and is referred to in the register;
(f) the loss or destruction of a document lodged at the LTRO for inspection or safe custody; or
(g) a mistake in the cautions register."

59. Of the matters listed above, (a) and (b) are the most important and will be the focus of attention below.

60. The first category of person who is entitled to be indemnified is someone who suffers loss because of rectification of the register. So where, as a result of a successful application to rectify the register, a party is displaced as registered owner of the land or registered owner of an interest in or affecting the land (such as a lease or a charge), that person is entitled recoup their losses from the Indemnity Fund.

61. The second category of person who is entitled to be indemnified is someone who suffers loss because of a decision *not* to rectify the register. If there is a *prima facie* right to rectification, but the application fails either because the current registered owner successfully avails himself or herself of the protection afforded to the registered proprietor in possession or because the Court or Registrar/Adjudicator decides that there are "exceptional circumstances" that justify a decision *not* to grant rectification, the applicant is entitled to an indemnity.

62. Thus, taken together, Schedules 1 and 6 will generally ensure a reasonably happy ending to a rectification claim: the winning party keeps the land, the losing party gets the monetary equivalent of their interest in the land.

Indemnity in fraud cases

63. By way of limited exception to the general rule, an indemnity is also available in one instance where the register is altered *otherwise than by rectification properly so called*. It will be recalled[51] that where a defrauded owner remains in actual occupation of the property when the fraudulent transaction occurs, he or she will have an overriding interest to which the new registered owner and, where applicable, his mortgagee will take subject. When the defrauded owner is restored, that constitutes mere alteration, not rectification, such that, on the face of it, the new registered owner and the bank have no right to be indemnified under Schedule 1 to the LTRA 2011.

64. However, paragraph 1(2)(b) of Schedule 1 provides that "the owner of a registered estate or charge claiming in good faith under a forged disposition is, where the register is rectified, to be regarded as having suffered loss by reason of such rectification as if the disposition had not been forged." After a bit of uncertainty, the English Court of Appeal has now confirmed that the equivalent provision in the LRA 2002 deems the situation contemplated in the previous paragraph to be a case of rectification even though technically it is not: *Swift 1st Ltd v The Chief Land Registrar* [2015] EWCA Civ 130. As a result, the deposed registered proprietor and the bank can obtain an indemnity in just the same way as they could if the defrauded owner had *not* remained in actual occupation.

No extension for voidable transactions

65. But beware: there is no equivalent deeming provision, in Schedule 1 to the LTRA 2011, for cases where alteration proceeds, not by rectification, but mere alteration because the transaction in question was voidable, rather than void (see paragraph 25 above). Accordingly, if a registered owner loses his or her land because of something that makes the transaction *voidable* – misrepresentation, undue influence, duress, mistake or incapacity – and the Court or Registrar/Adjudicator declines to order rectification, the registered owner would, in those circumstances, lose out. Similarly, an innocent purchaser or lender under a *voidable* disposition runs the risk of being left with neither property nor money.

(2) To whom should the application for an indemnity be made?

66. Paragraph 1 of Schedule 1 to the LTRA 2011 makes clear that the Registrar has the power to offer an indemnity himself. If turned down by the Registrar, the applicant can apply to the Court for a determination as to whether an indemnity is payable

[51] See paragraphs 31 - 33 above.

and, if so, in what amount. Unlike applications for alteration of the register, a dispute about the availability or quantum of an indemnity cannot be dealt with by means of adjudication under section 93 of the LTRA 2011, presumably because the Adjudicator is too closely linked to the Registrar and the LTRO to sit in judgment on what should or should not come out of the Indemnity Fund.[52]

(3) What losses will the indemnity cover?

67. Subject to any defences (discussed in paragraph 72 below), the applicant is entitled to recover any losses that flow from rectification of the register, a refusal to rectify the register or one of the other kinds of mistake listed in paragraph 1 of Schedule 1 to the LTRA 2011. Needless to say,[53] it is only once a decision has been made about whether or not to rectify the register that the question of the applicant's loss can be judged.

68. In most cases, the applicant will be applying for an indemnity because he or she has lost ownership of the land, a charge against it or some other interest in it. Schedule 1 provides for the measure of loss to be established by conducting two valuations of the estate, charge or interest in question: one immediately before and one immediately after rectification occurs. In cases where rectification was *refused*, valuations either side of the mistake fall to be made.[54]

69. Losses are not necessarily limited to the value of the estate or interest lost in consequence of the mistake: other forms of consequential loss are, in principle, recoverable. However, although not expressly stated in the legislation, it is thought to be the case that ordinary principles of remoteness would likewise apply to an indemnity claim.[55]

70. One question that is likewise not adequately answered by either the English or the Bermudian legislation is whether the applicant should first exhaust any potential claims against third parties (eg. negligent solicitors) before pursuing a Schedule 1 indemnity claim. Having regard to the statutory right of subrogation conferred on the Registrar (discussed in paragraph 78 below), it seems more likely that there is no such duty and that the Registrar is an insurer of first, rather than last, resort.[56]

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[52] See section 93(5) of the LTRA 2011.
[53] But paragraph 1(3) of Schedule 1 says so anyway.
[54] See para 5 of Schedule 1.
[55] See *Ruoff & Roper on Registered Conveyancing* para 4.018.
[56] In *Patel v Freddy's Ltd* [2017] EWHC 73 (Ch), Judge Elizabeth Cooke, sitting as a Deputy Judge, concluded (on an *obiter* basis) that a party with an entitlement to an indemnity from the Registrar would have to exhaust that avenue first before pursuing a claim against a third party.

71. In addition to the substantive losses, interest is payable, pursuant to paragraph 9 of Schedule 1 and Rules 166 of the Land Title Registration Rules 2018 on sums payable by way of indemnity, at the rate of 1.5%,[57] from the date of rectification or, if rectification was refused, from the date of the original mistake.

(4) When will the Registrar have a defence to an indemnity claim?

72. Even where an applicant has suffered loss as a result of one or other of the matters referred to in paragraph 1 of Schedule 1 to the LTRA 2011, that is not the end of the matter because the Registrar has a defence to an indemnity claim, under paragraph 5(1) of Schedule 1, if the loss was suffered "(a) wholly or party as result of [the applicant's] own fraud; or (b) wholly as a result of [the applicant's] own negligence".

73. The two limbs of the Registrar's defence are of course the Schedule 1 analogue of the two grounds that disqualify a registered proprietor from availing himself or herself of the protection conferred by Schedule 6 on the registered owner "in possession" (see paragraphs 37 – 45 above).

74. Unsurprisingly, fraud on the part of the applicant is a complete bar to indemnity. But in contrast to the equivalent provision in Schedule 6 – which is "all or nothing" in character – the "lack of proper care" defence operates in a more nuanced way in Schedule 1. If the loss has been suffered *partly* as a result of lack of proper care on the part of the applicant and party for other reasons, paragraph 5(2) of Schedule 1 provides that the right of recovery "is to be reduced to such extent as is fair having regard to his share of the responsibility for the loss."

75. The test to be applied when considering whether and to what extent to reduce the quantum of the indemnity is similar to that which applies under section 3 of the Law Reform (Liability in Tort) Act 1951. It is probably the case that the assessment goes beyond weighing the causal potency of the relevant parties' conduct and extends to a broader evaluation of the parties' conduct.[58] The focus of the enquiry includes, most obviously, the applicant's conduct at the time the mistake in the register was made; but it also includes consideration of whether the applicant took reasonable steps to limit the losses suffered in consequence of the mistake in the period after it was made (mitigation in other words).[59]

[57] Rule 166 applies the rate applicable under the Interest and Credit Charges Regulation Act 1975 (as amended).
[58] See *Ruoff & Roper on Registered Conveyancing* at paras 47.015-016.
[59] *Prestige Properties Limited v Scottish Provident Institution* [2003] Ch 1 16.

76. The concept of "lack of proper care" is otherwise the same as its Schedule 6 cousin: see paragraphs 40 and 41 above.

77. The Registrar also has a limitation defence available to him. An indemnity claim is a simple contract claim for the purposes of the Limitation Act 1984 and must therefore be brought within 6 years of the date on which the cause of action accrues.[60] Paragraph 8(2) of Schedule 1 provides that the cause of action is deemed to have accrued "at the time when the claimant knows, or but for his own default might have known, of the existence of his claim". Here, too, carelessness on the part of the party applying for an indemnity may cause the claim to founder.

(5) If the Registrar pays out on the indemnity, can he get the money back from someone else?

78. Even once the Registrar agrees or is ordered to pay out on the indemnity, that is not the end of the process. Paragraph 10 of Schedule 1 entitles the Registrar to:

(1) Bring a claim against any person who, by his fraud, has caused or substantially contributed to the loss in respect of which the Registrar has been required to provide an indemnity;[61]

(2) Bring any claim that the party who has just been indemnified or the party who has just successfully achieved rectification would have been entitled to bring against a third party had they been turned down by the Registrar;[62]

(3) Bring a claim against an attorney who has been negligent in the signing of a certificate of legal effect.[63]

79. The Registrar is thus entitled to go after the fraudster so as to ensure that, so far as possible, the real villain of the piece bears the financial consequences of the fraud. But cases where the fraudster (a) can be found and (b) still has money or other assets that would enable him or her to satisfy a judgment in favour of the Registrar will presumably be fairly few and far between.

80. The Registrar has a potentially more promising weapon available to him in the form of the statutory right of subrogation to claims that a party who has obtained rectification or an indemnity from the Registrar would otherwise have had. Where

[60] Paragraph 8 of Schedule 1.
[61] Paragraph 10(1)(a) of Schedule 1.
[62] Paragraph 10(2)(a) and (b).
[63] Paragraph 10(2)(c). A "certificate of legal effect" is one signed by an attorney confirming the applicant's title on first registration under paragraph 15(3) of Schedule 3.

such a person would have had a claim in contractual or tortious negligence,[64] for breach of trust, warranty, authority or undertaking, in the tort of deceit[65] or to enforce rights enjoyed by equitable subrogation,[66] the Registrar can bring that claim himself and seek to replenish the Indemnity Fund by that means. The solicitors on either side of the fraudulent or mistaken transaction are the obvious candidates for the Registrar to pursue.

81. It remains to be seen how assertive the Bermuda Registrar will be in exercising his statutory rights to recoup losses from third parties.

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[64] See *Chief Land Registrar v Caffrey & Co* [2016] EWHC 161 (Ch).
[65] For example, where a forged transfer and subsequent charge of a property have been registered and the monies advanced by the innocent subsequent chargee have been used to discharge a valid charge previously created by the defrauded former registered proprietor. In such a case, if the current charge is removed from the register as a result of an application for alteration, the chargee may have a claim to be subrogated to the security of the previous charge. The principles of equitable subrogation are set out in *Lowick Rose LLP (in liquidation) v Swynson Ltd* [2017] UKSC 32.
[66] For a discussion of the authorities dealing with the types of claim that arise in property fraud cases, see *Ruoff & Roper on Registered Conveyancing* at para 47.02.01.