



Neutral Citation Number: [2015] EWCA Civ 330

Case No: A3/2014/0725

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
RICHARD SHELDON QC (SITTING AS A DEPUTY HIGH COURT JUDGE)
HC12A03910

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 April 2015

Before :

LORD JUSTICE MOORE-BICK
Vice President of the Court of Appeal, Civil Division
LORD JUSTICE PATTEN
and
LORD JUSTICE TOMLINSON

Between :

SWIFT 1ST LIMITED

**Respondent/
Claimant**

- and -

THE CHIEF LAND REGISTRAR

**Appellant/
Defendant**

Mr Timothy Morshead QC (instructed by The Treasury Solicitor) for the Appellant
Miss Josephine Hayes (instructed by Swift Group Legal Department) for the Respondent

Hearing date : 13 January 2015

Approved Judgment

Lord Justice Patten :

Introduction

1. The issue on this appeal is whether the proprietor of a registered charge which turns out to have been a forged disposition is entitled to payment by way of indemnity under Schedule 8 to the Land Registration Act 2002 (“LRA 2002”) in circumstances where the registered proprietor and rightful owner of the property was in actual occupation at the date of the disposition. For reasons which I will come to, it also raises the question whether the much-debated decision of this court in *Malory Enterprises Ltd. v Cheshire Homes (UK) Ltd. & Ors* [2002] EWCA Civ 151; [2002] 3 WLR 1; [2002] Ch 216 (“*Malory*”) was decided *per incuriam* insofar as the court held that the innocent victim of a forged disposition acquired only the legal estate and not the beneficial ownership of the property.
2. The Chief Land Registrar (“the Registrar”) appeals with the leave of the deputy judge against an order of Mr Richard Sheldon QC (sitting as a deputy judge of the Chancery Division) dated 31 January 2014. He directed the Registrar to pay the respondent, Swift 1st Limited (“Swift”), £90,658.99 under Schedule 8 LRA 2002 to indemnify it for the loss occasioned by the cancellation of Swift’s registered charge over a property at 15 Elmstead Road, Ilford, Essex (“the Property”).
3. The facts are unusual. The registered proprietor of the Property is and was a Mrs Rani who has occupied it as her home throughout the relevant period. In April 2006 an unknown third party fraudulently executed a legal charge over the Property in favour of GE Money Lending Limited (“GE Money”) which purported to secure a loan to Mrs Rani of £32,000. The charge was registered in the charges register for the Property.
4. In May 2006 a second charge, again fraudulent, was executed in favour of Swift as security for a loan to Mrs Rani of £64,500. Swift advanced £34,403 of the loan to GE Money to redeem the prior registered charge and paid the balance by cheque to Mrs Rani who (the judge accepted) never received the funds and had not made the application for the loan. The charge in favour of Swift was duly registered on 2 June 2006 and the entry in favour of GE Money removed.
5. The instalments of interest due under the Swift loan were not paid and in May 2007 proceedings were issued seeking possession of the Property. Mrs Rani defended the proceedings on the basis that both the Swift charge and the GE Money charge were forgeries so that Swift had no enforceable security against the Property for its loan either under its own charge or by way of subrogation under the GE Money charge. Swift accepted this and on 20 January 2009 a consent order was made which required the Land Registry to amend the registered title to the Property by deleting the entry in the charges register in favour of Swift.
6. Swift then issued proceedings against the Registrar seeking an indemnity under Schedule 8 in respect of the loss of its charge. It pleaded that the register had been rectified to its prejudice by the deletion of the entry in respect of its charge and that it was entitled to be indemnified for its loss pursuant to paragraph 1(1)(a) or (b) and paragraph 1(2)(b) of Schedule 8 LRA 2002. The Registrar in his defence pleaded that the cancellation of the entry in the charges register did not amount to rectification of

the register within the meaning of Schedules 4 and 8 LRA 2002 but was simply an alteration of the register made in order to bring it up to date rather than to correct a mistake. It was not prejudicial to Swift because Mrs Rani as registered proprietor retained beneficial ownership of the Property and a right to have the forged disposition set aside which took effect as an overriding interest on the basis of her actual occupation of the Property at the time the registered disposition was created. Swift's charge therefore took effect subject to her rights and was always liable to be defeated by any application she made to have the charge set aside as a forgery.

LRA 2002

7. The grant of a legal charge is a disposition which requires to be completed by registration and does not operate at law until the relevant registration requirements are met: see s.27(1), (2). Once registered, the proprietor of the registered charge is entitled to exercise the powers of an owner in respect of the charge which would include the power of sale. Section 30 provides:

“(1) If a registrable disposition of a registered charge is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the charge immediately before the disposition whose priority is not protected at the time of registration.

(2) For the purposes of subsection (1), the priority of an interest is protected—

(a) in any case, if the interest—

- (i) is a registered charge or the subject of a notice in the register,
- (ii) falls within any of the paragraphs of Schedule 3, or
- (iii) appears from the register to be excepted from the effect of registration, and

(b) in the case of a disposition of a charge which relates to a leasehold estate, if the burden of the interest is incident to the estate.

...”

8. Mrs Rani's registered title to the Property therefore took effect subject to Swift's registered charge for so long as the charge continued to be protected by registration. But the priority enjoyed by the registered charge did not extend to any Schedule 3 interests which include the interests of persons in actual occupation. Schedule 3, paragraph 2, describes these as:

“An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for-

.....

(b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so;

(c) an interest—

(i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and

(ii) of which the person to whom the disposition is made does not have actual knowledge at that time;

...”

9. It is not suggested that any relevant inquiry was directed to Mrs Rani before completion of the charge which she failed to respond to or that her occupation of the Property was not known to Swift at the time of the disposition.

10. Swift’s registered charge therefore took effect subject to any overriding interest which Mrs. Rani could assert against its title. The Registrar’s position is that this would include her right to have the charge removed from the register as a void disposition by reason of the forgery. On this basis Swift’s charge, although substantively registered, was always liable to be defeated by a claim brought by Mrs Rani and was never therefore *de facto* enforceable against the registered title to the Property at least so long as she remained its owner.

11. The consent order which led to the deletion of the charge from the register involved an exercise of the powers contained in Schedule 4: see s.65. So far as material, Schedule 4 provides:

“1. In this Schedule, references to rectification, in relation to 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 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.

...

5. The registrar may alter the register for the purpose of—

(a) correcting a mistake,

(b) bringing the register up to date,

(c) giving effect to any estate, right or interest excepted from the effect of registration, or

(d) removing a superfluous entry.

6. (1) This paragraph applies to the power under paragraph 5, so far as relating to rectification.

(2) No alteration affecting the title of the proprietor of a registered estate in land may be made under paragraph 5 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 on an application for alteration under paragraph 5 the registrar has power to make the alteration, the application must be approved, unless there are exceptional circumstances which justify not making the alteration.

(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.

...

8. The powers under this Schedule to alter the register, so far as relating to rectification, extend to changing for the future the priority of any interest affecting the registered estate or charge concerned.

9. (1) If the register is altered under this Schedule in a case not involving rectification, the registrar may pay such amount as he thinks fit in respect of any costs or expenses reasonably incurred by a person in connection with the alteration which have been incurred with the consent of the registrar.

(2) The registrar may make a payment under sub-paragraph (1) notwithstanding the absence of consent if—

(a) it appears to him—

(i) that the costs or expenses had to be incurred urgently, and

(ii) that it was not reasonably practicable to apply for his consent, or

(b) he has subsequently approved the incurring of the costs or expenses.”

12. The scheme of these provisions is to draw a distinction between the alteration of the register to correct a mistake (which justifies the deletion of an entry either pursuant to an order of the court under paragraph 2 or administratively by the Registrar under paragraph 5) and a case where that process of correction prejudicially affects the title of the registered proprietor: paragraph 1(b). Under LRA 2002 rectification of the register is now restricted as a term to alterations which satisfy both conditions in paragraph 1 and the right to an indemnity under Schedule 8 is limited to cases of rectification so defined.
13. The Registrar has a discretion under paragraph 9 of Schedule 4 to pay costs incurred in connection with an alteration of the register. But substantial compensation for loss due to the correction depends upon the registered proprietor (in this case Swift) being

able to establish that its title has been prejudicially affected by the change. This is confirmed by the provisions of Schedule 8 which set out the conditions of entitlement to an indemnity:

“1. (1) A person is entitled to be indemnified by the registrar if he 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 registry for inspection or safe custody,
- (g) a mistake in the cautions register, or
- (h) failure by the registrar to perform his duty under section 50.

(2) For the purposes of sub-paragraph (1)(a)—

- (a) any person who suffers loss by reason of the change of title under section 62 is to be regarded as having suffered loss by reason of rectification of the register, and
- (b) the proprietor 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.

(3) No indemnity under sub-paragraph (1)(b) is payable until a decision has been made about whether to alter the register for the purpose of correcting the mistake; and the loss suffered by reason of the mistake is to be determined in the light of that decision.

...

3. (1) In respect of loss consisting of costs or expenses incurred by the claimant in relation to the matter, an indemnity under this Schedule is payable only on account of costs or expenses

reasonably incurred by the claimant with the consent of the registrar.

(2) The requirement of consent does not apply where—

(a) the costs or expenses must be incurred by the claimant urgently, and

(b) it is not reasonably practicable to apply for the registrar's consent.

(3) If the registrar approves the incurring of costs or expenses after they have been incurred, they shall be treated for the purposes of this paragraph as having been incurred with his consent.

4. (1) If no indemnity is payable to a claimant under this Schedule, the registrar may pay such amount as he thinks fit in respect of any costs or expenses reasonably incurred by the claimant in connection with the claim which have been incurred with the consent of the registrar.

...

5. (1) No indemnity is payable under this Schedule on account of any loss suffered by a claimant—

(a) wholly or partly as a result of his own fraud, or

(b) wholly as a result of his own lack of proper care.

...

11. (1) For the purposes of this Schedule, references to a mistake in something include anything mistakenly omitted from it as well as anything mistakenly included in it.

(2) In this Schedule, references to rectification of the register are to alteration of the register which—

(a) involves the correction of a mistake, and

(b) prejudicially affects the title of a registered proprietor.

...”

14. Swift's claim for an indemnity turns on the interaction between paragraph 1(1)(a) and 1(2)(b). The Registrar contends that the alteration of the register did not amount to rectification in this case within the meaning of paragraph 1(1)(a) because it did not prejudicially affect Swift's title to the registered charge so as to cause loss. The registration was always subject to Mrs Rani's right to have the forged disposition set aside which took effect as an overriding interest binding on Swift's own registered

title. Swift's title was not therefore prejudiced by the deletion of the charge even though Swift was obviously worse off than it would have been had Mrs Rani not taken the action which she did.

15. Swift's response to this was to rely upon the provisions of paragraph 1(2)(b) of Schedule 8 under which, it says, the proprietor of a registered charge claiming in good faith under a forged disposition (which this was) is deemed to have suffered loss by reference to an assumption that the charge had been validly executed. This statutory hypothesis therefore enables the registered proprietor of a forged charge who acts in good faith to obtain an indemnity notwithstanding that his charge was always liable to be set aside on the application of the registered proprietor of the property.
16. Before turning to the way in which the deputy judge construed these provisions, it is necessary to look at the relevant legislative history beginning with the earlier provisions of the Land Registration Act 1925 ("the 1925 Act"). Under s.20 of the 1925 Act a disposition of a legal estate in registered land for valuable consideration, once registered, conferred on the transferee the estate in fee simple free from all other estates and interests but subject to any other entries on the register which had priority and any overriding interests. It was the act of registration which, subject to overriding interests, vested the freehold title and gave the proprietor the powers of ownership: see s.69. Overriding interests were defined in s.70 to include (s.70(1)(g)) "the rights of every person in actual occupation of the land ... save where enquiry is made of such person and the rights are not disclosed".
17. Part VII of the 1925 Act dealt with the rectification of the register. Section 82 provided that:

(1) The register may be rectified pursuant to an order of the court or by the registrar, subject to an appeal to the court, in any of the following cases, but subject to the provisions of this section:—

...

(b) Subject to any express provision of this Act to the contrary, where the court, on the application in the prescribed manner of any person who is aggrieved by any entry made in, or by the omission of any entry from, the register, or by any default being made, or unnecessary delay taking place, in the making of any entry in the register, makes an order for the rectification of the register;

...

(d) Where the court or the registrar is satisfied that any entry in the register has been obtained by fraud;

...

(h) 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.

(2) The register may be rectified under this section, notwithstanding that the rectification may affect any estates, rights, charges, or interests acquired or protected by registration, or by any entry on the register, or otherwise.”

18. The term “rectification” was therefore used to describe any alteration or correction of the register and was not limited to cases where the alteration would prejudicially affect a registered title. The right to an indemnity depended, however, on proof of loss and s.83 provided:

“(1) Where the register is rectified under this Act, then, subject to the provisions of this Act—

- (a) any person suffering loss by reason of the rectification shall be entitled to be indemnified; and
- (b) if, notwithstanding the rectification, the person in whose favour the register is rectified suffers loss by reason of an error or omission in the register in respect of which it is so rectified, he also shall be entitled to be indemnified.

...

(4) Subject to the following provisions of this section, a proprietor of any registered land or charge claiming in good faith under a forged disposition shall, where the register is rectified, be deemed to have suffered loss by reason of such rectification and shall be entitled to be indemnified under this Act.

(5) No indemnity shall be payable under this Act—

- (a) on account of any loss suffered by a claimant wholly or partly as a result of his own fraud or wholly as a result of his own lack of proper care;

...”

19. It can be seen that s.83(4) contains for the most part the same provisions as those now comprised in paragraph 1(2)(b) of Schedule 8 to LRA 2002. But the inclusion in the 2002 definition of rectification of the requirement to show that the registered title has been prejudicially affected has no precise antecedent in the language of the 1925 Act. The term “loss” in s.83(1)(a) was, however, the subject of a decision of Clauson J. in *Re Chowood's Registered Land* [1933] 1 Ch. 574 where the judge held that no loss had been suffered for the purposes of s.83 where the register had been rectified in order to give effect to an overriding interest binding on the registered title. The case concerned the registration of title absolute to land which included parcels of woodland

that had prior to the date of registration been acquired by a third party by adverse possession. Clauson J. held that the subsequent correction of the register to exclude these parcels from the registered title did not occasion loss to the registered proprietor:

“It results from this that Chowood's title was all along subject to the rights which Lyall has succeeded in establishing; and the loss, if it may properly be so called, which Chowood has suffered is that they have not got, and since the Act of 1925 came into force (whatever may have been the position before) have never had title to the strip, except subject to an overriding right in Lyall. That loss was occasioned by Chowood failing to ascertain that, when they bought, Lyall was in possession, and in possession under such circumstances that Ralli could not make a title to the strip. The loss was occasioned by paying Ralli for a strip to which Ralli could not make title. The rectification of the register merely recognized the existing position, and put Chowood in no worse a position than they were in before.

In these circumstances I must hold that Chowood have suffered no loss by reason of the rectification of the register.”

20. The decision in *Chowood* did not, of course, concern a fraudulent disposition but it did establish the general principle that the alteration of the register in order to give effect to an overriding interest does not amount to loss for the purpose of the indemnity provisions. The correctness of *Chowood* has never been doubted and both sides accept that there is no material difference between the provisions of s.83 and those of paragraph 1(1)(a) of Schedule 8. For this reason Swift, I think, accepts that it cannot establish loss and therefore prejudice for the purposes of its claim for an indemnity under LRA 2002 unless either Mrs Rani's right to set aside the forged charge did not take effect as an overriding interest or loss is established by reason of the deeming provisions contained in paragraph 1(2)(b) of Schedule 8.
21. The second of these points requires a return to the earlier provisions of the 1925 Act. Had the same facts arisen before 2002 it would have been necessary to consider whether s.83(4) created an exception to the principle established in *Chowood* where the registered title that was rectified consisted of a forged disposition. Mr Morshead QC for the Registrar submits that the purpose of s.83(4) was much more limited and that the provision was included in the 1925 Act to meet a possible objection to indemnification based on the decision of this Court in *A-G v Odell* [1906] 2 Ch 47.
22. In that case the proprietor of a forged charge which had been removed from the register by order of the court sought an indemnity under what was then s.7 of the Land Transfer Act 1897. The Court of Appeal held that he was not entitled to an indemnity because, not having received a transfer from the registered proprietor, he had acquired no title by the forged disposition and had therefore lost nothing by the rectification of the register.
23. Section 7(4) of the Land Transfer Act provided:

“Where the register is rectified under the principal Act by reason of fraud or mistake which has occurred in a registered disposition for valuable consideration, and which the grantee was not aware of, and could not by the exercise of reasonable care have discovered, the person suffering loss by the rectification shall likewise be entitled to indemnity under this section.”

24. Mr Odell made his claim for an indemnity under this provision which, on the face of it, covered his case and Kekewich J. ordered an indemnity on the basis that Mr Odell had suffered loss by being deprived of the charge in circumstances where he took the charge in good faith and could not reasonably have discovered the fraud at the time. He said (at pp. 55-6):

“Now has Mr. Odell suffered loss by the rectification? He has certainly suffered loss. He paid for a transfer of a registered charge. It was transferred to him; it has been vacated; the register has been rectified; his money is gone, and he is no longer the proprietor of that charge. In connection with his defence of his rights he has incurred certain costs, so that there is no question he has suffered loss. But has he suffered it by the rectification? Now the first argument against him is this: The loss, it is said, was occasioned by the forgery - that is to say, by there being in existence a deed purporting to be executed by Mrs. Connell, the registered proprietor of the charge, but not in fact executed by her. His property was gone - or, rather, he never had any property at all, that is the more proper view. When he advanced this money and accepted what he thought to be a transfer of the charge he paid his money for nothing. No transfer had really been registered. There was no deed as between him and Mrs. Connell at all, and therefore what occasioned the loss was the forged deed, and not the rectification of the register when the fraud was discovered. Then, further, it was urged that, having got on the register, he could not have transferred to anyone else as soon as he discovered the forgery. He might possibly have done it before the discovery, and there was an interval during which he was in the position of registered owner of the charge with power as registered owner to transfer, and possibly to make a title to a third person; but he got something with which he could not deal, because it really had no existence. Therefore again, it is said, he has not suffered loss by the rectification. He has suffered loss by unfortunately paying for and holding something with which he could not deal, and which was not valuable in his hands. That is the argument on that part of the case. Now it seems to me that that is giving too narrow a construction to the words "by the rectification." As long as Mr. Odell is on the register, at any rate he is the registered proprietor of the charge, and he has lost that status by the rectification. The rectification is the proximate cause of the

loss, although no doubt the original cause was the forgery. In my judgment the rectification was the cause of the loss within the meaning of the Act.”

25. Vaughan Williams LJ took a different view. Referring to s.7(4) he said:

“These words are undoubtedly capable of a construction wide enough to support Mr. Odell's claim to indemnity on the ground that he has suffered loss by the rectification of the register necessitated by reason of the fraud and forgery of the name of the registered proprietor of the charge, but on its true construction I do not think that this sub-section entitles Mr. Odell to indemnity. It is true that the register has been rectified by reason of fraud which has occurred in a registered disposition for valuable consideration, but in my judgment the whole scheme of the Acts is to afford facilities and give security in the transfer of land and in the creation and transfer of incumbrances thereon to those who have acquired estates or rights by registration, or to those who have for valuable consideration become transferees from registered proprietors of land or charges. I cannot, having regard to the decision of this Court and the observations of Cozens-Hardy L.J., speak, in relation to this Act, of legal estates as passing by reason of registration, but merely of overriding rights; but, using the words "estates or rights" (which are the words used in the 95th section of the Act of 1875) in the sense of overriding rights, I think that Mr. Odell has no claim to indemnity under this sub-section. His name as registered proprietor of the charge has not been put on the register after any judicial investigation, such as that which takes place before the registration of a person as first registered proprietor of freehold land with absolute title, or a possessory title, or a qualified title (see ss. 7, 8, and 9 of the Act of 1875), or the registration of the first registered proprietor of leasehold land with a declaration of title of the lessor to grant the lease (see s. 13 of the Act of 1875, and r. 46 of the Rules of 1898). The act of the registrar in putting the name of a transferee of a charge on the register is a mere ministerial act in the performance of a ministerial duty. It confers on the transferee no estate or right which he had not before registration. The utmost which it confers on him is the capacity to transfer to a purchaser for valuable consideration unaware of any irregularity in the transaction. But it may be said that Mr. Odell has, by the rectification of the register, lost this capacity to transfer, because, until the rectification by the erasure of his name from the register, he could have given a good title to a transferee of the charge for valuable consideration, and that by the erasure he has lost this, but I do not think that it is by the erasure that he has lost this capacity; he could not, in my judgment, have exercised this power given to him by the ministerial, not the judicial, act of the registrar

after notice of the fact of the forgery, and I think that he could be restrained by injunction from so doing.”

26. There is no precise equivalent to s.7(4) in s.82 of the 1925 Act. Instead s.82(1)(a) and (h) enabled the register to be rectified to correct mistakes or to give effect to orders of the court. The indemnity provisions in s.83 did, however, qualify the general requirement that a loss should have been suffered by the person against whose interest rectification took effect to the extent of s.83(4) which deems a loss to have been suffered as a result of the rectification of the register in respect of a forged disposition. The conditions contained in s.83(4) reflect those in s.7(4) of the Land Transfer Act and it is common ground that s.83(4) was designed to reverse the effect of the decision in *A-G v Odell* and to exclude the argument that rectification of the register to remove a forged and therefore invalid disposition causes no loss to the registered proprietor because he derived no title from a void disposition. The change is also consistent with the policy of both the 1925 Act and the LRA 2002 that it is registration rather than the quality of the prior disposition which creates and constitutes the proprietor’s title to the registered estate or charge: see s.58(1) LRA 2002. This is certainly the view of the editors of *Ruoff & Roper on the Law and Practice of Registered Conveyancing* (see paragraph 47-006) and it was the view of the Law Commission when it produced its report on land registration which led to the passing of the LRA 2002.
27. Following a consultation exercise, the Law Commission published its report “*Land Registration for the Twenty-First Century*” on 9 July 2001. The report stated that the fundamental objective of the bill which it proposed was to create an electronic system of land registration under which the register should be a complete and accurate reflection of the state of the title of the land. One of the specific changes proposed was in relation to rectification and indemnity. The bill (in what is now paragraphs 1 and 2 of Schedule 4 LRA 2002) was intended, the Law Commission explained, to recast the existing provisions governing rectification and to make it clear that rectification (with a right to an indemnity) should be limited to cases of alteration of the register which prejudicially affect the title in question. The concept of rectification has therefore been narrowed from that under the 1925 Act and limited to circumstances in which loss has been caused. This is explained in paragraph 10.7 of the report:
- “10.7 The principal differences may be summarised as follows—
- (1) Rectification is confined to cases where a mistake is to be corrected. This will not include every case which is at present treated as rectification. It will not therefore cover cases where the register is altered to give effect to rights that have been acquired over the land since it was registered, or where the register was originally correct, but subsequent events have made it incorrect. In such cases the court will no longer have any discretion (albeit one that has seldom been exercised) whether or not to give effect to the right so established.
 - (2) Not every correction of a mistake will constitute rectification. The correction must be one which prejudicially

affects the title of a registered proprietor. Under the 1925 Act, if, in order to correct a mistake, the register is altered to give effect to an overriding interest, that is regarded as rectification. However, no indemnity will be payable because the proprietor will suffer no loss in consequence. He or she had taken the land subject to any overriding interests. Rectification in such a case therefore does no more than update the title and the registered proprietor is in no worse position than he or she was before. In other words, there can be rectification under the present law even where an alteration to the register does *not* prejudicially affect the title of the registered proprietor. That will cease to be so under the Bill. The circumstances in which the register is rectified and those in which the proprietor will be entitled to an indemnity will coincide.”

28. As explained in paragraph 10-7(2) above, it seems clear that the Law Commission intended cases where the registered title was “prejudicially affected” under LRA 2002 to be limited to cases where the alteration of the title would have been held to cause “loss” under s.83(1)(a) of the 1925 Act. But the draftsman of LRA 2002 has in fact preserved the requirement to show “loss” as the condition of an indemnity in Schedule 8 paragraph 1(1)(a) which on one possible construction of LRA 2002 might suggest that prejudice and loss as terms were not intended to be co-extensive or synonymous so that there could still be cases of rectification as defined in Schedule 8 paragraph 11(2) which do not create a loss and therefore qualify for an indemnity. This point is not, however, material to the issues on this appeal and does not affect the point of construction we are concerned with. I shall therefore treat “prejudicially affect” as limited to cases where the prejudice suffered does cause loss to the registered proprietor.
29. The footnotes to paragraph 10.7 make it clear that the reference in the new definition of rectification in Schedule 8, paragraph 11, to an alteration of the register which prejudicially affects the title of a registered proprietor is intended to reproduce and give effect to the decision in *Chowood* which governed the grant of an indemnity under s.84 of the 1925 Act. In that respect nothing has changed. A registered title which is defeated by the enforcement of an overriding interest does not create a prejudicial effect on the title any more than it constituted loss under the 1925 Act. But this leaves open the question of how what I shall call the *Chowood* principle operates, if at all, in a case involving a forged disposition.
30. The Law Commission report recognised that s.83(4) of the 1925 Act was intended to reverse the decision in *Re Odell* and paragraph 1(2)(b) of Schedule 8 was designed to replicate these provisions in the LRA 2002. Paragraph 10.31 states:

“10.31 There is an entitlement to indemnity where a person suffers loss by reason of rectification of the register. This replicates the effect of section 83(1)(a) of the Land Registration Act 1925 and it is a common reason for the payment of indemnity. In two specific cases, both of which are carried forward from the Land Registration Act 1925, a person is treated as if he or she has suffered loss by reason of

rectification, even though, but for the provision this might not have been so.

(1) The first is where he or she suffers loss by reason of the change of title resulting from the exercise by the registrar of his power to upgrade the title under Clause 62 of the Bill. The purpose of this provision is to remove any doubt as to whether the registrar can be said to have made a mistake when he has upgraded a title, but where, under the Bill, he is not required to be satisfied as to that title.

(2) The second case is where the register is rectified in relation to a proprietor of a registered estate or charge claiming in good faith under a forged disposition. That proprietor is treated as having suffered loss by reason of that rectification as if the disposition had not been forged. The reason for this provision is to reverse one effect of a case decided under the Land Transfer Acts 1875 and 1897, *Re Odell*. The Court of Appeal there held that an innocent purchaser of a registered charge who was registered as proprietor of it on the basis of a transfer that turned out to be forgery, was not entitled to any indemnity. Because the transfer was a forgery and therefore of no effect, he was not regarded as suffering any loss, even though he had been registered.”

31. It is tolerably clear from this passage that the Law Commission regarded the objective of paragraph 1(2)(b) as being to reproduce s.83(4) and to do so on the basis that the registered proprietor under a forged disposition would, if he acted in good faith, be treated as having suffered a loss from the rectification of the register even though he took his interest under a forged (and therefore invalid) disposition. At first sight this might be thought to be determinative of the appeal on this point. If the conditions are satisfied for the operation of the deeming provision it is difficult to see any room for the operation of the *Chowood* principle. Even if Mrs Rani’s right to set the Swift charge aside as a forgery subsists as an overriding interest, it still leads to the alteration of the register in respect of a forged disposition which are the conditions which engage the operation of what is now paragraph 1(2)(b). Conversely, if paragraph 1(2)(b) is not engaged by the alteration of the register following a court order in proceedings brought by Mrs Rani to enforce her right to have the Swift charge set aside then one asks whether and in what circumstances paragraph 1(2)(b) can ever have any scope for its operation. The unqualified application of the *Chowood* principle, absent paragraph 1(2)(b), is likely in most, if not all, cases to be a complete answer to any allegation of prejudice.
32. The Registrar’s response to this is that paragraph 1(2)(b) is not a dead letter if the person entitled to seek rectification was not in actual occupation of the property at the time the charge was entered into. In that case the right to set the charge aside would not take effect as an overriding interest and the registered proprietor of the charge could rely on paragraph 1(2)(b) as an effective answer to any argument based simply on the invalidity of the registered disposition. But for paragraph 1(2)(b), the argument accepted by the Court of Appeal in *Re Odell* would be an independent bar to an indemnity even in a case where no overriding interest could be relied upon.

33. The deputy judge held that the presumption of loss under paragraph 1(2)(b) was engaged by an alteration of the register to remove a registered estate or charge based on a forged disposition and that the presumption operated prior to the determination of any question whether the register had been “rectified” within the meaning of paragraph 11(2) of Schedule 8. He rejected Mr Morshead’s submission that, on its proper construction, paragraph 1(2)(b) only applies once it is determined that the alteration to the register amounted to rectification: i.e. caused prejudice to the registered title. This prior question, he submitted, depends on the application of the *Chowood* principle and therefore on whether the owner of the property could enforce an overriding interest in the form of a right to set the forged charge aside.
34. One of the difficulties which this argument faces is the content which can be given to paragraph 1(2)(b) if the *Chowood* principle has to be applied in priority to the presumption of loss. In *Malory* this Court decided that the fraudulent transfer of land to Cheshire Homes by a UK company with the same name as the registered proprietor of the land, a BVI company, was only effective to transfer the legal estate and left the BVI company with a beneficial interest in the property. The UK company had dishonestly obtained from the Land Registry a new land certificate in its own name and, on this basis, had sold and transferred the land to Cheshire Homes which had become the registered proprietor. The BVI company sought rectification of the register and damages for trespass against Cheshire Homes. The judge had held that the BVI company remained in possession of the land at the date of the transfer so that its right to have the fraudulent disposition set aside and the register rectified took effect as an overriding interest under s.70(1)(g) of the 1925 Act. But the damages claim depended on whether it had retained a right to possession between the registration of Cheshire Homes as proprietor and the date of rectification.
35. The argument centred on s.69(1) of the 1925 Act which provides:
- “The proprietor of land (whether he was registered before or after the commencement of this Act) shall be deemed to have vested in him without any conveyance, where the registered land is freehold, the legal estate in fee simple in possession, and where the registered land is leasehold the legal term created by the registered lease, but subject to the overriding interests, if any, including any mortgage term or charge by way of legal mortgage created by or under the Law of Property Act 1925, or this Act or otherwise which has priority to the registered estate.”
36. In her judgment Arden LJ said:
- “64. Although *Malory* UK had no title to convey to Cheshire, the position of Cheshire once it is registered as proprietor is governed by section 69 of the LRA. Accordingly, when it became the registered proprietor of the rear land, Cheshire was deemed to have vested in it “the legal estate in fee simple in possession”.
65. However, section 69 deals only with the legal estate. Unlike section 5, which deals with first registration, that registered

estate is not vested in Cheshire “together with all rights, privileges and appurtenances...”. Moreover, since the transfer to Cheshire could not in law be of any effect in itself, in my judgment it cannot constitute a “disposition” of the rear land and accordingly section 20 cannot apply. In those circumstances, Cheshire’s status as registered proprietor is subject to the rights of Malory BVI as beneficial owner. On this point I accept the submissions of Mr Dagnall and reject those of Mr Martin. It follows that I accept that Malory BVI has sufficient standing to sue for trespass even without seeking rectification of the register because it is the true owner and has a better right to possession. (See *Chowood v Lyall* (No.2) [1930] 2 Ch. 156, 163-164, C.A.).

66. As it is common ground on this appeal that the register should be rectified (though Mr Dagnall’s preferred case is that such rectification should be retrospective), no further issues, apart from the issue of actual occupation, need to be determined, but as they were all argued, I propose to express my view on them. The first question is whether Malory BVI has an overriding interest by virtue only of its right to seek rectification. It will be recalled that Cheshire conceded this point below. As the question whether a right to apply for rectification is a right for the purposes of section 70 (1)(g) is a question of law, I would permit Cheshire’s concession that such a right is an overriding interest to be withdrawn.

67. Mr Martin submits that the right cannot constitute an overriding interest because it is only discretionary. In my judgment, a distinction is to be drawn between a right to seek rectification and the fulfilment of that right. The exercise by the court of its discretion is necessary for the fulfilment of the right (and if exercised in a manner which is adverse to the holder will result in extinction of the right) but the exercise by the court of its discretion is not necessary to bring the right into existence.

68. In my judgment, the right to seek rectification to reflect a proprietary interest in land fulfils the criteria approved in *Williams & Glyns v Boland*, above, namely that it is a right in reference to land which is capable of transmission through different ownerships of land. There is no reason why the sale by Malory BVI of its beneficial interest in the rear land with any rights attaching thereto should not be effective to vest in the purchaser the right to apply to the court for rectification of the register. *Berkeley Leisure Group Ltd v Williamson* [1996] EGCS 18 (Beldam and Morritt LJ) (30 January 1996), which is cited by Megarry & Wade, *Law of Real Property*, 6th ed (2000) para. 6 – 128, supports this conclusion. In that case the Court of Appeal held that the equity to claim rectification of an

agreement for the sale of registered land could pass on sale by the vendor of adjoining land to the purchaser of the adjoining land as a result of the operation of section 63 of the Law of Property 1925 (which applies to all conveyances of land). (In that case the land and the adjoining land are previously part of a single property within the same title and a mistake had been made with respect to the boundary between the subdivided plots.) As respects transmissibility there can be no distinction between the equity of rectification of a document and a claim for rectification under section 82. Moreover in this case the right cannot be exercised in isolation from the interest in the land Malory BVI has, and thus in my judgment is a right in reference to land.

69. Nor do I accept the argument that the right to seek rectification comes into existence only after Cheshire is registered. The registration of Cheshire gives rise to the right to seek rectification at the same time as, and as part of, the same transaction. I do not consider that the registration can be treated as predating the right to seek rectification in this way.

70. Mr Martin also submits that the reference in s.82(3) to overriding interests is inconsistent with the notion that a claim to rectification is itself an overriding interest. The answer to this point is, as I see it, that the right to claim rectification must be coupled with actual occupation for the saving in section 82(3) to apply. Section 82(3) is, therefore, not rendered circular by construing section 70(1)(g) so that overriding interest is capable of including a claim to rectification. Accordingly, the interpretation of “overriding interest” which I prefer is not precluded by section 82(3). Even rectification with no retrospective effect may affect the enjoyment of estates and interests in land for the future. This, in my judgment, is the reason why section 82(2) states that rectification may affect any such interest. For example, the estate vested in Cheshire by virtue of section 69 of the LRA is affected by the order for rectification in this case even if it is not retrospective. The words “or otherwise” at the end of section 82(2) would appear to include overriding interests, which are protected only by the right to seek rectification.”

37. The decision in *Malory* has not received an enthusiastic response from commentators and continues to create difficulties in cases still governed by the 1925 Act. Although the Court’s determination that the right of the BVI company to obtain rectification of the register was capable of taking effect as an overriding interest has generally escaped criticism and is not challenged on this appeal, concerns have been expressed that the decision that the registration of title under s.69 does not carry with it both legal and beneficial ownership runs contrary to general principle and overlooks the function and purpose of the state of the register as an exhaustive statement of

ownership. Dr Martin Dixon in his book: *Modern Land Law*, 8th edn (Oxford: Routledge, 2012) said at p. 44:

“Acceptance of the *Malory* approach would be to import principles of unregistered conveyancing into registered land and this would wholly contradict the system of registration of title and the move to e-conveyancing that the LRA 2002 is designed to facilitate.”

38. To much the same effect, Professor Elizabeth Cooke in her case comment on Newey J’s decision in *Fitzwilliam v Richall Holdings Services Ltd* [2013] EWHC 86 (Ch) [2013]; 1 P&CR 19 (in the *Conveyancer and Property Lawyer* (2013) Conv 344) described the result in *Malory* as disastrous for the integrity of the statute:

“the principle of qualified indefeasibility is fatally undermined. The 2002 Act embodied a careful scheme, the structure of which is outlined above. X is to have the land back, subject to special protection for the registered proprietor in possession. This is an important policy framework and it should not be subverted without amendment to the legislation.”

39. The relevance of *Malory* to the present case centres on the Registrar’s argument that paragraph 1(2)(b) would not be a dead letter if the *Chowood* principle remained applicable to determine whether the registered title was prejudicially affected for the purpose of claiming an indemnity. Mr Morshead accepted before the deputy judge that if *Malory* is correctly decided on the beneficial ownership point and the original registered proprietor retains beneficial ownership of the property notwithstanding substantive registration of the new proprietor under the forged disposition, then no alteration of the register by the removal of the new entry will constitute prejudice for the purposes of rectification and indemnity under the LRA 2002. In every such case the transferee or chargee would never receive more than the bare legal estate and on the *Chowood* principle could not therefore claim to have suffered a loss by the subsequent alteration of the register in favour of the beneficial owner regardless of whether the right of rectification amounted to an overriding interest. The position would be equivalent to that under *Re Odell*; namely that a forged transfer or charge not executed by the registered proprietor could not deprive the original registered proprietor of his interest in the property or vest in the new registered proprietor any substantive estate or right in the property.
40. One way of circumventing this difficulty would be to treat the decision in *Malory* as confined to the 1925 Act. But in my view this is unsupportable. Although the scheme of the LRA 2002 is to make rectification as such synonymous with the right to an indemnity based on prejudice or loss, it is clear from the passages I have quoted in the Law Commission report that paragraph 1(2)(b) of Schedule 8 was not intended to make any substantive change to what had been the position under the 1925 Act and the same goes for what are now sections 29 and 58 LRA 2002. The same view was expressed by Newey J in his decision in *Fitzwilliam*.
41. One is therefore left to consider Mr Morshead’s submission that the beneficial ownership point was wrongly decided. Much of the academic criticism of *Malory* has centred on the limited circumstances in which the legal owner of property does not

also enjoy full beneficial ownership. Absent a trust, the legal estate carries with it all rights to the property and equity has no rôle to play in separating legal from beneficial ownership. Therefore to achieve the result which obtained in *Malory* it is necessary to construe s.69 of the 1925 Act as creating a departure from the usual rule that legal and beneficial ownership are, without more, indissoluble and to construe the references to the legal estate as meaning a bare legal estate of the kind that would be vested in a trustee. This runs contrary to the general principle embodied in s.69 that the register is a complete record of all enforceable estates and interests except for overriding interests and that it is registration rather than the transfer which confers title.

42. We are, of course, bound by the decision in *Malory* on the beneficial ownership issue unless it can be said that this question was decided *per incuriam*. Two matters have been drawn to our attention on this point. The first is that Arden LJ makes no reference in her judgment to the earlier decision of the Court of Appeal in *Argyle Building Society v Hammond* (1984) 49 P & CR 148 where Slade LJ, giving the judgment of the Court, refers to the statutory magic of s.69(1) which has the effect of vesting title by registration even when the transfer has been a forgery. At p. 156 he said:

“It follows that once a person has been registered as the proprietor of freehold land, he has, so long as he remains so registered, the statutory power to create valid charges (through the combined effect of ss.69(1) 25, 26 and 27), even though the purported transfer of the freehold under which he himself claims is a forged instrument. Likewise, so long as he remains so registered, he has the power to transfer the freehold title itself. The 1925 Act thus contains striking exceptions to the general principle “*Nemo dat quod non habet*”.”

43. The second and perhaps more important point is that the Court’s attention was not drawn to s.114 of the 1925 Act which provided that:

“Subject to the provisions in this Act contained with respect to indemnity and to registered dispositions for valuable consideration, any disposition of land or of a charge, which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner.”

44. An important, perhaps even critical, part of Arden LJ’s reasoning in [65] of her judgment in *Malory* was that s.20 of the 1925 Act had no application to a forged disposition. But s.114 makes it clear that, although a registered disposition which would be fraudulent and void if unregistered remains fraudulent and void even if registered, this takes effect subject to the provisions of the 1925 Act with respect to registered dispositions for valuable consideration one of which is, of course, s.20. It is not therefore possible to construe s.20 as having no application to a fraudulent transfer for valuable consideration that is registered.

45. Although hesitating before differing from Arden LJ and the other members of the Court in *Malory* on this point, I am satisfied that the beneficial ownership issue was

decided *per incuriam* for the reasons I have given and is wrong. In these circumstances, we are, I think, entitled to approach the construction of paragraph 1(2)(b) unaffected by the decision in *Malory* save for the determination that a right to seek rectification is capable of existing as an overriding interest. This therefore takes me back to Mr Morshead's argument that there are some circumstances in which paragraph 1(2)(b) could operate to make the alteration of the register rectification within the meaning of paragraph 11(2) rather than being a dead letter in all cases.

46. The deputy judge who regarded himself as bound by *Malory* accepted Swift's argument that paragraph 1(2)(b) applies for the purpose of determining whether the alteration of the register amounts to rectification. The words "where the register is rectified" were not, he held, to be read as requiring a prior application of the *Chowood* principle but rather as meaning that for the purpose of determining whether the register should be rectified in cases of a forged disposition, loss (and therefore prejudice) was to be presumed. He said:

"39. I nevertheless find, though with some doubt, that Swift's position is to be preferred. It is clear from the passages in the Proposals dealing with indemnity that an exception is made in a case where a registered proprietor is claiming in good faith under a forged disposition. Exception is therefore made, at least to some extent, for forged dispositions. It also seems to me that the change in the wording to which I have referred in paragraph 25 above may bear on this point. Under the 1925 LRA, s 83(4), a registered proprietor claiming in good faith under a forged disposition is deemed to have suffered loss by reason of rectification. That leaves open the question of what loss was suffered, and a claim for an indemnity could in such a case, it would appear, be defeated or reduced by an existing overriding interest (*Re Chowood*). The wording of paragraph 1(2)(b) of Schedule 8 of the 2002 adds to the phrase "is to be regarded as having suffered loss by reason of such rectification" the words "as if the disposition had not been forged". Giving effect to these added words, the loss suffered by a registered proprietor claiming in good faith under a forged disposition is now to be determined on the basis that the disposition had not been forged. On that basis, the overriding interests of the purported disponor could not be set up to reduce or defeat the claim."

47. Mr Morshead submitted that the limitation of what constitutes rectification under the LRA 2002 to cases of prejudice in the sense of loss makes it impossible to regard paragraph 1(2)(b) as intended in effect to neutralise the *Chowood* principle in what would otherwise be its application in this case to the claim for an indemnity. Given that the statutory reversal of *Odell* is capable of serving a purpose in cases where there is no overriding interest enforceable against the title it should not be treated as having the same effect where an overriding interest, as in this case, does exist. Paragraph 1(2)(b) therefore has a role to play in relation to the effect of a forged disposition but it has nothing to do with the enforcement of overriding interests which bind the registered estate by virtue of what is now s.29(2)(iii) and 30(2)(ii) of the

LRA 2002 and for that reason fall to be taken into account under the *Chowood* principle.

48. I have not found this an easy question and it is certainly an issue which deserves to be considered in the forthcoming review by the Law Commission of the workings of the LRA 2002. One of the problems is that the phrase “where the register is rectified” that appears in paragraph 1(2)(b) has been taken verbatim from s.83(4). There is no clear statement in the Law Commission report to indicate whether, given the change in the meaning of rectification, the use of that term was intended to denote, as the Registrar contends, a prior determination of loss in accordance with the *Chowood* principle or whether the draftsman of the bill intended that paragraph 1(2)(b) as drawn would have the same effect as s.83(4) under the 1925 Act. Paragraph 10.31(2) of the report certainly suggests that paragraph 1(2)(b) was not intended to effect a change in the law.
49. On this latter basis the question really resolves itself into whether the effect of s.83(4) was to neutralise the application of the *Chowood* principle in cases which fall within the sub-section. I am not persuaded that the phrase in paragraph 1(2)(b) “where the register is rectified” is sufficient in itself to compel me to the conclusion that the existence of an overriding interest ousts the right to rectification and an indemnity. Paragraph 1(2)(b) is capable of being read, as the judge found, in a much more neutral way. The contrary construction of the reference to rectification is entirely circular.
50. The strongest argument in favour of the Registrar’s construction is that s.83(4) has a different origin from the *Chowood* principle. Section 83(4) was designed to reverse the decision of the Court of Appeal in *Re Odell* to the effect that a forged transfer or charge was not capable of creating any rights and that registration therefore gave the registered proprietor nothing better than a defeasible interest whose deletion could not be treated as causing loss. The decision in *Chowood* leads to the same conclusion (i.e. no loss) but does so on different grounds: namely the fact that the registered title remains subject to an overriding interest. That is a broad principle not limited to cases of a forged disposition.
51. In the end, however, like the judge, I have reached the conclusion that the history of s.83(4) and now of paragraph 1(2)(b) is not sufficient in itself to enable one to treat those provisions as of no application where the overriding interest enforced against the registered title consists of a right to seek rectification (now alteration) of the register on the ground that the disposition was forged. That a right to seek rectification in these circumstances is capable of subsisting as an overriding interest does not alter the fact that the registered proprietor seeking the indemnity is claiming in good faith under a forged disposition and is to be regarded as having suffered loss by reason of the rectification of the register *as if the disposition had not been forged*. The application of *Chowood* in the present case would lead to the conclusion that there has been no loss; which is directly contrary to the statutory presumption under paragraph 1(2)(b). The *Chowood* principle is based on the overriding interest always having been enforceable against the registered estate or charge. But in cases of forgery the fact that the right to have the forged disposition set aside exists as an overriding interest adds nothing. The circumstances in which the overriding interest is enforced are precisely those contemplated by what is now paragraph 1(2)(b). If the 2002 or the 1925 Act intended the deemed loss provisions to provide a limited exception for cases involving the enforcement of an overriding interest, some much

clearer indication would, I think, be necessary in the language of the statute and I would have expected to see the point flagged up in the Law Commission report. As it is, the reference in the footnote to paragraph 10.31(2) to s.69 of the 1925 Act strongly suggests that the Law Commission considered paragraph 1(2)(b) to be consistent with the principle that registration confers substantive rights on the proprietor even under the forged disposition and that its loss is to be regarded as prejudicial to the title notwithstanding that the transfer or charge was void.

52. For these reasons, I would dismiss the Registrar's appeal.

Lord Justice Tomlinson :

53. I agree.

Lord Justice Moore-Bick :

54. I also agree.

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