

*Updating the Land Registration Act 2002: Title Guarantee, Rectification and Indefeasibility.*

By the time this is published, the consultation period for the Law Commission's project, *Updating the Land Registration Act 2002*,<sup>1</sup> will have long closed.<sup>2</sup> However, given that concrete proposals are unlikely to be solidified until well in to 2017, the Law Commission will continue collecting views until the final report is ready for submission to Government. At that time, it is anybody's guess what the fate of the report will be, although given that the final proposals are likely to be presented as technical legislative changes rather than the expression of new policy aims, perhaps there is a reasonable prospect of amending legislation. If, of course, any is needed.

It is over ten years since the 2002 Act entered force and it has triggered some significant litigation and generated a sizeable amount of controversy. Large issues have come to the fore – for example, the meaning of title guarantee in section 58 of the Act,<sup>3</sup> the scope of the power to alter the register<sup>4</sup> and the present failure to implement e-conveyancing as originally conceived – as well as more technical issues such as the proper scope of the “boundary exception” in Schedule 6,<sup>5</sup> the interaction of the priority rules and dispositive powers<sup>6</sup> and the mechanics of protecting third party interests by registration. However, the mere fact that there have been issues, and that not everyone would agree with the outcome in some cases (*Swift 1<sup>st</sup> v Chief Land Registrar*<sup>7</sup> being a prime example), does not necessarily mean that the legislation is faulty. We should not confuse disputed policy effectively implemented by legislation, with defective legislation. It is, therefore, not immediately apparent to everyone that the 2002 Act actually needs updating, or at least not in so extensive a manner that the consultation proposals might suggest.

One part of the 2002 Act that appears to give the Commission considerable concern is the interaction between s. 58 (title guarantee) and Schedule 4 (Alteration of the Register). The Law Commission consider that there are difficulties with the way the current legislation is working, at least in respect of the circumstances that the register can be rectified.<sup>8</sup> Specifically, the suggestion is that the indefeasibility of titles is compromised because currently there is no time limit after which a title becomes immune from rectification (or more accurately an application for rectification) if it has been registered under a mistake. Consequently, the Commission ask whether there should be a “long stop” of ten years from the mistake, after which, broadly speaking, no rectification could occur.<sup>9</sup> This would bring finality, certainty and protect the indefeasibility of titles. Ten years has been chosen because it reflects the period after which a person might apply for title by adverse possession, although the Commission are keen to point out that this would not be a limitation period per se.<sup>10</sup>

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<sup>1</sup> Consultation Paper No. 227, 31 March 2016

<sup>2</sup> On 30 June 2016.

<sup>3</sup> *Swift 1<sup>st</sup> v Chief Land Registrar* [2015] EWCA Civ 330

<sup>4</sup> *Gold Harp Properties v Mcleod* [2014] EWCA Civ 1084

<sup>5</sup> *Zarb v Parry* [2011] EWCA Civ 1306; *IAM Group v Chowdrey* [2012] 2 P & CR 13

<sup>6</sup> *Mortgage Express v Lambert* [2016] EWCA Civ 555

<sup>7</sup> Above fn.3.

<sup>8</sup> Consultation Paper Ch. 13.

<sup>9</sup> Consultation Paper para. 13.100. There is no time limit for alterations.

<sup>10</sup> Consultation Paper para. 13.124.

In order to consider this proposal, it is worth noting briefly how the rectification provisions work at present.<sup>11</sup> Relatively trivial mistakes which do not compromise the title of a registered proprietor are mere “alterations” and must be made on application unless there are exceptional circumstances.<sup>12</sup> Time lag is, by definition, irrelevant in these cases simply because the mistakes are trivial. Mistakes<sup>13</sup> whose correction would prejudicially affect the title of a registered proprietor amount to “rectifications”<sup>14</sup> and, of course raise serious issues such as loss of title,<sup>15</sup> removal of a registered charge<sup>16</sup> and even changes to priority.<sup>17</sup> In such cases, the rectification will be made, save in exceptional circumstances, unless the current registered proprietor is in possession.<sup>18</sup> If the current proprietor is in possession,<sup>19</sup> which of course is very often the case, the mistake will not be rectified unless there is consent, or the mistake is the fault of the current proprietor or it would be unjust not to rectify.<sup>20</sup> In other words, the current system protects the person in possession from rectification against their wishes, unless they are at fault or there are extraordinary reasons for granting it - that is, that it must be “unjust not to rectify”.

In the now familiar A, B, C situation (where A is the original registered proprietor, B the fraudster and C the new registered proprietor), C in possession keeps the title when A applies for rectification unless fault or unjustness. A gets an indemnity. If C is out of possession, A gets the title and C gets an indemnity (and note, the great likelihood is that C is out of possession because A is still in it: so the Act continues to protect possession).<sup>21</sup> This seems simple enough. Indeed, it is simple, and clear. Further, given now that we know that A does not retain any beneficial interest in the land even if the transaction to B was void (*Swift I<sup>st</sup>*, overruling *Malory Enterprise v Cheshire Homes*<sup>22</sup>), we have a strikingly transparent system, which even accommodates the equity lawyer’s conscience by having the “unjust” safety net. Of course, it may well be that commentators and judges do not *like* this answer (Lady Hale’s tail and dog point in *Scott v Southern Pacific Mortgages*<sup>23</sup> might be an example), especially because it seems, in some emotional way, to validate fraud. But, it is a clear answer, expressing a policy for upholding title by registration when accompanied by possession. Indeed, at this macro level the Law Commission do not see the need to interfere with the current law, save only to ask whether it is necessary to have both an “exceptional circumstances” exception to some parts of the rectification scheme and an “unjust not to rectify” exception to others.<sup>24</sup> For me, the difference in words carries a difference in meaning and purpose and I would retain them. In order to rectify against an innocent proprietor in possession, usually by taking something from them, it must be “unjust not to rectify”: not

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<sup>11</sup> See generally Schedule 4 LRA 2002.

<sup>12</sup> Land Registration Rules 2003, R. 126.

<sup>13</sup> “Mistake” is not defined in the 2002 Act and the Commission propose no change, preferring a flexible, fact responsive position. This seems sensible. Consultation Paper para. 13.76.

<sup>14</sup> Schedule 4 para. 1, LRA 2002.

<sup>15</sup> *Walker v Burton* [2013] EWCA Civ 1228 where the rectification was not granted

<sup>16</sup> As would have been in *Swift I<sup>st</sup>* had the lender not agreed to its deletion

<sup>17</sup> *Gold Harp Properties*.

<sup>18</sup> Schedule 4 paras. 3(3) and 6(3) LRA 2002.

<sup>19</sup> Section 131 LRA 2002 determines that for “the purposes of this Act, land is in the possession of the proprietor of a registered estate in land if it is physically in his possession”.

<sup>20</sup> Schedule 4 paras. 3 and 6 LRA 2002.

<sup>21</sup> If we fear that C gets no indemnity because A might have a right to rectify that is an overriding interest. See both *Swift I<sup>st</sup>* and Dixon [2016] Conv. 382 “Rectifying the register under the LRA 2002: The Malory 2 non-problem”.

<sup>22</sup> [2002] EWCA Civ 151.

<sup>23</sup> [2014] UKSC 52.

<sup>24</sup> Consultation Paper para. 13.99

exceptional, but positively unjust not to rectify. So it is a high hurdle in order to do something which would not otherwise be done. The “exceptional circumstance” provision is not only weaker, it operates conversely: it is a reason not to do something which would otherwise be done. The two concepts express different policies at different levels of intensity.

This aside, if the operation of Schedule 4 is this clear – albeit controversial – why introduce a long stop time limit on rectification claims? Good question, to which, perhaps, there are no persuasive answers. In fact, here are some reasons why it might be misplaced to modify what looks like a well thought out original scheme.

First, in principle, it is always a “good thing” to bring finality to claims, especially involving title to land, although I note in passing that an adverse possessor does not enjoy this luxury however long she may be in possession. However, where is the evidence that, at present, there is a problem with rectification claims long after a mistake has occurred? Where is the evidence of uncertainty, as opposed to the worry about uncertainty? This is more than the simple (but accurate) assertion that the 2002 Act has not been in force long enough for us to know if this is a real issue, it is also the point that, in the real world, people tend to respond to mistakes over land fairly urgently. Of course, it is conceivable that a mistake might be hidden for a long time, but if that is true, might it not be wise to ask why it was hidden before we ipso facto prevent a rectification claim. Although no-one can yet be sure, is it not likely that a rectification claim after ten years would, almost inevitably be the result of some very unusual set of circumstances. Should even the possibility of rectification be lost here simply because time has passed?

Secondly, Schedule 4 already brings a high degree of finality and certainty to the Register. Rectification against a proprietor out of possession will be granted, save in exceptional circumstances. Rectification against an innocent proprietor in possession will not be, unless it is unjust. The person who loses title is likely to obtain an indemnity. While this current scheme does not stop long-nurtured or late revealed claims, it does not actually compromise certainty. For sure, it is *possible* under the current scheme that a current proprietor – perhaps the 4<sup>th</sup> or 5<sup>th</sup> since the mistake - *might* lose their title and have to make do with an indemnity, but really, is this likely in the real world given what the Schedule already provides? Surely it would usually be “exceptional” (so as to deny rectification) if a claim was made against an innocent proprietor out of possession so long after a mistake; and surely it would hardly ever be “unjust” to rectify if the same proprietor were in possession? And if a court thought otherwise, perhaps the circumstances would actually be so unusual as to justify disturbing the current proprietor. In fact, this proposed reform looks like planning for the worst, the very remote worst. It looks like a solution to a non-problem.

Thirdly, the Land Registration Act 2002 is a title guarantee system, not a system promising title indefeasibility. These are not the same, despite much commentary that seeks to explain the LRA 2002 in terms of indefeasibility. It is, with respect, the mistake made by the Law Commission in para.13.2 of their Consultation Paper when they say that s.58 guarantees title and that this is what is called “the indefeasibility question”. As a consequence, much of Chapter 13 of the Consultation Paper is directed towards indefeasibility. However, title guarantee means that the current registered proprietor is guaranteed owner for the purpose of transferring title, so that the intending new owner can rely on the register (as correctly stated in para. 13.2). It also means that should the current proprietor be deprived of title through the rectification provisions, that the guarantee takes effect in a monetary indemnity. But it does not mean that the current proprietor is indefeasible. Nowhere in the 2002 Act is a registered title declared indefeasible (as in generally unremoveable from the current proprietor) whether immediate, qualified or deferred. These are words and concepts employed at large in the

academic literature, and in the Consultation Paper, but not in the Act. Indefeasibility is simply not the point of the LRA and the word “indefeasible” makes no appearance in the LRA 2002. Indefeasibility is a Torrens concept that has been misapplied to the LRA 2002. The Law Commission in seeking to prevent rectification after the “long stop” are seeking explicitly to make title indefeasible<sup>25</sup> and this does not sit well with the LRA 2002. If we recognise that under the LRA 2002 title guarantee is critical, but title indefeasibility is not, there is no need to have a long stop and the rectification provisions are not in need of amendment. In fact, they are already entirely consistent and supportive of s.58 as a guarantee of title and the error is to think that they need amendment in order to make title more indefeasible.

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<sup>25</sup> Consultation Paper, Ch 13 passim and e.g. para. 13.145.