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Unpacking Schedule 4 of the Land Registration Act 2002: To what extent does the statute promote a narrow interpretation of 'mistake'?

Dara Kieran Foody

ABSTRACT

The Law Commission enthusiastically predicted that the Land Registration Act 2002 would orchestrate a 'conveyancing revolution'. It was hoped that the register could provide prospective purchasers with a largely comprehensive insight into the state of various land titles – much like a mirror (albeit one which is subject to a limited number of cracks). This in turn could reduce the extent to which purchasers need to peak behind the curtain in order to ascertain title encumbrances, accelerating the conveyancing process. Reducing uncertainty for buyers is therefore a key aim of the Act. Linked to this, the Act ensures that a newly registered proprietor is the guaranteed owner of an estate, notwithstanding any defects in the underlying transaction. However, the statutory vesting of title does not give rise to indefeasibility; proprietors' titles are vulnerable to rectification. This is available in the event of a mistake, the correction of which would prejudicially affect the proprietor. The meaning of mistake is not entirely clear as Parliament did not choose to adopt a statutory definition.

This thesis investigates how mistake ought to be construed for the purposes of the Act. In particular, it explores whether the statute promotes the narrow interpretation of mistake which has emerged in two recent Court of Appeal judgments. To do so, it will examine whether the scope of rectification has been limited by key statutory provisions, not least those pertaining to title security and priority disputes. Ultimately, it will be argued that the statute establishes a non-absolute title guarantee which is perfectly reconcilable with a broad corrective power. Moreover, a range of erroneous omissions and deletions from the register can be construed as mistakes. Consequently, the thesis contends that the approach taken by recent case law is unnecessarily restrictive (not least in relation to voidable dispositions of property).

Unpacking Schedule 4 of the Land Registration Act 2002: To what extent does the statute promote a narrow interpretation of 'mistake'?

Dara Kieran Foody

Master of Jurisprudence (MJur) Thesis

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Introduction

Described by the Law Commission as a catalyst for a 'conveyancing revolution', the Land Registration Act 2002 (hereby referred to as the LRA 2002) aims to significantly increase the number of estates which are incorporated into the registered land system.[1] The Commission's key aspiration was to develop a centralised register which provides a complete and accurate insight into the state of a title at any given time. Crucially, the register ought to reflect the vast majority of third-party encumbrances burdening an estate. This can limit the number of extraneous enquiries and inspections which purchasers need to undertake prior to entering transactions.[2] In turn, the conveyancing process can be expedited- a stark contrast to the cumbersome and protracted procedure which taints unregistered land dealings. A key aim of the LRA 2002 is therefore to reduce title uncertainty for prospective purchasers. Charles Harpum – who is the architect of the Act – argues that the statute aims to create strong protections for purchasers more broadly.[3]

On this basis, one may be forgiven for thinking that purchasers' titles cannot be usurped. If so, the register would be characterised by indefeasibility. However, this cannot be the case – Schedule 4 of the LRA 2002 establishes that the register is susceptible to alteration.[4] This corrective power can be exercised on three grounds. Firstly, the register can be altered for the purpose of bringing it up to date. Secondly, it can be altered to give effect to a right, interest, or estate which is excepted from the effect of registration.[5] It can also be modified in response to a mistake, the correction of which would prejudicially affect the registered proprietor.[6] This form of alteration is referred to as rectification and entitles the losing party to a state indemnity unless they have caused or substantially contributed to the mistake through fraud or lack of care.[7] Mistake represents the key pre-requisite for rectification; as Cooper contends, 'it takes first place in determining whether the land register is susceptible to correction'.[8] Its importance cannot be understated; by controlling the availability of

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[1] Law Commission, *Land Registration for the 21st Century: A Conveyancing Revolution* (Law Com No 271, 2001) [1.5].
[2] Ibid.
[3] Charles Harpum, 'Can Rectification be Retrospective?' in Stephen Watterson, Amy Goymour, and Martin Dixon (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (Hart Publishing 2018).
[4] Land Registration Act 2002 (LRA 2002) sch 4
[5] LRA 2002 sch 4 para 2(1)(b); LRA 2002 sch 4 para 2(1)(c)
[6] LRA 2002 sch 4 para 2(1)(a)
[7] LRA 2002 sch 8 para 1
[8] Simon Cooper, 'Regulating fallibility in registered land titles' (2013) 72(2) CLJ 341, 342.

rectification, it plays a paramount role in shaping the level of title security which proprietors can avail of. Cooper observes that an expansive interpretation may compromise the permanence of a proprietor's title, a characteristic which is often associated with proprietary rights. Despite its importance, mistake has not been attributed with a statutory definition.

The purpose of this thesis is to explore how mistake should be construed for the purposes of the Act. In particular, it will examine whether the statute promotes the narrow interpretation of mistake which has emerged in recent case law. This issue warrants close examination for numerous reasons. Chiefly, the definitional void left by the statute creates uncertainty as to the scope of the corrective power. In practice, proprietors may struggle to anticipate the circumstances in which their titles can be impugned. Equally, interest holders may be unable to predict whether valuable rights can be readmitted into the register, such that they bind subsequent proprietors of the estate. This uncertainty can be partially alleviated by examining which construction of mistake, if any, is most compatible with the statute. Secondly, the way in which mistake is interpreted has significant implications for the statute's ability to achieve its objectives. In principle, a broad construction of mistake may result in several erroneously omitted interests being recorded in the register. In turn, the register may offer a more exhaustive insight into the extent of third-party encumbrances, furthering the statutory objectives. At the same time, it may be argued that an unfettered corrective power could compromise the reliability of the register, to the detriment of expedient conveyancing. Whether an expansive or restrictive interpretation is adopted, there is likely to be a trade-off which is reflective of broader conflicts between the statutory objectives. It is important to explore how the LRA 2002 seeks to navigate this tension, something which can influence the interpretation of several statutory provisions (such as the priority and title security rules).

More specifically, the thesis will explore two Court of Appeal judgments which have had a particular impact on the breadth and scope of mistake: *NRAM Limited v Evans* and *Antoine v Barclays Bank Plc*.[9] These decisions engage in detailed deliberations about the principles underpinning mistake. At present, they are the leading sources of authority on the question of when dispositions of property between two persons can be regarded as mistaken. This thesis will assess the merits of these judgments, which arguably promote a narrow interpretation of mistake. It will evaluate whether the statute necessitates this restrictive approach or alternatively whether there is flexibility to construe mistake more broadly. While *Antoine*

[9] *NRAM Limited v Evans* [2017] EWCA Civ 1013; *Antoine v Barclays Bank Plc* [2018] EWCA Civ 2846.

involved a derivative disposition, it should be noted that these judgments primarily focus on the circumstances in which transfers of property between two persons can be impugned as mistakes (the A-B scenario). The judgements do not extensively address the circumstances in which subsequent dispositions of property can be regarded as mistaken (the A-B-C scenario). This problem has been examined in other decisions, not least *Knights Construction (March) Ltd v Roberto Mac Ltd*.[10] Consequently, the thesis will focus on how mistake ought to be interpreted in the A-B context; it does not propose to explore the status of derivative dispositions.

The thesis is structured as follows. Primarily, it will explore how *NRAM* and *Antoine* artificially restrict the scope of mistake, not least by importing the void versus voidable distinction into the adjudication of registered title disputes. Having done so, it will examine how compatible this approach is with the statutory provisions. Chapter 2 explores the objectives which were attributed to the LRA 2002 by the Law Commission. This is because these objectives may provide a helpful insight into how the relevant provisions ought to be interpreted. Chapter 3 assesses the extent to which the title security provisions (namely section 58 and Schedule 4) immunise proprietors' titles from rectification; a more profound degree of protection would curtail the scope of the corrective power and by extension, mistake.[11] Chapter 4 investigates whether erroneous omissions and deletions from the register are susceptible to rectification, both at the point of first registration and when an estate has already been registered. The priority rules, and their relationship with Schedule 4, will be the main focus here. Finally, the thesis will reflect on whether the statute permits a broader construction of mistake and offer insights into how it arguably ought to be interpreted.

Ultimately, it will be argued that the *NRAM* and *Antoine* formulation is overly restrictive, with the LRA 2002 permitting a broader interpretation of mistake. Indeed, far from rendering proprietors' titles indefeasible, the statute merely establishes a non-absolute title guarantee; permanence and irrevocability are not prescribed by a statute which grants the courts discretion to correct mistakes on a case-by-case basis (albeit subject to possession related presumptions). Moreover, the correction of certain erroneous omissions and deletions from the register can be reconciled with the statute, not least at the point of first registration. While the priority rules applicable to already registered estates appear to be hostile towards this possibility, it is ultimately authorised by Schedule 4, which also permits rectification to alter

[10] *Knights Construction (March) Ltd v Roberto Mac Ltd* [2011] 2 WLUK 336.
[11] LRA 2002, s 58.

acquired priorities. At the very least, this demonstrates that there is significant tension between the priority and rectification provisions, which is reflective of broader conflicts between statutory objectives. However, it does not follow that the scope of the corrective power should be heavily curtailed. A better view is that the priority rules are subject to the revisionary effect of Schedule 4, enabling rectification to play a prominent role. In view of this, it is submitted that the statute permits an expansive interpretation of mistake. The *NRAM* and *Antoine* formulation is therefore not entirely necessary. Arguably, it would be desirable to discard elements of this approach in favour of a broader construction. For instance, a voidable disposition should become mistaken once it has been rescinded. It will be argued that this more liberal interpretation should not form the subject of a statutory definition. This is so that the registrar and the courts can enjoy latitude to apply the concept of mistake to unique and novel circumstances (such that it can develop incrementally). Indeed, if anything, this flexible approach appears to be central to the proper functioning of Schedule 4.

Chapter 1

A narrow construction of mistake – the fallout from NRAM and Antoine

Introduction

Rectification is a specific type of alteration which occurs whenever the correction of a mistake prejudicially affects the title of a registered proprietor.[12] Despite acting as a pre-requisite for rectification, mistake is left undefined by the LRA 2002; on the face of the statute, there is no 'express curtailment' of its meaning.[13] The resulting uncertainty has triggered a considerable volume of litigation.[14] Above all, two recent Court of Appeal judgments play a key role in shaping understandings of how mistake operates: *NRAM Limited v Evans* and *Antoine v Barclays Bank plc*.[15] Both cases engage in detailed deliberations about the principles underpinning mistake and explore the circumstances in which erroneous property transactions between two persons can be impugned. In the absence of a definitive Supreme Court ruling, they represent the two leading authorities in the area and so set the trajectory for how mistake is likely to be interpreted in the foreseeable future (at least in a conveyancing context).

The purpose of this chapter is to assess how *NRAM* and *Antoine* have influenced the interpretation of mistake. Firstly, the chapter will explore how mistake is capable of being broadly construed, something which has been largely embraced by the authors of both Megarry & Wade and Ruoff & Roper. Secondly, it will explore the judgment in *NRAM*. While *NRAM* may initially appear to endorse an expansive interpretation of mistake, it imposes several qualifications on its scope. In particular, the judgment promotes a registrar-centric approach, which suggests that mistakes can only be commissioned by a limited class of persons (namely registry actors).[16] The scope of mistake has also been fettered by a) the application of the void versus voidable distinction to registered title disputes and b) the Court

[12] Elizabeth Cooke, *Land Law* (2nd edn, OUP 2009) 67.
[13] John Summers, 'Shurely Shome Mistak? – Knight v Fernley and the continuing debate about the meaning of "mistake" in the Land Registration Act 2002 Schedule 4' (2022) 2 Conv 202, 205.
[14] *Campbell v Chief Land Registrar* [2022] EWHC 200 (Ch); *Isaaks v Charlton Triangle Homes Ltd* [2015] EWHC 2611 (Ch); *Balevents v Sartori* [2014] EWHC 1164 (Ch).
[15] *NRAM* (n 9); *Antoine* (n 9).
[16] Summers (n 13) 203.

of Appeal's insistence that register entries cannot become erroneous if they were correct at the time of being made. The chapter will then assess how this approach has been consolidated by *Antoine*. Finally, it will investigate whether the prevailing trend has been challenged at any point, not least by the earlier Court of Appeal decision in *Baxter v Mannion*.[17] Ultimately, it will be argued that this is not the case. In this respect, there appears to be an emerging judicial preference for a relatively narrow construction of mistake.

While *Antoine* involved a derivative disposition, it should be noted that the judgments primarily focus on the circumstances in which transactions between persons A and B can be construed as mistakes. They do not devote significant attention to exploring whether subsequent dispositions of property can be impugned as mistakes if the initial transaction is flawed (although in *Antoine*, it was accepted that a mistake in the immediate transaction would taint subsequent dispositions, as established by the earlier case of *Knights Construction*).[18] This would arise in the A-B-C scenario; here, the registered proprietor B conveys the estate to Person C, having previously received it from Person A under a defective disposition.[19] Therefore, *NRAM* and *Antoine* do not extensively address the reach of mistake (or in other words, its ability to unravel derivative dispositions); this is an issue which has been examined in other decisions.[20] Rather, they determine how mistake applies to dispositions of property between two persons. This thesis is thus designed to examine whether the statute necessitates an artificially narrow interpretation of mistake in the A-B context.

A definitional void

Schedule 4 does not place any specific limits on the meaning of mistake. As such, it is entirely possible that mistake could be construed in broad and expansive terms so as to encompass a range of errors. This option has seemingly been endorsed by a number of commentators, not least the authors of Megarry & Wade and Ruoff & Roper. However, it is important to note that both texts impose limits on mistake which would somewhat curtail its scope.

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[17] *Baxter v Mannion* [2011] EWCA Civ 120.
[18] *Knights Construction* (n 10).
[19] Pamela O'Connor, 'Registration of Invalid Dispositions: Who Gets the Property' in Elizabeth Cooke (eds), *Modern Studies in Property Law* (Volume III, Hart Publishing plc 2005).
[20] *Guy v Barclays Bank Plc* [2010] EWCA Civ 1936.

The authors of Megarry & Wade have argued that mistakes occur 'whenever the Registrar would have done something different had he or she known the true facts at the time at which the relevant entry in the Register was made or deleted.'[21] Armed with the full facts, the registrar may not have made an entry or may have inputted an entry in a different format.[22] Conversely, the registrar may have refrained from deleting an entry or may not have omitted an interest from the register. This interpretation appears to be somewhat broad; it indicates that mistake does not only encompass positive actions but also erroneous omissions. Moreover, a mistake could arise whenever the registrar would have acted differently had they been familiar with the true state of affairs at the time that they interacted with the register. It does not exhaustively outline which facts would be sufficiently material to alter the registrar's trajectory and thus render an entry or omission mistaken; while this may undermine legal certainty, it enhances the discretion which the judiciary can exercise in applying the concept to novel cases. The courts may therefore be able to flexibly expand the ambit of mistake on a case-by-case basis: 'what constitutes a mistake is widely interpreted and is not confined to any particular kind of mistake.[23] On this view, mistakes could – at the very least – include circumstances in which:

A) Entries are made in pursuance of void dispositions.
B) Double registration occurs – here, a parcel of land is erroneously incorporated into two titles.
C) Encumbrances are not recorded in the register at first registration.
D) Entries are erroneously omitted or deleted from the register.

The authors of Ruoff & Roper initially contended that mistakes occur 'whenever the Registrar (i) makes an entry in the register that he would not have made; ii) makes an entry in the register that he would not have been made in the form in which it was made; (iii) fails to make an entry in the register which he otherwise would 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'.[24] The authors have since updated the definition so that it does not explicitly refer to the registrar's state of mind. This responds to concerns that the definition

[21] Martin Dixon, Stuart Bridge, and Elizabeth Cooke (eds), *Megarry & Wade: The Law of Real Property* (9th edn, Sweet & Maxwell 2019) 6-133.
[22] Ibid.
[23] Ibid.
[24] Darren Cavill and others, *Ruoff & Roper on the law and practice of registered conveyancing* (Sweet & Maxwell 2021) 46.009.02.

could insinuate that the existence of a mistake is contingent upon the registrar's subjective knowledge.[25] The Law Commission also complained that the definition fails to clarify which facts are sufficiently material to alter the registrar's course of action.[26] The updated definition stipulates that mistakes arise 'whenever the circumstances are such, that on the facts and law appertaining at the time' an entry (including an entry in a particular form), omission, or deletion is made which should not have been made.[27] This too appears to be a broad construction; it could include any scenario in which the registrar should not have acted as they did in relation to the register, given both the legal and factual situation which existed at the time. It does not limit the number of factual events or legal provisions which could have a bearing on the correct course of action. As with Megarry & Wade's definition, both omissions and positive actions are included. The authors liken the definition to the general boundary rule; in the same way that a boundary line on a title plan does not precisely demarcate the boundary between adjoining titles, the description does not rigidly dictate which events can qualify as mistakes.[28] Rather, it details mistake's 'broad parameters', enabling the corrective power to be liberally applied on a case-by-case basis.[29]

However, the definitions do not render mistake a boundless concept. Both descriptions focus on register entries, deletions, and omissions; the substance of the register must be flawed, not simply the wider circumstances surrounding a disposition (though this may influence whether a subsequent entry can be impugned).[30] This may imply that mistakes can only be commissioned by parties who directly interact with the register, as opposed to interest holders and their agents. Moreover, the Ruoff & Roper construction focuses on the facts and law which appertain at the time that the change or omission is made; provided that the registrar acted correctly at this point in time, it does not appear that an entry can later be impugned. If so, an entry which was correct at the time that it was made could not retrospectively become erroneous even if the proprietor's underlying proprietary entitlement has been nullified. The definitions are thus subject to qualifications which would somewhat curtail the scope of mistake.

[25] *Antoine* (n 9) at [42].
[26] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018) [13.18].
[27] Cavill and others (n 24) 46.009.03.
[28] Ibid.
[29] Ibid.
[30] Cavill and others (n 24) 46.009.05.

Ultimately, the authors of both texts couch mistake in relatively expansive terms, even though the definitions are not as broad as they may first appear to be. The next section will explore how the judiciary have imposed a series of limits which artificially restrict the scope of mistake.

NRAM Ltd v Evans: The judiciary wades in

The academic commentary on mistake has been supplemented by case law. In *NRAM Ltd v Evans,* the Court of Appeal subscribed to the Megarry & Wade definition, declaring that mistake has a broad scope.[31] A superficial analysis may conclude that the judgment promotes an expansive interpretation of mistake. However, this should not be accepted; not only has the judgment accepted the limits imposed by the Megarry & Wade interpretation but it has also imposed further qualifications which artificially restrict the ambit of mistake.

The dispute in *NRAM* concerned the deletion of a charge from the register.[32] In 2004, Mr and Mrs Evans successfully obtained mortgage finance from NRAM Ltd, which was secured as a legal charge against their property. The Evans subsequently consolidated their loans with the bank; while this culminated in the redemption of the mortgage, it also created a new loan agreement which was secured by way of a second charge. In 2015, the bank adopted the erroneous view that the charge should be discharged; the bank had overlooked the existence of the 2005 loan which had not been fully repaid. An application was made to the Land Registry, using an e-DS1 form, to remove the charge. While this application was flawed – and therefore susceptible to rescission– it was valid at the time that it was made. The registrar duly removed the charge. Upon discovering the error, NRAM Ltd applied for rectification of the register, contending that the removal of the charge constituted a mistake. The key issue was whether the deletion of an entry pursuant to a valid, albeit voidable, disposition could qualify as a mistake. The Court of Appeal rejected this possibility.

At first, Kitchin LJ declared that mistake has been broadly construed and can encompass a plethora of events: 'it is therefore of no surprise that the term is generally understood to have a broad if somewhat uncertain scope and to encompass a wide range of circumstances'.[33] Nevertheless, the discussion which follows significantly limits the ambit of mistake. Despite the uncertainty surrounding mistake, Kitchin LJ acknowledged that 'a degree of consensus

[31] *NRAM* (n 9) at [48]-[52].
[32] Ben McFarlane, Nicholas Hopkins, and Sarah Nield, *Land Law* (2nd edn, OUP 2020).
[33] *NRAM* (n 9) at [48].

appeared to be emerging as to its boundaries', which was reflected in the definitions offered by the authors of Megarry & Wade and Ruoff & Roper.[34] He endorsed their suggestion that the question of whether a mistake exists in the register should be determined by reference to the position at the point in time that a register entry, deletion, or omission is made. He did not consider that an entry could be impugned as a mistake if it was correct at the time of being made.[35] Kitchin LJ's analysis fetters the scope of mistake in two ways. Firstly, on this understanding, mistakes can only arise at the time that the register is being modified (or not modified in the case of omissions).[36] Subject to the limited exceptions (for instance, if a register change directly stems from an external cyber-attack) this means that only the registrar's actions can be categorised as mistakes. The omissions of interest holders and their agents would be excluded, even if they play a key role in contributing towards a defective entry or omission. For instance, a solicitor may neglect to inform the registry of a third-party encumbrance; while this lack of oversight may culminate in the registry's failure to lodge a protective notice, it would not necessarily surpass the *NRAM* threshold for mistake. Rather, mistakes can only be made by a narrow class of persons at a particular point at time, giving rise to a registrar centric approach.[37] This has been acknowledged by McFarlane who observes that 'it is not sufficient that Person A has made a mistake; the mistake must be made by the Registrar.[38] Secondly, the temporal qualification indicates that an entry which was correct at the time of being made cannot subsequently be categorised as a mistake, even if the benefactor's supporting entitlement has been extinguished. The entitlement which authorised the entry may no longer exist, seemingly rendering the entry erroneous or at the very least outdated; yet, following *NRAM*, it would not be classed as a mistaken entry.

The scope of mistake has also been fettered by the distinction which the judgment draws between void and voidable dispositions. Before proceeding, it is necessary to outline how the distinction operates. On one hand, void dispositions are so significantly vitiated by defects that they have no legal effect; they cannot validly initiate a transfer of proprietary entitlements from A to B.[39] The transfer is null and is not considered to have occurred. This tends to happen when dipositive instruments, which purport to effect a transfer of property,

[34] *NRAM* (n 9) at [49].
[35] *NRAM* (n 9) at [52].
[36] Summers (n 13) 203.
[37] Ibid.
[38] McFarlane, Hopkins, and Nield (n 32) 117.
[39] Amy Goymour, 'Mistaken Registrations of Land: Exploding the Myth of "Title by Registration" (2013) 72(3) CLJ 617, 619.

are either tainted by forgery or defectively executed.[40] Transfers may be executed by the directors of a company which is being wound up.[41] The transfer may also be precluded by *non est factum*; here, the transferor may harbour a fundamental misunderstanding about a material aspect of the transaction, such as the property to be conveyed. A further example of a void disposition can be found in *Iqbal v Najeeb*, where the transferor purported to exercise a power of attorney after it had been revoked.[42] While voidable dispositions are also tainted by defects, these flaws do not extinguish the transaction's validity in and of themselves.[43] The transaction retains its validity but is susceptible to being set aside or avoided. To do so, the transferor must apply for the disposition to be rescinded. Factors which render dispositions voidable include misrepresentation and undue influence.[44]

Kitchin LJ notes that the distinction arises because the question of whether an entry is mistaken depends upon its effect at the time that it is registered.[45] The registrar should examine the effect of a disposition at this point in time and ascertain whether it can validly effectuate a shift in proprietary entitlements. If so, it can give rise to a register entry which formally vests title in the transferee. Provided that they have not been rescinded, entries made in pursuance of voidable dispositions are therefore not deemed to be mistaken. As Kitchin LJ ruled, 'such a voidable disposition is valid until it is rescinded and the entry in the register of such a disposition before it is rescinded cannot properly be characterised as a mistake'.[46] Conversely, void dispositions are incapable of transferring proprietary interests. They cannot authorise a register entry or deletion. If the registrar nevertheless decides to make an entry, they are misinterpreting the legal effectiveness of the disposition and thus making a mistake. This was emphasised by Kitchin LJ at paragraph 59: 'A distinction must be made between a void and voidable disposition. On this analysis, an entry made in the Register of an interest acquired under a void disposition should not have been made and the registrar would not have made it had the true facts been known at the time'.[47]

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[40] *Fretwell v Graves* (High Court, 16 March 2005).
[41] *Park Associated Developments Ltd. v Kinnear* (High Court, 10 April 2013).
[42] *Iqbal v Najeeb* (2011) REF/2009/1234.
[43] Elizabeth Cooke, 'Land Registration: void and voidable titles - a discussion of the Scottish Law Commission's paper' (2004) Nov/Dec Conv 482.
[44] Ibid.
[45] *NRAM* (n 9) at [53].
[46] *NRAM* (n 9) at [59].
[47] *NRAM* (n 9) at [59].

Fox argues that Kitchin LJ's analysis of void dispositions induced by forgery is consistent with the LRA 2002.[48] While section 23 enables registered proprietors to effect dispositions of property, no such power extends to third parties who forge transactions. The section 23 power has not been legitimately exercised here. Hence, the registrar errs in treating the transaction as a registrable disposition which should be completed by registration. It is worth noting that the void and voidable distinction has long featured in property law. It was approved by the Court of Appeal in *Norwich and Peterborough Building Society v Steed*, a case which was decided under the LRA 1925.[49] Here, Mr and Mrs Hammond obtained a power of attorney in favour of Mrs Steed and fraudulently induced her to transfer the freehold from Mr Steed to themselves. This amounted to a voidable disposition. The transferees also obtained mortgage finance which was secured by way of a legal charge. The key issue was whether the register could be rectified to remove the charge. The Court of Appeal considered whether this would be permissible under section 82(1)(h) of the LRA 1925, which authorised rectification 'in any other case where, by reason of error or omission in the register, or by reason of an entry made under a mistake, it may be deemed just to rectify the register'.[50] Scott LJ ruled that this 'catch all' criterion did not apply to entries made in pursuance of voidable dispositions which had not been set aside at the date of registration.[51] It followed that the transferees had legitimately assumed title and could validly dispose of the property. Had the disposition been void, the Court of Appeal would have reached the opposite conclusion, applying *Argyle Building Society v Hammond*.[52] The reasoning in *NRAM* therefore perpetuates a historic albeit contentious trend.[53]

The Court of Appeal's treatment of voidable dispositions prevents rectification from responding to a range of egregious conduct on the part of transferees, namely misrepresentation and undue influence. There is an increasingly precise distinction between the type of conduct which can give rise to a mistake and the type of conduct which falls outside its ambit; the boundaries of mistake are more rigidly demarcated. Crucially, registrations which are made in pursuance of voidable dispositions do not become mistaken once the dispositions have been rescinded. Kitchin LJ warned that that this could undermine

[48] David Fox, 'Forgery and Alteration of the Register under the Land Registration Act 2002' in Elizabeth Cooke (eds), *Modern Studies in Property Law* (3rd edn, Hart Publishing 2005) 27.
[49] *Norwich and Peterborough Building Society v Steed* [1993] Ch 116.
[50] Land Registration Act 1925 (LRA 1925), s82(1)(h).
[51] *Norwich and Peterborough Building Society* (n 49) at page 135.
[52] *Argyle Building Society v Hammond* [1984] 10 WLUK 174.
[53] Kitchin LJ observes that the distinction has been questioned in both *Baxter v Mannion* and Emmet and Farrand on Title.

the register's ability to accurately reflect the state of a title at any one time.[54] Rather, the register can be altered for the purpose of bringing it up to date. An entry cannot retrospectively become mistaken - this temporal qualification has been borrowed from the authors of Megarry & Wade and applied in a manner which confines the availability of the corrective power.

A further consequence of the void versus voidable distinction is that the register cannot be mistaken simply because an underlying disposition was erroneously made. Indeed, while the bank made an error in issuing an e-DS1 in *NRAM*, this did not give rise to a corresponding mistake in the register. Significant errors in transactions do not amount to mistakes in and of themselves. The judgment thus establishes that mistake has a restricted meaning within the LRA 2002; there is a disparity between the circumstances it is generally understood to include and what it encompasses for the purposes of the statute. Summers supports this, observing that 'events which were obviously mistakes in the general sense of the word… were not regarded as mistakes within the meaning of Schedule 4'.[55] This was further reiterated by Kitchin LJ: 'It may be the case that the disposition was made by mistake but that does not render its entry on the Register a mistake, and it is entries on the register with which Schedule 4 is concerned'.[56] Rather, the substance of the register, as determined by the registrar, must be mistaken. This further demonstrates that non registry actors are precluded from perpetrating mistakes save on the rare occasions where they happen to interact with it (for instance, during a cyber-attack orchestrated by third parties). In this respect, the judgment adopts a registrar centric approach which artificially confines the scope of mistake.

[54] *NRAM* (n 9) at [59].
[55] Summers (n 13) 205.
[56] *NRAM* (n 9) at [59].

Antoine v Barclays Bank Plc: The judiciary doubles down

The meaning of mistake was subsequently revisited by the Court of Appeal in *Antoine v Barclays Bank Plc*.[57] The decision perpetuates the narrow registrar centric interpretation of mistake which is promoted by *NRAM*.

The dispute in *Antoine* concerned two registrations. The property in question was initially owned by Mr Joseph. In 1987, he allegedly procured a loan from Mr Taylor, for which the property acted as a security. It later transpired that two of the three documents which formed the basis of the arrangement were forged, rendering them null and void. Nevertheless, in 2007, Mr Taylor obtained a court order which stipulated that title would be vested in him unless loan repayments were made. This did not occur and therefore Mr Taylor was registered as proprietor. He subsequently granted a charge over the property to Barclays Bank Plc. However, in 2008, Mr Antoine – who is Mr Joseph's son - applied to be joined in proceedings with Mr Joseph. By virtue of a court order, Antoine was registered as proprietor in Taylor's place. Subsequently, in 2016, Antoine argued that Taylor's previous registration constituted a mistake, something which in turn impugned the derivative interest granted to Barclays. The key issue was whether registrations which are made in pursuance of valid, albeit voidable, court vesting orders can be mistaken. Asplin LJ ruled that mistakes do not arise in these circumstances.

Antoine largely reiterates the ruling in *NRAM*.[58] Primarily, the Court of Appeal ruled that mistakes pertain to the substance of the register itself, with less focus being attributed to the underlying conveyance.[59] A flawed disposition of land does not necessarily culminate in a mistake for the purposes of Schedule 4 unless a mistake is also made in registering the interest under the disposition.[60] Moreover, Asplin LJ reaffirmed that the relevant time for assessing whether a mistake exists is the time of registration.[61] This in turn means that the question of whether a register entry is susceptible to rectification is determined by reference to the void versus voidable distinction.[62] The novel manner in which the distinction was applied further undermines the breadth of mistake. Asplin LJ held that court vesting orders are tantamount to voidable dispositions; this is because they constitute registrable

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[58] Simon Cooper, 'Register Entry Pursuant to a Court Order Subsequently Set Aside: *Antoine v Barclays Bank UK Plc*' (2019) 1 Conv 70.
[59] *Antoine* (n 9) at [40].
[60] Ibid.
[61] *Antoine* (n 9) at [39].
[62] *Antoine* (n 9) at [44]-[45].

dispositions (according to a combined reading of both Section 9 of the Law of Property Act 1925 and Section 27 of the Land Registration Act 2002) which remain valid until overturned.[63] Applying the distinction, the registration of an interest in pursuance of a non-rescinded vesting order therefore cannot be mistaken; this is compounded by the fact that the registrar is under a duty to comply with these orders, not least to preserve the rule of law.[64] This will be the case, irrespective of whether the vesting order has been procured through the use of forged documents; as Asplin LJ ruled at paragraph 52, the registrar should not look beyond the vesting order to ascertain whether the underlying disposition is void.[65] The implications are stark. As Proferes argues, registrations which are indirectly induced by forgery cannot necessarily be impugned as mistakes.[66] There is an acute possibility that rectification cannot be used to remove entries which are based on defects that render dispositions void.

Asplin LJ also criticises the definition of mistake which was initially provided by the authors of Ruoff & Roper.[67] The authors proposed that a mistake could occur whenever the registrar would have acted differently had they been familiar with the true state of affairs at the time of dealing with the register. This places an emphasis on knowledge which can be attributed to the registrar. However, Asplin LJ expressed concerns that this could be misinterpreted; it could project the false impression that the existence of a mistake is contingent upon the registrar's subjective knowledge or their ability to conduct investigations and enquiries.[68] These fears have been reiterated by Cooper, who warns that the definition could require the judiciary to exhaustively outline how the omniscient registrar would act in a range of scenarios– an onerous and unrealistic task.[69] As Cooper posits, 'one would need to construct a whole set of standards for action by the hypothetical registrar'.[70] Difficult questions may arise here; in particular, one may ask whether the all-knowing registrar would refuse to comply with a court order mandating registration if they knew that it was induced by forgery. These reservations have been acknowledged by the authors of Ruoff & Roper, whose modified definition makes no reference to the registrar. While the removal of this qualification may suggest that mistakes do not necessarily need to be perpetrated by registry

[63] *Antoine* (n 9) at [46].
[64] *Antoine* (n 9) at [51].
[65] *Antoine* (n 9) at [52].
[66] Amy Proferes, 'Land Registration: The Meaning of Mistake' [2018] NLJ 11, 12.
[67] *Antoine* (n 9) at [42].
[68] *Antoine* (n 9) at [42].
[69] Cooper (n 58) 74.
[70] Ibid.

actors, this does not appear to be the intended effect of *Antoine*. Indeed, it adopts several tenets of *NRAM's* registrar centric approach. In particular, it stipulates that the time for assessing whether a mistake has arisen is the time that the registrar is interacting – or not interacting – with the register.

In this respect, *Antoine* endorses the narrow interpretation of mistake which emerged in *NRAM*. Elements of this approach were also adopted by the Privy Council in *Brelsford v Providence Estate Ltd,* not least the void versus voidable distinction.[71] On the facts of the case, it was held that mistakes arose as void dispositions, which could not authorise the creation of new proprietary interests, had been recorded in the register.

Baxter v Mannion: A challenge to the newfound orthodoxy?

While *NRAM* and *Antoine* have orchestrated a shift towards a narrower construction of mistake, they are by no means the only authorities to address this issue. The Court of Appeal previously reviewed the meaning of mistake in *Baxter v Mannion*.[72] Here, an encroacher (Baxter) sought to acquire title to Mannion's land by virtue of adverse possession. He submitted an application to the Land Registry which stipulated that he had been in occupation of the disputed land for the duration of the ten-year statutory limitation period. The Land Registry duly notified the registered proprietor Mannion, who failed to serve a counter notice or objection to Baxter's application within the required sixty-five-day period. In accordance with Schedule 6 of the LRA 2002, Baxter was registered as proprietor, displacing Mannion.[73] It later transpired that Baxter had not exhausted the limitation period. Mannion argued that the register should be rectified on the basis that Baxter's registration constituted a mistake for the purposes of Schedule 4.

Jacobs LJ rejected Baxter's contention that there was no actionable mistake. Counsel for Baxter argued that Schedule 6 was designed to both clarify and simplify the adverse possession provisions. On this reading, the statute institutes a 'once and for all system'; the registrar conducts a factual assessment of the encroacher's claim and duly serves notice to the proprietor.[74] If no counter notice or objection is received within the required timeframe, the proprietor forfeits the right to resist the application, with title instead being vested in the encroacher. This submission was not successful. As Jacobs LJ ruled, encroachers are only

[71] *Brelsford v Providence Estate Ltd* [2022] UKPC 46 [67].
[72] *Baxter v Mannion* (n 17).
[73] LRA 2002 sch 6
[74] *Baxter* (n 17) at [21].

eligible to lodge an application for registration if they have been in adverse possession of an estate for the duration of the prescribed limitation period.[75] Parliament cannot have envisaged that applications would be successfully made by squatters who fail to satisfy the core qualifying criteria. Hence, Baxter's registration would not have been authorised by the statute, rendering it mistaken: 'a person who has not in fact been in adverse possession is simply not entitled to apply'.[76] This was the primary basis on which the Court of Appeal found that a mistake existed. Jacobs LJ also rejected the notion that entries in the register cannot be impugned as mistakes unless they are induced by fraud. If this approach was followed, registrations which are made in pursuance of flawed adverse possession claims would not be susceptible to rectification provided that the error in the application was inadvertent. As Jacobs LJ noted, 'the insuperable difficulty with this submission is that it is impossible to draw any rational distinction between a mistake induced by fraud and a mistake induced by a wrong application. The reason for the mistake – that the Registrar was given false information – is the same in both cases'.[77] He also refuted the idea that mistakes are limited to procedural errors on the part of the registry.[78]

Some aspects of the judgment appear to challenge the prevailing orthodoxy in *NRAM* and *Antoine*. Perhaps most fundamentally, Jacobs LJ questions the void versus voidable distinction in his obiter remarks – 'I would add that I would reserve my position as to whether the authors are right in their proposed distinction: it is difficult to see why, for instance, a transaction induced by a fraudulent misrepresentation (which would only be voidable) could not be corrected once the victim has elected to treat it as void'.[79] He disputes the suggestion that entries induced by voidable dispositions cannot be rectified once they have been rescinded. Indeed, once a disposition has been avoided, it assumes the same legal effectiveness as a void transaction.[80] It may follow that the corresponding register entry should be treated in the same manner, namely as a mistaken entry which is susceptible to rectification. Although implicit, the judgment therefore expresses some sympathy for the idea that entries can retrospectively become mistaken if the interest holder's entitlement to procure the entry has been invalidated by a supervening event. If so, mistake would be construed

[75] *Baxter* (n 17) at [24].
[76] *Baxter* (n 17) at [24].
[77] *Baxter* (n 17) at [29].
[78] *Baxter* (n 17) at [28].
[79] *Baxter* (n 17) at [31].
[80] Gerwyn LI H. Griffiths, 'An important question of principle – reality and rectification in registered land' (2011) 4 Conv 331.

more expansively. Even so, Jacob LJ's comments do not pose a strong challenge to the approach taken in *NRAM* and *Antoine*. Crucially, the observations that he makes about the void versus voidable distinction are confined to obiter. *Baxter* was concerned with a flawed application for registration on the basis of adverse possession, as opposed to a defective conveyance. Therefore, it cannot authoritatively pronounce on the circumstances in which dispositions are susceptible to rectification. This was conceded by Jacobs LJ: 'Fourthly, her reliance on Ruoff and Roper is misplaced. Their suggestion that there is a distinction to be drawn between a void and voidable transaction, interesting though it is, sheds no light on an application made by someone not entitled to apply'.[81] In any event, the purported disparity between *Baxter* on the one hand and *NRAM* and *Antoine* on the other hand is rather minimal. In neither of these later cases did the Court of Appeal reject Jacob LJ's view that mistakes should not be confined to a) official procedural errors in examining an application or b) fraudulently induced register entries. If anything, it would appear that these principles are endorsed by both *NRAM* and *Antoine*. For instance, *NRAM* establishes that a mistake occurs whenever an individual is registered as the proprietor of an estate on the basis of a void transfer deed; the focus is on the proprietary entitlements of the parties, rather than the registry's procedural operations. There is greater consensus between the cases than may perhaps first meet the eye.

Despite the understandable hype that the case has generated amongst advocates of a broader interpretation, *Baxter* is therefore not particularly well placed to challenge the narrow construction of mistake which arose in *NRAM* and *Antoine*. This more restrictive approach is very much in the ascendancy.

Conclusion

Parliament's unwillingness to define mistake has given rise to uncertainty. Recent case law has arguably demonstrated a willingness to adopt a narrow and restrictive interpretation of mistake. This has been primarily achieved in three ways. Firstly, *NRAM* and *Antoine* rule that the question of whether a mistake exists should be determined by reference to the position at the point in time that a register entry, omission, or deletion is made. This has instilled a heavily registrar centric approach, limiting the number of persons who can perpetrate mistakes. Secondly, the Court of Appeal held that the void versus voidable distinction can determine whether a mistake arises; an entry which records a voidable disposition cannot

[81] *Baxter* (n 17) at [31].

retrospectively become mistaken once the disposition has been rescinded. Linked to this, the cases reject the notion that errors in the background facts of a transaction necessarily give rise to mistakes. The focus is instead on the substance of the register. While the earlier case of *Baxter* may appear to challenge these authorities to some extent, it is not particularly well placed to do so. Indeed, the reservations which it expresses about the void versus voidable distinction are confined to obiter. Hence, in the A-B context, there is a growing judicial preference for a relatively narrow interpretation of mistake which is characterised by greater prescriptiveness and rigidity.

Chapter 2

Locating the Statutory Objectives

Introduction

The previous chapter contended that mistake has been narrowly construed by the Court of Appeal. The remainder of the thesis will explore whether this approach is necessitated by the statute, or alternatively whether there is scope to interpret mistake more extensively (and if so, how). This primarily depends upon the meaning and effect of the statutory provisions. Before engaging in a detailed analysis of the relevant provisions, it is important to outline the objectives of the LRA 2002; after all, these ambitions underpin the statute and provide a useful – albeit not definitive – insight into the provisions' intended effects. The purpose of this chapter is therefore to identify the aims which were attributed to the LRA 2002 by the Law Commission.

The statute is primarily designed to create a largely comprehensive and accurate register which purchasers can rely upon to depict the state of a title; in turn, the volume of extraneous title investigations can be reduced, expediting the conveyancing process. This enhances the transferability of land and may pave the way for the introduction of e-conveyancing; here, the disposition and registration of interests in land occurs simultaneously as part of an online process. This is the overarching or 'fundamental' objective of the Act.[82] The Act also seeks to achieve a number of additional objectives; for instance, the influence that unregistered land principles exert over the registered land system should be limited. It will be argued that the Act is unable to realise many of these objectives in their most absolute form. In part, this stems from issues of practicality, something which has impeded the progress of the envisaged e-conveyancing 'revolution'.[83] However, it can be predominantly attributed to the Commission's desire to advance countervailing policies which cannot be easily reconciled with certain objectives. In particular, there is a conflict between the aims of enhancing register comprehensiveness and retaining overriding interests. Ultimately, this reflects the fact that the LRA 2002 is designed to navigate tension between competing policy objectives;

[82] Law Commission (n 1) [1.5].
[83] Law Commission (n1) [1.1].

it represents a compromise between the interests of proprietors, transferees, and interest holders, and does not engender the maximum level of purchaser protection.

Key statutory objectives will be examined in turn.

The marginalisation of unregistered land principles

A major objective of the statute is to create a coherent set of rules for registered land. The law governing registered land should advance the specific aims of the registration project, even if this necessitates a departure from general property law principles. It was not accepted that the LRA 2002 should merely perpetuate general property law doctrines (though in practice it retains many of its predecessor's principles); rather, registration could orchestrate a shift in the substantive law. In particular, the drafters did not envisage that the register should act as a conduit for the realisation of unregistered land principles.[84] On the contrary, the Commission argued that the principles of registered and unregistered land should not be heavily aligned.[85] This is principally because the two systems adopt a different view as to how proprietary entitlements arise– in a registered land context, registration itself is constitutive of title whereas in unregistered land, possession is the paramount factor. As the Commission noted, 'At its most fundamental level, the basis of title to unregistered land is possession, whereas… the basis for registered title is the fact of registration…. There seems little point in inhibiting the rational development of principles of property law by reference to a system which is rapidly disappearing'.[86] Goymour argues that this has given rise to an orthodox school of thought which views the LRA as a sovereign and self-sufficient statute (the operation of which should not be fettered by extraneous principles).[87] On this view, external rules should not play a prominent role in the adjudication of registered title disputes.

The LRA's subordination of unregistered land principles is illustrated by its approach towards adverse possession. Provided that an encroacher has been in adverse possession of unregistered land for the duration of a twelve-year limitation period, they can successfully acquire title. However, Schedule 6 of the LRA 2002 introduces a distinct scheme for registered land. Following the expiration of a ten-year limitation period, encroachers must apply to be registered as the proprietor of the registered estate (though they can apply within

[84] Ibid.
[85] Law Commission *Land Registration for the 21st Century: A Consultative Document* (Law Com No 254, 1998) [1.5].
[86] Ibid.
[87] Goymour (n 39) 628.

six months of the end of the limitation period).[88] This reflects the fact that title to registered land is based upon registration. At this stage, the Registry is obliged to notify the existing proprietor that an application has been lodged.[89] The proprietor has sixty five business days to either a) consent to the application, b) object to the application under s73(1), c) remain passive or d) serve a counter-notice to the registrar, compelling the registrar to address the application by reference to paragraph 5(4) of Schedule 6.[90] If the proprietor serves a counter notice, adverse possession claims cannot succeed unless one of three conditions listed in paragraph 5 are satisfied. The third condition is most commonly relied upon; it arises whenever a) the contested land is adjacent to the applicant's land, b) the exact boundary has not been determined by reference to section 60, c) the applicant or any predecessor in title reasonably believed that the contested land belonged to them for at least ten years of the period of adverse possession ending on the date of the application and d) the estate to which the application relates was registered more than a year prior to the date of the application.[91] This exemption has been narrowly construed. A key issue is whether the reasonable belief of ownership must endure up until the date of the application or alternatively whether it can subsist for any ten years during the period of adverse possession.[92] The second view has been rejected; in *Zarb v Parry*, Arden LJ held that whilst reasonable belief does not need to persist up until the date of the application, it should not cease to exist more than a short period of time before the application is made.[93] This was reiterated in *Brown v Ridley*, notwithstanding the Upper Tribunal's reservations about the substantive merits of *Zarb*.[94]

The LRA 2002 has significantly curtailed the availability of adverse possession by enabling proprietors to object to applications and serve counter notices. Gone are the days in which a successful period of adverse possession could extinguish a paper owner's title in and of itself (except in the increasingly rare unregistered land context); rather, registered proprietors' security of title has been fortified to the detriment of encroachers. Increasingly, the doctrine marginalises knowing trespassers; to satisfy the third exception, it is necessary to hold a reasonable belief of ownership, something which is only applicable to inadvertent encroachers. An entire category of encroacher may be de facto excluded from the doctrine,

[88] LRA 2002 sch 6 para 1(1)
[89] LRA 2002 sch 6 para 2
[90] LRA 2002 sch 6 para 3(1)
[91] LRA 2002 sch 6 para 5(4)
[92] Patrick Milne 'Mistaken Belief and Adverse Possession – Mistaken Interpretation? *Iam Group plc v Chowdrey*' (2012) 4 Conv 343.
[93] *Zarb v Parry* [2011] EWCA Civ 1306.
[94] *Brown v Ridley* [2024] UKUT 14 (LC).

lending credence to Cooke's claims that the LRA 2002 renders registered land 'virtually squatter proof'.[95] Dixon echoes these sentiments, contending that the Act has facilitated the 'emasculation of adverse possession' and largely restricted its applicability to boundary disputes between neighbouring landowners.[96] This stands in stark contrast to the more pronounced role that the doctrine plays in unregistered land. It serves as a telling reminder that the LRA 2002 does not seek to harmonise the principles of registered and unregistered land; the latter have sometimes been expunged from the registration system, with the doctrine of notice being a prominent casualty.

A complete and accurate register

Another key ambition of the LRA 2002 is to enhance the register's comprehensiveness. While this is often perceived to be the statute's core aim, it cannot be unqualifiedly achieved due to countervailing policy considerations; in some circumstances, it is desirable to prioritise interest holders who have not protected interests via a notice. Arguably, this demonstrates that the LRA 2002 does not seek to engender the maximum level of purchaser protection; rather, it strikes a more nuanced compromise between competing interests.

The Law Commission stated that the 'fundamental objective of the Land Registration Bill is that, under the system of electronic dealing that it seeks to create, the register should be a complete and accurate reflection of the state of the title to land at any given time'.[97] Prospective purchasers should be able to rely upon the register to accurately depict both the registered proprietor and enforceable third party incumbrances. This limits the volume of extraneous investigations which purchasers need to undertake. In turn, dispositions can occur more efficiently, reducing transaction costs. McFarlane observes that a key aim of the statute is to publicise important details about registered titles so that prospective purchasers can make an informed decision about whether to acquire a plot of land.[98] Ruoff contends that the register may act as a mirror, which reflects the sum of adverse interests burdening a title.[99] If so, the register may act as a sole – or predominant – source of information for purchasers,

[95] Elizabeth Cooke, *The New Law of Land Registration* (Hart Publishing 2003) 139.
[96] Martin Dixon, 'The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment' (2003) Mar/Apr Conv 136, 150.
[97] Law Commission (n 1) [1.1].
[98] Ben McFarlane, *The Structure of Property Law* (Hart Publishing 2008) 82.
[99] Theodore B.F. Ruoff, *An Englishman Looks at the Torrens System* (Law Book Co. of Australasia 1957).

limiting the extent to which they need to look behind the curtain to ascertain potential incumbrances.[100]

However, this aim has not been absolutely realised. The LRA 2002 does not seek to create an entirely comprehensive register. This ambition has been qualified by countervailing policy considerations. In its purest form, the mirror principle stipulates that all unregistered interests should lose, or fail to acquire, priority which they may otherwise enjoy; after all, this incentivises interest holders to lodge applications for registration, enhancing the register's completeness. Nevertheless, the LRA 2002 rejects this possibility by preserving a category of overriding interests. These interests retain their enforceability against subsequent registered proprietors despite being unregistered.[101] Not all binding incumbrances can be found in the register, giving rise to a 'crack in the mirror'.[102] The Law Commission accepts that the retention of overriding interests cannot be easily reconciled with efforts to produce a comprehensive register: 'Overriding interests… present a very significant impediment to one of the main objectives of the Bill, namely that the register should be as complete a record of title as it can be, with the result that it should be possible for title to land to be investigated almost entirely on-line'.[103] Cooke regards any suggestion of an entirely complete register as a 'myth'.[104] It should be noted that the LRA 2002 reduces the number of overriding interests. Certain interests which were previously overriding under the LRA 1925 have lost their status, namely rights of chancel repair liability and rights of persons in receipt of rent and profits. The Act phased out several overriding interests within ten years of its entry into force, such as franchises, manorial rights, and Crown and corn rents. Any person applying to be registered as proprietor must also notify the registrar of any unregistered interests affecting the estate so that they can be recorded in the register.[105] Efforts have therefore been made to curtail the number of binding interests which do not appear in the register. However, overriding interests still exist. Schedule 1 of the LRA 2002 establishes which interests override first registration. Where an estate has already been registered, Schedule 3 of the LRA 2002 attributes overriding status to a number of interests, including:

A) Legal leases granted for a term of seven years or less.[106]

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[100] Ibid.
[101] LRA 2002, s29(3).
[102] David Hayton, *Registered Land* (3rd edn, Sweet & Maxwell 1981).
[103] Law Commission (n 1) [2.24].
[104] Cooke (n 13) 76.
[105] LRA 2002, s 71.
[106] LRA 2002 sch 3 para 1

B) The qualifying interests of persons who are in actual occupation of an estate.[107] This refers to proprietary interests which may arise informally (for instance, under trusts of land). Provided that the beneficiary is in actual occupation, these rights are converted into overriding interests pursuant to Schedule 3, paragraph 2. However, this is not the case if either of the two exceptions detailed in Schedule 3 paragraph 2(b) and (c) are satisfied. These exceptions are as follows:

- The rights of persons in actual occupation are not readily discoverable. There are two limbs to the test. Firstly, the interest holder's occupation of the land must not have been obvious on a reasonably careful inspection at the time of the disposition.[108] This involves an objective assessment. Secondly, the transferee or chargee should not be endowed with actual knowledge of the interest at the time of the disposition.[109]
- An inquiry is made of the person in actual occupation. They fail to disclose the interest in circumstances where it would have been reasonable to do so.[110]

C) Certain types of legal easements and profits.[111] This is not universally applicable to all rights of way; easements which are expressly granted out of a registered estate constitute registrable dispositions and so must be completed by registration to operate at law. Until this occurs, they merely exist in equity and cannot amount to overriding interests. Indeed, only implied easements can override registered dispositions, provided that they adhere to at least one of the criterions detailed in paragraph 3.

Despite diluting the comprehensiveness of the register, the Commission argued that the retention of overriding interests pursued worthy policy objectives.[112] In particular, it may sometimes be entirely unreasonable to expect parties to lodge protective applications for registration. This is most likely to apply when interests arise informally, for instance through the operation of proprietary estoppel or constructive trusts. In the absence of formality requirements – which often compel parties to consciously execute legal deeds –beneficiaries in actual occupation may be unaware that they have acquired a proprietary interest. The need

[107] LRA 2002 sch 3 para 2
[108] LRA 2002 sch 3 para 2(c)(i)
[109] LRA 2002 sch 3 para 2(c)(ii)
[110] LRA 2002 sch 3 para 2(b)
[111] LRA 2002 sch3 para 3
[112] Law Commission (n 85) [4.17].

to apply for registration would not be readily apparent and so should not be imposed. As Jackson observes, 'the rationale is relatively straightforward: a category of overriding interests must be retained as it is unreasonable to expect these particular interests to be registered'.[113] In a similar vein, the Commission argued that some parties who occupy land for residential purposes are 'unlikely to appreciate the need to take the formal steps of registering their occupation'.[114] Here, overriding status can be justified on the basis that 'this is a very clear case where protection against purchasers is needed but where it is not reasonable to expect nor sensible to require any entry on the register'.[115] In the Commission's view, the policy of supporting vulnerable occupiers, who may rely upon the property to provide a sole or primary residence, should not be automatically subordinated to purchasers' interests. In some circumstances, the drafters envisage that the pursuit of dynamic security should be tempered by equitable considerations of fairness and justice. This illustrates that it is too superficial to simply view the LRA as a mechanism for creating an entirely comprehensive register. Its objectives are instead realised in a more qualified manner, reflecting the fact that it must navigate tension between various actors. This is further necessitated on practicality grounds; in some circumstances, it may not be pragmatic to promote universal registration. Leases granted for a term of seven years or less are a prime example; the Commission was reluctant to remove their overriding status due to their short duration and the fact that, being relatively common, they may unduly 'clutter the register'.[116] If so, the process of reviewing the register may become increasingly protracted, undermining efforts to simplify the conveyancing process.

Indeed, overriding interests continue to play a prominent role in registered land, namely the rights of persons in actual occupation. In *Boland*, Wilberforce LJ held that actual occupation assumes its ordinary meaning and can be equated with 'physical presence'.[117] However, in *Link Lending v Bustard*, Mummery LJ ruled that a rubric of factors should be consulted to determine whether actual occupation arises.[118] Relevant factors include the interest holder's continuity of presence, the length of any absence from the property and the reasons for it, the personal circumstances of the interest holder, and their intentions and wishes.[119] The test does

[113] Nicola Jackson, 'Title by Registration and Concealed Overriding Interests: The Cause and Effect of Antipathy to Documentary Proof' (2003) 119 LQR 660.
[114] Law Commission (n 85) [5.61].
[115] Ibid.
[116] Law Commission (n 1) [8.9].
[117] *Williams & Glyn's Bank v Boland* [1981] A.C. 487, 504.
[118] *LinkLending Ltd v Bustard* [2010] EWCA Civ 424 [127].
[119] Ibid.

not simply involve an assessment of whether a party resides in the disputed property. Rather, it encompasses a plethora of factors, giving rise to what Bevan describes as a 'wide-ranging evaluation of the factual circumstances of each individual case'.[120] The judiciary therefore enjoy greater discretion to determine whether actual occupation exists. This has been compounded by the fact that the interest holder's subjective intentions can be considered. Given that these intentions cannot be precisely or objectively verified, there is a risk that transferees may be bound by encumbrances which were not reasonably foreseeable. Bogusz warns that actual occupation may be extended to cases in which its existence cannot be unequivocally established, giving rise to 'occupation creep'.[121] Bevan echoes these concerns, arguing that the courts have exploited the lack of a statutory definition in order to incrementally expand the ambit of overriding interests.[122] He doubts that this can be reconciled with the Commission's desire to curtail the number of unregistered encumbrances. Instead, he calls for a more restrained approach which is faithful to the statute. This is entirely reasonable. However, while expansive judicial interpretations have emerged, these have at least been partly facilitated by Parliament's failure to provide more specific guidance about when actual occupation arises. Rather than adopting a heavily prescriptive approach, the statute allows the judiciary to significantly influence the scope of actual occupation on a case-by-case basis. As such, it passively permits overriding interests to play a prominent role in registered land. This further demonstrates that the LRA does not create an entirely comprehensive register or engender the most profound level of purchaser protection.

The next section will explore how another core ambition has also been tempered, this time by practicality considerations.

[120] Chris Bevan, *Land Law* (2nd edn, OUP 2020) 85.
[121] Barbara Bogusz, 'The Relevance of "Intentions and Wishes" to Determine Actual Occupation: A Sea Change in Judicial Thinking?' (2014) 1 Conv 27, 31.
[122] Chris Bevan, 'Overriding and Overextended? Actual Occupation: A Call to Orthodoxy? (2016) 2 Conv 104, 117.

E-Conveyancing

The Commission also sought to orchestrate an e-conveyancing 'revolution'.[123] However, the realisation of this objective has been significantly compromised by concerns surrounding its practical viability. Arguably, this should be cautiously welcomed as the project may give rise to a series of difficulties, not least the increased risk of fraud. It is submitted that the Commission adopted an overly idealistic view of how quickly such a transition could be achieved. This demonstrates that the sustainability of the statute's initial objectives may need to be reviewed with the passage of time.

At its core, e-conveyancing requires that the creation, disposition, and registration of proprietary interests should be conducted online; paper dealings with land are abolished in favour of a totally electronic system.[124] Ultimately, it was envisaged that the completion and registration of transactions would occur simultaneously, so as to eliminate the registration gap.[125] This is the gulf which presently exists between the transfer and the registration of the transferee as proprietor. The Commission described e-conveyancing as the 'single most important function of the legislation'.[126] It is also enthusiastically predicted that the 'Bill will bring about an unprecedented conveyancing revolution within a comparatively short time'.[127] Gardner emphasises its importance, observing that 'the establishment of registration arrangements was not the end in itself, but a means to deliver the Act's real key aspiration, namely that all conveyancing would take place via a prescribed form of electronic transaction'.[128] He notes that it was designed to play a key role in facilitating 'constitutive registration'; here, the creation and transfer of proprietary interests would be constituted by registration as part of a single process.[129]

However, in practice, e-conveyancing has failed to garner sufficient momentum. In 2011, the Land Registry declared that it had suspended the project, not least because e-conveyancing

[123] Law Commission (n 1) [1.1].
[124] Deveral Capps, 'Conveyancing in the 21st century: an outline of electronic conveyancing and electronic signatures' (2002) Sep/Oct Conv 443.
[125] Ibid.
[126] Law Commission (n 1) [13.1].
[127] Law Commission (n 1) [1.1].
[128] Simon Gardner, 'The Land Registration Act 2002 – the Show on the Road' (2014) 77(5) MLR 763, 764.
[129] Ibid.

could inadvertently exacerbate the risk of fraud.[130] It also noted that conveyancers may need to provide e-signatures on behalf of clients, something which could give rise to practical difficulties.[131] The Commission has accepted that the envisaged timeframe for implementing e-conveyancing was unduly optimistic; in its 2016 Consultation Paper, it conceded that 'simultaneous completion and registration does not provide a practical way forward at this time. We feel that for electronic conveyancing to become a reality it is necessary to step back from the goal'.[132] Even so, it would remain the 'ultimate, if long term, goal'.[133] Again, this illustrates that the statutory objectives cannot be absolutely achieved – here, pragmatism dictates that the initial aims may need to be revised.

Arguably, this development should be welcomed as e-conveyancing may give rise to a series of difficulties. As well as eliminating the registration gap, Gardner contends that e-conveyancing can enhance the autonomy of contracting parties.[134] Under the current model, parties lack control over registration events; they instruct solicitors to lodge applications, which are in turn processed by registry actors. While Gardner concedes that e-conveyancing does not entirely alleviate this issue, he argues that it removes an actor from the chain (registry staff) over whom transferees exercise no influence (in so far that they cannot select or appoint registry officials). Rather, the completion and registration of dispositions is entirely carried out by the interest holder's chosen agents. However, it is not clear that e-conveyancing empowers the parties in the manner contended for by Gardner. A key issue with e-conveyancing is that it heightens the risk of fraud; as Cooke observes, it is easier to forge signatures electronically than to do so in wet ink.[135] This increases the likelihood that proprietors may be non-consensually deprived of property due to the intervention of third parties, eroding their autonomy over transactions. Confidence in the security of the electronic conveyancing process may stall, potentially contributing towards market drag. This is supported by Perry, who warns that fraudsters may be able to gain access to private keys which are used to generate digital signatures and commit forgery on a widespread scale.[136] As the effects of such digital security breaches may not be initially apparent (in the way that a

[130] HM Land Registry, *Report on Responses to E-Conveyancing Secondary Legislation* (HM Land Registry 2011) [5.2].
[131] Ibid [5.1].
[132] Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (Law Com No 277, 2016) [20.20].
[133] Ibid [20.24].
[134] Gardner (n 128) 771.
[135] Cooke (n 95) 164.
[136] Raymond Perry 'E-conveyancing: problems ahead?' (2003) May/June Conv 215, 223.

computer virus is for instance), he argues that fraud could go undetected until proprietary entitlements have been transferred. To mitigate this, the devices used to facilitate e-conveyancing may need to be heavily secured, incurring considerable costs.[137] This may undermine the then government's prediction that e-conveyancing would generate a gross saving of £21.00 per transaction.[138] To succeed, any drive towards e-conveyancing must therefore be accompanied by robust measures to mitigate property fraud. Perhaps these changes will be prompted by the Commission's proposal that the registry should establish minimum standards – or reasonable steps – that conveyancers must adhere to when verifying clients' identities (giving rise to a duty of care).[139] However, until material progress is made, this ambition has rightfully been consigned to the backburner. It is also unclear that the system could be successfully implemented; as Cooke warns, parties who attempt to transfer proprietary entitlements through conventional paper-based deeds may use the doctrine of proprietary estoppel to assert the enforceability of their interests. If successful, they could acquire a binding right despite circumventing the electronic scheme. This would 'sabotage the new system'.[140]

Conclusion

The Law Commission attributed a series of objectives to the LRA 2002. Above all, it is designed to ensure that the register provides a complete and accurate insight into the state of a title; in turn, dispositions of land can be expedited as part of a wider drive to revolutionise the conveyancing process. Electronic conveyancing would form a central cornerstone of this project. However, the Act does not fully deliver on these lofty ambitions. The risk of fraud has derailed progress towards the simultaneous completion and registration of transactions. More fundamentally, it should be recognised the Act does not aim to create an entirely comprehensive register; this intention has been tempered by a desire to simultaneously advance competing policy objectives. Ultimately, this highlights that the LRA 2002 does not place the absolute realisation of one aim above all others. Rather, it strikes a subtler compromise, reflecting the fact that it must balance the sometimes irreconcilable interests of various registration participants. It is a product of this tension and does not seek to engender the maximum level of purchaser protection. This consideration should serve as useful

[137] Ibid [222].
[138] Lord Chancellor's Department, *Electronic Conveyancing--A draft order under section 8 of the Electronic Communications Act 2000. A Consultation Paper* (Lord Chancellor's Department 2001).
[139] Law Commission (n 26) [22.36].
[140] Cooke (n 95) 164.

guidance when interpreting the statute and ascertaining the extent to which proprietors ought to be insulated from adverse rectification claims. With this in mind, the following sections evaluate the statutory provisions which have a particular influence on the scope of rectification (and by extension, mistake).

Chapter 3

Examining the Title Security Provisions

Introduction

The previous chapter argued that the LRA 2002 seeks to produce a largely accurate and comprehensive register which can be readily relied upon by prospective purchasers. However, this objective has not been absolutely realised because it conflicts with other aims of the land registration project, not least the policies underpinning overriding interests. In some circumstances, the statute therefore envisages that purchasers should be subjected to adverse encumbrances which cannot be gleaned from the register. It follows that the statute does not seek to engender the maximum level of purchaser protection, something which should serve as useful guidance when interpreting the statutory provisions relating to rectification (which necessarily prejudices proprietors, including those who have recently acquired an estate). This chapter will examine the first set of provisions which have a particularly significant influence on the scope of rectification – those relating to the conclusiveness of the proprietorship register.

This chapter explores the degree of title security which the LRA 2002 promotes. On one hand, registration systems may stipulate that registration acts as the source of indefeasible title; here, proprietors' titles are generally irremovable. At the other extreme, they may endorse 'registration of title'; the register can be altered whenever it fails to reflect the entitlements conferred by general property law. This chapter will assess which of these models, if any, the LRA 2002 subscribes to. The following three provisions exert a particularly significant influence on the conclusiveness of the register: section 58, Schedule 4, and Schedule 8. Accordingly, these provisions will form the focal point of the analysis.

The chapter will be structured as follows. Firstly, it will provide an overview of the various degrees of title security which registration systems can promote, ranging from indefeasibility to mere registration of title. Having done so, it will explore the aforementioned statutory provisions in turn, with a view to ascertaining how much title security they create. Finally, it will consider the extent to which the provisions collectively expose proprietors' titles to the risk of rectification.

Arguably, the title security which the statute creates is heavily qualified. While, in principle, section 58(1) establishes that registration confers absolute ownership upon proprietors (as opposed to a bare legal title), there are a number of occasions on which this title promise may fail to transpire. The scope of this statutory vesting power has been fettered by the general boundary rule (located in section 60 of the LRA) and the section 58(2) exception. More importantly, the provision does not immunise proprietors from the risk of rectification; it merely establishes that registration is constitutive of title, subject to Schedule 4. Schedule 4 appears to make a greater contribution towards title security; it contains a presumption against rectification when registered proprietors are in possession of disputed land. However, the provision's vagueness means that it does not necessarily provide such a profound degree of protection. It does not articulate the meaning of key prerequisites for departing from the presumption, such as 'unjust not to rectify'; this grants the judiciary considerable discretion to interpret these terms and thus determine whether rectification should be ordered on a case-by-case basis. Rather than rigidly confining the ambit of rectification, Schedule 4 instead permits the register to be modified in a flexible manner. Neither does Schedule 8 curtail the registrar's ability to order rectification. If anything, it indicates that a broad corrective power is perfectly reconcilable with the statute, seeing that the proprietor's title guarantee can manifest itself in the form of an indemnity (and not merely land). Ultimately, the provisions therefore establish qualified title security at best; indefeasibility is not the aim of the game. Therefore, mistake – which is the key prerequisite for rectification - does not need to be narrowly construed.

Title security systems: An overview

Land registration systems may seek to promote static and dynamic security. As O'Connor observes, static security tends to safeguard the current proprietor; it preserves the existing allocation of proprietary entitlements so that owners are not deprived of land unless they voluntarily convey it to others.[141] According to this principle, nonconsensual dispositions should not effectuate a shift in proprietary entitlements. For O'Connor, this provides existing owners with assurances that their titles are secure, encouraging investment. O'Connor also recognises that land registration systems aim to promote dynamic security.[142] This principle is more favourable to purchasers. It ensures that their titles are not susceptible to nonconsensual

[141] O'Connor (n 19) 48.
[142] Ibid.

rectification, except in a limited range of circumstances; purchasers' reliance on the public face of the register is protected, irrespective of defects in the root of title. This may limit the risks associated with acquiring land, increasing its alienability. In turn, purchasers may be more inclined to purchase land with a view to exploiting its potential, giving rise to more productive and innovative land use. In the event of title disputes, these concepts cannot be easily reconciled; land law must decide whether the new proprietor can resist rectification or alternatively, whether the property should be revested in the original owner. O'Connor refers to this as a 'security dilemma'.[143] Cooper describes the problem in similar terms, arguing that 'any property regime must choose between security of owners and security of purchasers, either protecting owners against the risk of loss to future acquirers or protecting purchasers against the risk of failure to acquire the anticipated rights: it cannot do both'.[144] In his view, title disputes can be adjudicated by subordinating one form of security to the other, with property law expected to appropriately contain and allocate the risks posed to each party. There are various title dispute systems or adjudication rules which can be deployed here.

The first of these models is referred to as indefeasibility. In its purest form, indefeasibility insulates registered proprietors from rectification; the register cannot be modified, irrespective of any defects in either the root of title or the immediate disposition.[145] The register acts as a conclusive statement of title; as Dixon notes, indefeasibility is a 'convenient description of the immunity from attack by adverse claims (which is) enjoyed by a registered proprietor'.[146] Cooke likens it to 'a strong positive warranty' which 'tells a purchaser that what he or she buys will be stable and cannot be taken away even if there is a defect in the transaction by which it was acquired'.[147] Few registration systems implement indefeasibility in its purest form. Many Torrens systems profess to be guided by indefeasibility yet permit rectification in certain circumstances. Indeed, a key aim of many Torrens systems is that 'the intelligent man or woman should, by looking at the register, know all that needs to be known and can be certain that his or her ownership will be protected from all corners, subject to well-defined exceptions'.[148] These exceptions prevent absolute indefeasibility from transpiring and tend to arise when the proprietor has fraudulently effected a disposition from

[143] O'Connor (n 19) 47.
[144] Simon Cooper, 'Resolving title conflicts in registered land' (2015) 131(1) LQR 108, 131.
[145] Elizabeth Cooke, *Land Law* (3rd edn, OUP 2020).
[146] Martin Dixon, 'Title Guarantee or title indefeasibility?' in David Grinlinton and Rod Thomas (eds), *Land Registration and Title Security in the Digital Age: New Horizons for Torrens* (1st edn, Routledge 2020) 16.
[147] Cooke (n 95) 102.
[148] Dixon (n 146) 16-17.

the original owner. This 'in personam' exception was recognised in *Frazer v Walker,* where the Privy Council explored the title security provided by section 62 of New Zealand's Land Transfer Act 1952.[149]

Commentators have broadly argued that there are three principal forms of indefeasibility. Firstly, immediate indefeasibility ensures that the title of a registered proprietor, B, is not susceptible to rectification following a disposition from person A. Indefeasibility arises at the first stage of a chain of conveyance.[150] This is very similar to pure indefeasibility. Some jurisdictions implement aspects of immediate indefeasibility, though few tend to absolutely embrace it. New Zealand is a striking example; in *Frazer v Walker*, it was held that rectification was not available against a newly registered proprietor, provided that they were unaware of the fraud which tainted the underlying disposition. This immunity only arose because the purchaser had no knowledge of the underlying fraud. The decision suggests that immediate indefeasibility is not available to all parties. Even so, it could arise when these statutory conditions were adhered to, demonstrating that the jurisdiction has somewhat promoted it. A prominent criticism of immediate indefeasibility is that it produces harsh results for original proprietors, who may be deprived of property through no fault of their own (perhaps due to egregious conduct on the part of the purchaser).[151] O'Connor is sceptical that immediate indefeasibility generates considerable benefits for purchasers, since they have little redress against non-consensual appropriations of their newly acquired property.[152] In other words, they enjoy limited static security, minimising any initial gains.

Indefeasibility may also be deferred. Here, the title of the immediate transferee B can be impugned if the disposition from person A is flawed. However, if the property is subsequently conveyed to another party, the new proprietor (or remote purchaser) is immune from rectification. Indefeasibility arises at the second stage of a chain of conveyance.[153] In Lees' view, the LRA 2002 may defer indefeasibility in this manner.[154] She attributes this to the combined effect of sections 58 and 23; the former establishes that registration is constitutive of title, subject to the possibility of rectification. Pursuant to section 23, the registered proprietor B then assumes the dispositive powers of an absolute owner (subject to limitations

[149] *Frazer v Walker* [1966] UKPC 27.
[150] O'Connor (n 19) 53.
[151] O'Connor (n 19) 60.
[152] Ibid.
[153] Ibid.
[154] Emma Lees, 'Title by Registration: Rectification, Indemnity and Mistake and the Land Registration Act 2002' (2013) 76 MLR 62.

listed in the register), enabling them to validly convey the property to person C. In her eyes, the subsequent disposition is not tainted by a mistake; rather, it is authorised by the statute, precluding rectification. Cooper refers to this as the statutory empowerment theory.[155] The merits of Lees' argument are fiercely contested and a full discussion is not included in this thesis (which, as outlined in the introduction, is concerned with dispositions from A-B). However, if Lees' contentions are correct, they provide a useful illustration of how deferred indefeasibility operates.

Cooke argues that indefeasibility may also be qualified.[156] Here, the title of the registered proprietor may be vulnerable to rectification in certain circumstances. For instance, the proprietor's conduct may have made a material contribution to a mistaken registration. It is questionable whether this amounts to indefeasibility; after all, purchasers' titles are defeasible once the claimant can demonstrate that certain conditions have been satisfied. It is markedly different from pure indefeasibility. Even so, it should be recognised that Cooke argues that there is a spectrum of indefeasibility, which can accommodate these milder iterations.

While indefeasibility is conducive to greater levels of purchaser protection, other title dispute mechanisms have also emerged. At the other extreme lies registration of title. Here, the register is viewed as a mere record of title; it not the source of proprietary entitlement but a reflection of a pre-existing state of affairs.[157] The register can be modified whenever it fails to reflect the true extraneous position, which is often determined by general property law principles. If so, the register may act as what Watterson and Goymour describe as a 'publicising mechanism'; it merely demonstrates that an individual has convinced the land registry that they have satisfied the requirements for registration.[158] Lady Hale expressed support for this model in *Scott v Southern Pacific Mortgages*: 'it is important to bear in mind that the system of land registration is merely conveyancing machinery. The underlying law relating to the creation of estates and interests in land remains the same. It is therefore logical to start with what proprietary interests are recognised by the law and then to ask whether the conveyancing machinery has given effect to them and what the consequences are if it has not. Otherwise, we are in danger of letting the land registration tail wag the land ownership

[155] Cooper (n 144) 110.
[156] Cooke (n 145) 68.
[157] Martin Dixon, 'A Not So Conclusive Title Register' (2013) 129 LQR 320.
[158] Amy Goymour and Stephen Watterson, 'A Tale of Three Promises: (1) The Title Promise' in Amy Goymour, Stephen Watterson, and Martin Dixon (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (Hart Publishing 2018) 281.

dog'.[159] This can be contrasted with 'title by registration' which stipulates that the purchaser's status as proprietor is contingent upon registration.

The remaining sections of this chapter will assess the extent – if any – to which the LRA's title security provisions align with these models.

Section 58

The first of these title security provisions is section 58. At first, section 58 may appear to attribute considerable protections to registered proprietors; it is the most poignant indication that the Act has supplanted registration of title with title by registration. However, while it establishes that registration confers absolute ownership upon proprietors – an attractive title promise - it otherwise makes a limited contribution towards title security. Not only has the provision's title promise been undermined by section 58(2) and the general boundary rule but it also fails to immunise proprietors from rectification. Rather, it provides that registration is constitutive of title, subject to the Schedule 4 correction powers. As such, it does not limit the scope of rectification.

What does Section 58 establish?

Section 58(1) states that 'If, on entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration'.[160] It is qualified by section 58(2) which stipulates that the statutory vesting power does not apply if there are outstanding registration requirements: 'Subsection (1) does not apply where the entry is made in pursuance of a registrable disposition in relation to which some other registration requirement remains to be met'.[161]

The significance of section 58(1) cannot be understated. It unequivocally confirms that registration confers title upon the proprietor of the legal estate, irrespective of whether the proprietor is otherwise entitled to be registered. It is immaterial that general property law principles stipulate that title should not be vested in the proprietor; registration is

[159] *Scott v Southern Pacific Mortgages* [2014] UKSC 52 [96].
[160] LRA 2002, s 58(1).
[161] LRA 2002, s 58(2).

determinative of ownership.[162] The goalposts are shifted so that deeds of conveyance no longer play a definitive role in ascertaining proprietary entitlement. In this respect, registration is the source of a proprietor's entitlement and constitutive of title; the transfer of title is contingent upon registration, with the Act establishing 'title by registration'.[163] The provision illustrates that Parliament has rejected 'registration of title', a model which may expose the proprietor's title to rectification whenever the register fails to reflect the extraneous unregistered land position.

Section 58 performs what Nair describes as 'statutory magic'.[164] Registration is constitutive of title, irrespective of any defects in the underlying disposition which would otherwise inhibit the transfer of proprietary rights. For instance, the disposition between persons A and B may be void, preventing title from passing under general principles of property law; the disposition is not deemed to have occurred. However, if person B is registered as proprietor pursuant to the void disposition, they will acquire title. A non-existent entitlement is converted into effective legal ownership. Goymour likens section 58(1) to the 'Midas Touch'; in the same way that King Midas transformed worthless objects into gold, the provision upgrades void interests into 'fully fledged proprietary rights'.[165]

Section 58 imposes unique rules for determining proprietary entitlement which depart from unregistered conveyancing principles. The Scottish Law Commission categorise such registration systems as 'positive' or 'bijural' in nature; registration confers rights, notwithstanding the reservations of general property law.[166] Such systems do not solely defer to the principles of general property law. They can be contrasted with negative systems, which do not permit any such divergence from general property law; the registration system cannot cure dispositions which are void under the general law.

At first, section 58 appears to make a meaningful title promise to registered proprietors who are not entitled to property under the general law. To further unpack this, it is necessary to consider the strength and conclusiveness of the title which section 58 confers.

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[162] Lees (n 154) 71.
[163] Ibid.
[164] Aruna Nair, 'Interpreting Section 58 of the Land Registration Act 2002: The Limits of "Statutory Magic"' (2013) 72(2) CLJ 257, 258.
[165] Goymour and Watterson (n 158) 282.
[166] Scottish Law Commission, *Discussion Paper on Land Registration: Void and Voidable Titles* (Scottish Law Com DP No 125, 2004).

'The Legal Estate': Absolute Ownership or Bare Legal Title?

Section 58(1) stipulates that registration vests the legal estate in the proprietor. It does not explicitly refer to equitable entitlement. This has prompted some commentators to claim that section 58(1) merely vests a bare legal title in the proprietor following a void disposition, as opposed to full beneficial ownership.[167] The equitable interest would remain vested in the original owner. If this theory is correct, the proprietor's title security could be heavily compromised; pursuant to the rule in *Saunders v Vautier*, the former owner may direct the proprietor to effect a retransfer the legal title.[168] As this is a right which beneficiaries enjoy, it would encumber the new proprietor from the moment that they assume title; in turn, any alteration to the register would merely give effect to a pre-existing entitlement, rather than specifically prejudicing the proprietor.[169] A key pre-requisite for rectification would therefore not be satisfied, precluding rectification and the possibility of an indemnity. The proprietor would be subjected to a double whammy loss, deprived of both land and monetary compensation.

This view of the statutory vesting power manifested itself in *Malory*.[170] It is important to note that *Malory* was determined under the LRA 1925 and did not directly consider section 58(1). However, it did address the meaning of section 69 LRA 1925, which also rendered registration constitutive of legal title without referring to the equitable entitlement. Section 69 stated that: 'The proprietor of land (where 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'.[171]

The facts of *Malory* were as follows. The dispute concerned a parcel of rear land adjoining a development site. The original proprietor, Malory BVI, was incorporated in the British Virgin Islands and claimed that it was in actual occupation of the rear land. In 1996, a similarly

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[167] Simon Gardner, 'Alteration of the Register: an alternative view Fitzwilliam v Richall Holdings Services Limited' (2013) 6 Conv 530.
[168] *Saunders v Vautier* [1841] 5 WLUK 52.
[169] Fox (n 48) 36.
[170] *Malory Enterprises Limited v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151.
[171] Land Registration Act 1925 (LRA 1925), s 69.

named company – Malory Enterprises Ltd (Malory UK) – was established, which fraudulently obtained a land certificate from the registry stipulating that it was the registered proprietor. Malory UK then executed a transfer of the rear land to Cheshire Homes (UK) Ltd, which was subsequently registered as proprietor. It was accepted that the disposition was void under the general law, having been induced by forgery.

The Court of Appeal held that that registration pursuant to a void disposition merely confers a bare legal title upon the proprietor. Significant emphasis was attributed to section 20 of the LRA 1925, which stipulated that the registration of a disposition of the freehold estate conferred the absolute fee simple estate upon the transferee, 'together with all rights, privileges, and appurtenances belonging or appurtenant thereto'.[172] As the transaction from Malory UK to Cheshire Homes (UK) Ltd was void, the Court of Appeal held that there was no relevant disposition within the meaning of section 20. Therefore, the registration of a void transaction could not transfer all the rights and privileges which would ordinarily accompany the freehold estate, including an equitable title; all that was transferred was the legal title to the estate pursuant to section 69.[173] It followed that Malory BVI retained an equitable interest in the property and reserved the power to request a retransfer of legal title. This would result in the alteration of the register, with no indemnity being paid to Cheshire Homes (UK) Ltd. This has been referred to as the '*Malory* 1 argument', which imposes a trust solution.[174] In any event, the Court of Appeal considered that Malory BVI enjoyed a proprietary right to rectify the register.[175] Given that Malory BVI was in actual occupation of the estate, this amounted to a binding overriding interest within the meaning of section 70(1)(g) of the LRA 1925.[176] Hence, Malory BVI's right to seek rectification encumbered Cheshire Holdings (UK) Ltd and could give rise to alteration. Dixon describes this as the 'the *Malory* 2 argument'.[177] Crucially, it was held that section 69 – the forerunner to section 58(1) of the LRA 2002 – merely confers a bare legal title upon proprietors who take under a void disposition.

This ruling was reiterated in *Fitzwilliam*, which was decided under the LRA 2002.[178] The dispute involved a property in Richmond which was originally vested in Mr Fitzwilliam. Mr

[172] LRA 1925, s 20.
[173] *Malory* (n 170) at [65].
[174] Law Commission (n 132) [13.44].
[175] *Malory* (n 170) at [67]-[68].
[176] Ibid.
[177] Martin Dixon, 'Rectifying the register under the LRA 2002: the Malory 2 non-problem' (2016) 5 Conv 382.
[178] *Fitzwilliam v Richall Holdings Services Ltd* [2013] EWHC 86.

George forged a power of attorney which purportedly granted him the authority to manage Fitzwilliam's property and affairs. Relying on this, Mr George executed a transaction of the property to Richall Holdings Services Ltd, which was subsequently registered as proprietor of the freehold estate. While Newey J acknowledged that *Malory* has attracted substantial criticism, he considered that it was binding upon him.[179] This was because he did consider that there were any material differences between sections 69 and 58, and sections 20 and 29 respectively.[180] Hence, he concluded that a) the registration of a void transaction merely vests the legal estate in the proprietor, b) the original proprietor retains a beneficial interest in the estate and c) the original proprietor can therefore seek alteration of the register without recourse to the Schedule 4 rectification scheme. In applying the law to the facts, Newey J held that Richall retained the property on bare trust for Fitzwilliam. Fitzwilliam could apply for the register to be altered for the purpose of bringing it up to date. This would have been the case in any event because Fitzwilliam enjoyed an overriding proprietary right to rectify the register by virtue of actual occupation.

Fitzwilliam asserts that the statutory magic of section 58 is limited in cases involving void dispositions; the new proprietor is not the absolute beneficial owner but a bare trustee. This position is supported by Hill Smith, who contends that section 58 effects a separation of the legal and equitable titles.[181] He acknowledges that legal and beneficial entitlements are not inherently segmented. As Lorde Browne Wilkinson ruled in *Westdeutsche*, 'A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title'.[182] In Hill Smith's view, section 58 initiates such a separation by omitting any reference to the equitable title; the provision fails to explicitly recognise its existence, suggesting that registration treats legal and equitable entitlements in a different manner. On this view, registration simply orchestrates a transfer of legal title, with statutory vesting not extending to equitable entitlements. However, Hill Smith's contentions cannot be easily reconciled with the *Westdeutsche* judgement. Lorde Browne Wilkinson stipulates that the legal title is accompanied by all corresponding rights unless the estates are specifically separated. The

[179] Ibid at [84].
[180] *Fitzwilliam* (n 178) at [77]-[81].
[181] Alexander Hill-Smith, 'Forgery and Land Registration: the decision in Malory Investments v Cheshire Homes' (2009) 2 Conv 127, 135.
[182] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 HL [706].

transfer of legal title can effectively convey the beneficial interest to the transferee in the absence of any such separation. Contrary to Hill Smith's contentions, there is therefore no need for section 58 to explicitly refer to the equitable interest; the legal title vests absolute beneficial ownership as a general rule. This sentiment is well captured by Lees, who argues that 'section 58 is not so much irrelevant as to equitable title, but merely silent, and therefore does not require us to conclude that where a disposition is void the equitable title is held on trust for the original owner following registration'.[183] Read properly, section 58(1) thus indicates that registration is constitutive of absolute beneficial ownership unless the parties explicitly create a trust. Indeed, the Law Commission notes that section 58 only refers to the legal estate because there may be some circumstances in which a transferee makes an express declaration of trust in favour of another party.[184] However, this would be exceptional.

Gardner contends that the registration of a void disposition may constitute a trust generating event.[185] For Gardner, this position is not 'inherently unsupportable', not least because the general law stipulates that void dispositions do not effect any transfer of property at all; the disposition is not considered to have taken place, with title remaining vested in person A.[186] While he concedes that the land registration provisions permit a transfer of legal title in these circumstances, he contends that there is scope to reconcile this with the general law. In particular, it is possible to 'engineer a replica of voidness' whereby the transferee holds property on trust for the transferor in the event of a void transaction (such that person A can rely on the rule in *Saunders v Vautier* to regain legal title).[187] This is faithful to the land registration provisions while also achieving the outcome envisaged by the general law, namely that the property is revested in the transferor. Moreover, Gardner argues that a trust can arise whenever the transferor lacks an intention to transfer property to person B, something which tends to apply to void dispositions involving forgery. In his view, this is supported by Lord Browne Wilkinson's dicta in *Westdeutsche*, a case which concerned an ultra vires – and thus unintended (as a matter of law) – disposition. While Lorde Browne Wilkinson rejected the notion that a resulting trust arose in these circumstances, he was receptive to the idea that a trust generating event had occurred.[188] He expressed some support

[183] Emma Lees, '*Richall Holdings v Fitzwilliam: Malory v Cheshire Homes* and the LRA 2002' (2013) 76 MLR 924, 931.
[184] Law Commission (n 132) [13.58].
[185] Gardner (n 167) 532.
[186] Gardner (n 167) 531.
[187] Gardner (n 167) 532.
[188] *Westdeutsche* (n 182) [716].

for the idea that a constructive trust could emerge, despite not ultimately ruling that it had done so (in part because the parties did not make pleadings to this effect). Gardner therefore argues that void transactions induced by forgery can separate the legal and equitable titles. However, it is difficult to see how a trust could have arisen in either *Malory* or *Fitzwilliam* – the very circumstances which Gardner is referring to. Both cases involve a third-party fraudster engineering a transfer of A's property to a good faith proprietor. In these circumstances, an express trust has not arisen; the unsuspecting new proprietor does not voluntarily or explicitly establish a trust in favour of A. It is equally implausible that a constructive trust could arise; as Goymour reasons, these trusts exist to abate the trustee's unconscionable conduct in denying the trust.[189] However, in both cases, the purported trustee is a bona fide proprietor who has not consciously participated in fraudulent activity. Hill Smith recognises this, noting that Cheshire Homes (UK) Ltd did not act in an egregious manner in *Malory*; it provided consideration for the transfer and did not demonstrate a lack of due diligence or carelessness (such that 'there would have been no basis for imposing any form of constructive trust').[190] This leaves only the possibility of a resulting trust, which Goymour describes as improbable; they tend to arise when the former owner effects the transfer of legal title. However, in both *Malory* and *Fitzwilliam*, the intervention of a third party was responsible for the conveyance. Hence, even when the underlying transaction is void, it appears highly unlikely that property will be held on bare trust for the original owner.

Hill Smith argues that the *Malory* and *Fitzwilliam* approach is vindicated by a joint reading of sections 58 and 29 of the LRA 2002. For Hill Smith, the provisions have the combined effect of ensuring that the registration of a void disposition merely confers a bare legal title – replicating the consequences of sections 69 and 20 of the LRA 1925.[191] In Hill Smith's view, sections 69 and 20 of the LRA 1925 played markedly different roles; section 69 merely referred to the legal estate and so simply conveyed the legal title to the transferee. It performed what he describes as a limited vesting function. Conversely, he argues that section 20 could facilitate the transfer of both legal and equitable estates provided that certain conditions were satisfied. Indeed, so long as a disposition took place, the freehold estate would be conferred upon the proprietor, 'together with all rights, privileges, and appurtenances'; the provision also stipulated that 'the disposition shall operate in like manner

[189] Goymour (n 39) 644.
[190] Hill Smith (n 181) 135.
[191] Ibid 134.

as if the registered transferor… was entitled to the registered land in fee simple in possession for his own benefit'.[192] A disposition could culminate in the conferral of both the legal and equitable title, indicating that section 20 played a much more profound vesting role than section 69. Hill Smith thus argues that section 69 alone could not guarantee absolute beneficial ownership. He contends that a similar distinction can be drawn between sections 58 and 29 of the LRA 2002. For Hill Smith, section 58 is a universally applicable provision which confers legal title upon all registered proprietors. Conversely, section 29 (which governs the effect of dispositions) confers additional advantages upon a select number of proprietors, namely those who secure the registrable disposition of a registrable estate for valuable consideration (which is subsequently completed by registration). In Hill Smith's view, this mirrors the distinction between sections 69 and 20 of the LRA 1925: 'The distinction made by the Court of Appeal between the limited vesting of the legal estate conferred by s69 and the legal and beneficial vesting conferred by s20 is plain and is one precisely mirrored in ss29 and 58 of the 2002 Act'.[193] According to this view, section 58(1) plays the same limited vesting role that has been attributed to its predecessor.

However, Hill Smith's argument can be disputed on several grounds. He claims that section 69 of the LRA 1925 was merely constitutive of legal title. However, this does not appear to be the case. If section 58 mirrors its predecessor, it does not therefore simply confer a bare legal estate upon proprietors. As Harpum observes, section 82 of the LRA 1925 envisaged that errors in the register could be resolved through rectification, with special protections existing for proprietors in possession.[194] Indemnities would ordinarily be payable to the losing party except in limited circumstances (for instance, where the alteration gave effect to overriding interests).[195] However, Arden LJ's treatment of section 69 in *Malory* circumvents this statutory scheme, undermining what Harpum describes as the 'essential structure of land registration'.[196] Indeed, if the original owner constituted a beneficiary, they could require the bare trustee to transfer the legal estate to them (pursuant to the rule in *Saunders v Vautier)*; the register would be altered to give effect to this beneficial entitlement, with no indemnity payable. This would occur, irrespective of whether the proprietor was in possession. Proprietary entitlements would shift due to the application of the extraneous *Saunders v*

[192] LRA 1925, s 20.
[193] Hill Smith (n 181) 134.
[194] Charles Harpum, 'Registered Land — A Law Unto Itself?' in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts* (Butterworths 2003) 99.
[195] LRA 1925, s 82(3).
[196] Harpum (n 194) 99.

Vautier doctrine, rather than the statutory alteration regime which Parliament designed to regulate such matters. Hence, Arden LJ's interpretation of section 69 could frustrate the legislature's intention, undermining its plausibility. A purposive interpretation yields a similar conclusion. Harpum supports this, arguing that section 69 was designed to clarify how the registered land system differed from its unregistered counterpart.[197] At the time of the LRA 1925's inception, registered land was still a relatively new phenomenon, with unregistered conveyancing rules influencing understandings of how transactions operated. There was a widespread understanding that valid deeds of conveyance effected a transfer of legal title. Registered land systems accord primacy to registration itself; the importance of the underlying dispositive instrument is subordinated. In view of this difference, it was important to explicitly outline how the registered land system would transfer legal title, a function which was delegated to section 69; it was not consciously designed to draw a distinction between legal and equitable titles. The provision is not attempting to limit the scope of the statutory vesting power in the manner contended for by Hill Smith. If section 58 mirrors its predecessor, it does therefore not simply confer a bare legal title upon proprietors.

Even if section 69 played a limited vesting role, section 58 can nevertheless be distinguished from it. At first, sections 69 and 58 may appear to be very similar provisions. Both provisions establish that registration confers the legal estate upon the proprietor, irrespective of whether there has been a valid conveyance. They also omit any reference to the position in equity. However, there are material differences between the provisions. Unlike section 69, section 58(1) is qualified by subsection 2, which stipulates that the vesting of the legal estate will not take place if there are outstanding registration requirements in relation to the underlying disposition. This is designed to complement section 27(4) of the LRA 2002, which provides that a registrable disposition cannot operate in law unless all registration requirements have been fulfilled. In the interim period, it can only take effect in equity. As Harpum contends, it does not follow that a disposition ceases to operate in equity once the requirements have been fulfilled and the disposition takes effect in law.[198] Moreover, Harpum notes that the wording of section 58(1) is distinct from that of section 69; it refers to the registration of the 'proprietor of the legal estate' as opposed to registration vesting the legal estate in the 'proprietor of the land'.[199] Legal estate assumes the same meaning as it does under sections

[197] Ibid.
[198] Harpum (n 194) 203.
[199] Ibid.

1(4) and 205(1)(x) of the Law of Property Act 1925; crucially, it does not merely encompass substantively registrable estates in land but also 'interests and charges which under this section are authorised to subsist or be conveyed or created by law'.[200] For the purposes of section 58(1), the proprietor of a legal estate can thus include the proprietor of a registered charge. Such charges cannot be held on trust for others; it would be incoherent - and as Harpum argues redundant - to claim that a financial institution holds a forged charge on bare trust for the proprietor of the encumbered estate.[201] The only possible beneficiary of the legal charge would be the financial institution itself – it certainly would not be the proprietor of the land, whose title would be subject to an unwelcome and unexpected encumbrance!

Most importantly, Hill Smith's argument inaccurately draws parallels between sections 20 and 29. It may be the case that section 20 governs the transfer of equitable entitlements. However, section 29 of the LRA 2002 performs an entirely different role. This is supported by Lees, who argues that the provisions are functionally distinct.[202] While section 29 is also concerned with dispositions, she notes that it forms part of the statute's priority rules, determining whether proprietors are encumbered by pre-existing interests. It has no bearing on whether the transfer of the legal title is potentially accompanied by beneficial entitlements, differing from section 20 of the LRA 1925. The issue of vesting is entirely governed by section 58. This means that the LRA 2002 does not seek to consciously separate the legal and equitable title to an estate – rather, registration gives rise to absolute beneficial ownership. For Lees, the material difference between sections 20 and 29 also means that the *Malory* reasoning, which focuses on the provisions of the LRA 1925, is inapplicable to the adjudication of the LRA 2002.[203]

Indeed, *Malory* and *Fitzwilliam* are highly unlikely to be compatible with the LRA 2002 because the judgments circumvent the statutory rectification scheme. As earlier explained, *Malory* enables dispossessed proprietors to regain disputed land pursuant to the rule in *Saunders v Vautier*. Any modification to the register merely gives effect to this beneficial entitlement; it is not the source of the proprietor's loss. The alteration does not prejudicially affect the interests of the proprietor, precluding rectification and the possibility of obtaining an indemnity. Problematically, this facilitates a transfer of proprietary rights without any

[200] Law of Property Act 1925 (LPA 1925), s 1(4).
[201] Harpum (n 194) 203.
[202] Lees (n 183) 929.
[203] Ibid 930.

regard for the special rules governing rectification.[204] Schedule 4 establishes a specific test for determining whether rectification should be ordered. The starting point is to ascertain whether the registration of a void disposition amounts to a mistake and whether the correction of said mistake would prejudice the proprietor. If so, the question of possession assumes paramount importance; there is a presumption against rectification if the proprietor is in possession, subject to two exceptions. Conversely, rectification should be ordered against proprietors who are out of possession in the absence of exceptional circumstances. The judiciary failed to consult these factors in *Fitzwilliam*; there was no consideration of whether rectification was available in principle (on the basis that a void disposition constituted a mistake) nor whether it should be ordered in view of Richall's status as a proprietor in possession. These concerns are echoed by Nair.[205] She argues that the exceptions to the presumption in favour of proprietors in possession are designed to enable the judiciary to exercise the discretion to depart from the general rule in appropriate circumstances. For instance, the judiciary can assess whether it would be unjust to refuse rectification in light of the specific factual circumstances, adopting a context led approach, rather than one which is entirely guided by abstract legal principles. Yet, *Malory* appears to support an 'automatic' or absolute general rule, namely that the registration of void dispositions should always be corrected through alteration. For Nair, the Court of Appeal's approach has thus marginalised the discretionary element of Schedule 4, undermining the legislature's intentions.[206] As she puts it, *Malory* 'produces an unnecessarily polarised conception of the choices to be made by the title registration system and it would be preferable to allow the discretionary aspects of the statute to do more work in this area'.[207]

Gardner argues that *Malory* represents a sensible interpretation of Section 58.[208] For Gardner, the Act does not represent an 'unqualified vector' for dynamic security; it dilutes purchaser protections in numerous ways, including through the alteration provisions and the binding effect of overriding interests.[209] He refutes the notion that these statutory exceptions are the only qualifications which apply to the dynamic security principle. Indeed, given that the Act loosely defines key pre-requisites for rectification, such as mistake and exceptional

[204] Elizabeth Cooke, 'The register's guarantee of title' (2013) 4 Conv 344, 346.
[205] Aruna Nair, 'Forgery and the Land Registration Act 2002: The Marginalisation of Discretion' [2013] 24 KLJ 403.
[206] Ibid.
[207] Nair (n 205) 411.
[208] Gardner (n 167) 533.
[209] Gardner (n 167) 534.

circumstances, he argues that it does not represent a carefully crafted scheme which seeks to tightly confine the scope for impugning proprietors' titles. Rather, the statute offers an incredibly vague insight into how strong purchaser protections should be, amounting to what Gardner describes as a 'tragic mess'.[210] In turn, it falls to the judiciary to determine the degree of purchaser protection which the statute affords; the starting point is to interpret undefined terms or elusive provisions which influence title security, namely section 58. For Gardner, *Malory* performed this task sensibly, recognising that the demand for dynamic security – the epitome of economic liberalism - does not necessarily outweigh the demand for liberal property theory (the notion that property should not be non-consensually appropriated from proprietors). In Gardner's view, this trend is evidenced by a number of factors, not least the UK's commitment to Article 1 of Protocol 1 ECHR.[211] This prohibits the involuntary seizure and confiscation of property. However, Gardner should arguably pay closer attention to the Act's aims and objectives before concluding that this interpretation is justifiable. One consequence of construing section 58(1) in this way is that the legitimate expectations of purchasers can be usurped; proprietors lose title due to an equitable interest which is not apparent on the face of the register. As Dixon observes, purchasers' reliance on the register is insufficient to protect their investments.[212] In *Fitzwilliam* for instance, Richall was deprived of the freehold estate, despite having consulted the register and relied on its assurance that the original owner did not retain an adverse interest. In turn, confidence in the reliability of the register as an information source may reduce, potentially prompting prospective purchasers to undertake a host of additional enquiries into titles. This would contravene the curtain principle, thereby increasing transaction costs and creating a more onerous, costly, and protracted conveyancing process.[213] A key objective of the statute – to expedite and simplify conveyancing – could be considerably undermined. To claim that a *Malory* or *Fitzwilliam* style interpretation of the statute is coherent is therefore misplaced.

The credibility of *Fitzwilliam* has been further undermined by the High Court's treatment of section 29. It was held that void transactions do not constitute dispositions for the purposes of section 29, such that Richall's title was encumbered by all pre-existing interests. This purportedly included Fitzwilliam's equitable entitlement. Fitzwilliam's beneficial interest

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[210] Gardner (n 167) 535.
[211] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 1 of Protocol 1.
[212] Dixon (n 157) 323.
[213] Ibid.

assumed priority vis a vis Richall's title and could be exercised to effect a retransfer of the legal estate. However, it is unclear why such significance was attributed to section 29. This is supported by Dixon, who observes that section 29 governs whether prior unregistered interests can bind the new registered proprietor; the interests in question must already exist at the time that the disposition takes place.[214] This did not apply to Fitzwilliam's purported beneficial interest – if it did exist, it would have been created by virtue of the disposition's voidness. The circumstances of the disposition would have generated the interest; it would not have predated the conveyance. Consequently, section 29 could not determine its priority in relation to Richall's estate, rendering the provision irrelevant.[215] This is echoed by Cooke, who argues that 'there is no need to go anywhere near section 29 and the meaning of disposition'.[216] Newey J's misinterpretation of section 29 casts further doubt on *Fitzwilliam's* plausibility.

In view of these considerations, it is argued that *Malory* and *Fitzwilliam* adopt a flawed interpretation of section 58(1). Section 58 confers absolute beneficial ownership upon registered proprietors and does not render the purchaser a bare trustee for the original owner. Fortunately, this was recognised by the Court of Appeal in *Swift 1st*.[217] Moore-Bick LJ held that Arden LJ's ruling on the statutory vesting power was decided 'per incuriam', such that it should be departed from.[218] As it stands, the courts do not endorse the notion that section 58 simply bestows a bare legal title upon the registered proprietor in the event of a void disposition. The *Malory* 1 argument has been rejected. While section 58 is limited in other ways (something which will be explored in the next section), it does at least ensure that registration vests both legal and equitable title in the registered proprietor. This is the title promise which the provision makes.

[214] Ibid.
[215] Ibid.
[216] Cooke (n 204) 350.
[217] *Swift 1st Limited v Chief Land Registrar* [2015] EWCA Civ 330.
[218] Ibid at [45].

The limits of the 'statutory magic'

At first, section 58 appears to establish a profound degree of title security; absolute ownership is conferred upon registered proprietors. This reduces the risk that purchasers may be usurped of legal title without receiving compensation (by virtue of the rule in *Saunders v Vautie*r). However, it is submitted that the purchaser protection which the statutory vesting power provides is in fact rather limited. In part, this has been contributed to by the fact that section 58(1) – with its promise of absolute beneficial ownership– is not engaged in a number of scenarios. Moreover, the provision does not insulate proprietors' titles from challenge or reduce their vulnerability to rectification. These caveats will be examined in turn.

A) The section 58(2) exception

The first difficulty emanates from section 58 itself and can be found in subsection 2. Section 58(2) qualifies subsection 1; it stipulates that the statutory magic does not operate if there are outstanding registration requirements in relation to the underlying disposition.[219] More specifically, it states that section 58(1) is inapplicable when 'the entry is made in pursuance of a registrable disposition in relation to which some other registration requirement remains to be met'.[220] This is designed to complement section 27(4), which provides that registrable dispositions cannot operate in law until they have been successfully completed by registration; all registration requirements must be adhered to, otherwise the disposition merely exists in equity. In this way, section 58(1) cannot be used to circumvent section 27(4).[221]

The prevalence of statutory vesting is therefore contingent upon how diligent proprietors are in discovering and executing the relevant registration requirements. The nature and scope of these registration requirements play a key role here; the more extensive and onerous they are, the less likely it is that proprietors will be able to effectively comply with them. Watterson and Goymour argue that the registration requirements can be solely located in Schedule 2 of the statute.[222] This interpretation is supported by the Government's Explanatory Notes, which provide that: 'Subsection (2) is designed to prevent subsection (1) overriding the rule in relation to registrable dispositions that a disposition only operates in law when all the relevant

[219] LRA 2002, s 58(2).
[220] Ibid.
[221] *Fitzwilliam* (n 178) at [81].
[222] Watterson and Goymour (n 158) 284.

registration requirements have been met (i.e. entry of the disponee on in the register as proprietor may not always be the only requirement. The legal estate will not vest in the transferee until all the appropriate requirements for registration set out in schedule 2 have been met'.[223] The drafters appear to favour a modest construction, which only encompasses requirements which can be found within the statute itself. In the absence of any contradictory statements in the statutory text, this intention should be honoured through a purposive interpretation. However, there is a risk that the vagueness of section 58(2) may provide scope for different judicial interpretations. The provision fails to clarify that the relevant registration requirements are confined to Schedule 2. As Watterson and Goymour observe, there is therefore a danger that the requirements may be construed more broadly so as to include obligations which are extraneous to the statutory scheme. This increases the likelihood that proprietors will be caught by the section 58(2) exception, preventing the provision's title promise from transpiring. Watterson and Goymour state that 'Section 58's title promise may be undermined ab initio by unwarranted expansive interpretations of the statutory exception as to when it bites'.[224]

Gelley v Shephard is a prominent example.[225] The case concerned a transfer of land between two companies, A and B. Company A had been struck off the British Virgin Islands Register on insolvency grounds. A third-party fraudster purporting to represent company A nevertheless initiated a transfer of its land to company B. The land registry subsequently requested evidence that company A constituted an extant company, with the response being forged as opposed to genuine. At trial stage, counsel for Gelley appeared to concede that a) this land registry requirement amounted to a 'registration requirement' for the purposes of section 58(2) and b) the requirement was not satisfied as the certificate illustrating A's status was forged. Consequently, section 58(1) was not engaged and B was not registered as proprietor of the land. At appeal stage, the matter was not reconsidered; it was held that counsel's concession could not be withdrawn, prohibiting any further debate on the matter. It thus appears that the statutory registration requirements were deemed to encompass the land registry's requirements, notwithstanding their omission from Schedule 2.[226] These requirements were attributed with a broader scope than intended, inhibiting the applicability

[223] *Fitzwilliam* (n 178) at [81].
[224] Watterson and Goymour (n 158) 285.
[225] *Gelley v Shephard* [2013] EWCA Civ 1172.
[226] Watterson and Goymour (n 158) 285.

of section 58(1). In this respect, section 58(2) could be interpreted in a way which materially qualifies subsection 1's title promise.

B) Section 60

Section 58's title promise has also been fettered by the general boundary rule.[227] Pursuant to section 60(1), the title plans in the register merely demarcate the general boundaries of a property; they do not illustrate the exact boundary line.[228] If parties wish to gain a more accurate insight into the precise demarcation of the boundary, they must make an application to the registrar.[229]

In principle, the general boundary rule constitutes a major exception to the statutory magic of section 58. The land in the general boundary area is not bestowed upon the proprietor following registration. As such, proprietors are not the guaranteed owners of certain land which may appear to fall on their side of the boundary according to a registry title plan (albeit subject to the general boundary warning). The title promise is not engaged in respect of this area – a geographical qualification on the Midas Touch.[230]

Neighbouring landowners may become involved in disputes about land abutting a boundary. These disputes may be classed as boundary disputes.[231] If so, the disputed land is viewed as falling within the general boundary area, such that the section 58 title promise is inapplicable. Following an application, the registrar determines the exact position of the boundary off register. Once this has occurred, some land may be removed from the title plans of either neighbour; however, this is not treated as removing land from the title because section 58's title guarantee never extended to this area.[232] Rather, the registrar merely produces 'another general boundary in a more accurate position than the current general boundary' (*Derbyshire City Council v Fallon*).[233] Any modification to the title plan is therefore not deemed to prejudice the proprietor, precluding rectification and an indemnity. Here, a proprietor may be deprived of land which they believed would fall within their title without any compensation – any expectations of ownership are entirely unprotected, undermining purchaser protections.

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[227] LRA 2002, s 60(1).
[228] LRA 2002, s 60(2).
[229] LRA 2002, s 60(4).
[230] Goymour (n 39) 641.
[231] Watterson and Goymour (n 158) 287.
[232] Ibid.
[233] *Derbyshire City Council v Fallon* [2007] EWHC 1326.

As Goymour notes, the above scenario can also be settled through a property dispute.[234] Here, the disputed land is not deemed to fall within the general boundary area – rather, it is vested in A by virtue of registration. The title promise applies. For said land to be incorporated into B's title, B must resort to the rectification provisions, demonstrating that a) there has been a mistake, b) the correction of said mistake would cause a loss to person A and c) rectification should be ordered on the facts of the case. Generally, A obtains an indemnity if rectification is ordered.

The statute does not define boundary land. This provides scope for judicial creativity, with Goymour arguing that the courts have demonstrated a tendency to construe disputed land as 'boundary land' even when the land mass involved covers a significant geographical area.[235] Such land is not subject to the section 58(1) title promise. For instance, in *Derbyshire City Council v Fallon*, the disputed area constituted a sizeable strip of land on which a garage had been erected. In *Barwell v Skinner*, the general boundary area amounted to between fifteen and twenty per cent of the total area which was covered by the neighbouring plots.[236] Similarly, in *Drake v Fripp,* it amounted to over one and a half acres while *in Well Barn Farming Ltd v Backhouse* an area of approximately 5 acres was subject to the general boundary rule.[237]

Taken together, these two exceptions to section 58(1) undermine the statutory title promise. The section 58(2) qualification means that purchasers may not in fact own the land which they have acquired and paid for. Due to the general boundary rule, a proprietor is not necessarily the guaranteed owner of all land which appears on the title plan. This has been compounded by Parliament's failure to define boundary land which enables the judiciary to expansively interpret the concept. In turn, there is a risk that proprietors may be unable to avail of significant swathes of land which they believed to form part of their titles.

[234] Goymour (n 39) 642.
[235] Ibid.
[236] *Barwell v Skinner* [2011] EWLandRA 2010/0982.
[237] *Drake v Fripp* [2011] EWCA Civ 1279; *Well Barn Farming Ltd v Backhouse and Anor* [2005] EWHC 1520.

C) Susceptibility to rectification

The greatest limitation on section 58's ability to engender strong title security is that it provides no protection from rectification. While the provision is labelled 'conclusiveness', it does not warrant this description; it does not establish that an absolute title is indefinitely vested in the registered proprietor unless they voluntarily convey it to others.

Section 58 merely stipulates that registration is constitutive of title, irrespective of defects in the underlying conveyance. It does not state that proprietary entitlements cannot be non-consensually altered once registration has taken place. Neither does it contain any other provisions which fetter the scope for rectification. This means that it is otherwise silent on the issue of conclusiveness. As Dixon argues, section 58 does therefore not embrace indefeasibility as it is traditionally understood; these systems would attribute some permanence to the registered proprietor's title, ensuring that it is generally irremovable from the proprietor save for limited exceptions.[238] Section 58 provides no such insulation or immunity. Instead, registration is constitutive of title, subject to the Schedule 4 rectification scheme.[239]

It would be more appropriate to characterise section 58 as a key element of the statute's title guarantee. As Dixon contends, its primary function is to ensure that the registered proprietor is the guaranteed owner for present purposes.[240] More specifically, they are the guaranteed owner for the purposes of transferring the land and enjoy an absolute owner's powers of disposition, save for any express limitations which appear in the register.[241] Indefeasibility is simply not what the provision envisages. As such, section 58 does not appear to be incompatible with an extensive corrective power (and by extension, a broad construction of mistake). Dixon supports this, stating that the rectification provisions are 'entirely consistent and supportive of section 58 as a guarantee of title and the mistake is to think that they need amendment in order to make title more indefeasible'.[242] For Dixon, 'title by registration' - the core characteristic of section 58 - does not always give rise to indefeasibility. While it may be adopted by registration systems which embrace indefeasibility, 'title by registration' alone cannot establish that the proprietor's title is irremovable; further factors need to be present for

[238] Dixon (n 146) 16.
[239] Dixon (n 146) 17.
[240] Ibid.
[241] LRA 2002, s 26.
[242] Martin Dixon, 'Updating the Land Registration Act 2002: title guarantee, rectification, and indefeasibility' (2016) 6 Conv 423, 426.

this to occur, namely non susceptibility to rectification.[243] In the absence of these additional features, the land registration system should be characterised differently, with England and Wales adopting a title guarantee which can manifest itself in either mud or money. Indeed, even though the Law Commission erroneously associated the LRA 2002 with indefeasibility in its 2016 Consultation Paper, the concept makes no appearance in the statute.[244] As Dixon states, 'indefeasibility is simply not the point of the LRA'.[245]

Ultimately, section 58 engenders limited title security. In some respects, it appears to confer meaningful protections upon purchasers. It rejects the 'registration of title' approach in favour of title by registration. The former could render proprietors' titles incredibly precarious; in the event of a discord between the register and the off-register position, alteration of the title register would always ensue. However, this is no longer the case. Secondly, section 58 arguably vests absolute beneficial ownership in proprietors, even when the underlying disposition is void. This alleviates the risk that proprietors may be prejudiced by the doctrine in *Saunders v Vautier*, which can give rise to alteration without the possibility of an indemnity. Considering this, it would be disingenuous to claim that section 58 provides no title security at all. However, such security is arguably limited, not least because the provision provides no insulation from rectification. In this sense, it does not confer a conclusive title, leaving proprietors to the mercy of the rectification provisions. Rather, section 58 guarantees that the proprietor is the absolute beneficial owner for present purposes (subject to the Schedule 4 alteration scheme). Even then, there are numerous qualifications which can prevent this title promise from materialising, namely the section 58(2) exception.

To ascertain whether the LRA 2002 promotes a strong degree of title security, it is therefore necessary to examine whether Schedule 4 significantly limits the scope for modifying the register. This will be examined in the next section.

[243] Dixon (n 146) 21.
[244] Law Commission (n 132) [13.89].
[245] Dixon (n 242) 426.

To rectify or not to rectify? – The effect of Schedule 4

The rules which govern the availability of rectification can be found in Schedule 4. Schedule 4 stipulates that rectification can arise in the event of a mistake, the correction of which would prejudicially affect the registered proprietor.[246] When deciding whether to order rectification, particular focus should be attributed to whether the proprietor is in possession. If so, there is a presumption against rectification, subject to two exceptions.[247] Firstly, the proprietor may have caused or substantially contributed to the mistake through fraud or lack of care.[248] Secondly, it may be unjust not to rectify the register.[249] If these exceptions apply, rectification ought to be ordered in the absence of exceptional circumstances.[250] Moreover, if the proprietor is not in possession. rectification should only be refused in exceptional circumstances.[251]

The presumption against rectification certainly confers enhanced protections upon proprietors in possession; to satisfy the second exception, applicants should demonstrate that it would be positively unjust to maintain the existing allocation of proprietary entitlements. However, the exceptions to the presumption may not necessarily impose an incredibly exacting standard. The second exception is sparse on detail, in that it refuses to attribute a more precise meaning to 'unjust'. This gives rise to considerable judicial discretion, enabling the courts to determine the scope of the exception (and by extension, the prevalence of the corrective power). This vagueness is also apparent in the statute's treatment of 'mistake'; there is no explicit confirmation that it must exist within the register. In turn, the judiciary enjoy significant latitude to determine how broadly a key prerequisite for rectification should be construed. As such, Schedule 4 does not rigidly confine the scope of the corrective power. This demonstrates that the statute does not embrace indefeasibility. This section will explore Schedule 4's core provisions in greater detail.

[246] LRA 2002 sch4 para 1
[247] LRA 2002 sch4 para 3(2)
[248] LRA 2002 sch4 para 3(2)(a)
[249] LRA 2002, sch4 para 3(2)(b)
[250] LRA 2002 sch4 para 3(3)
[251] Ibid.

Mistake

The statute merely notes that the availability of rectification is contingent upon the existence of a mistake. It does not provide any further insights into which events constitute mistakes, nor whether the mistake must exist within the register itself. Smith speculates that it may be wise to import this qualification into the test for mistake; given that it is the register which is being corrected, it could be argued that any errors should be consigned to the register alone.[252] According to this view, errors in the background facts do not necessarily constitute mistakes – for this to occur, they must also give rise to errors within the register itself. However, it is not readily apparent from the statute that this approach should be adopted. It may be implausible to do so, not least because it can be challenging to ascertain whether an error exists in the register or alternatively within the background facts. Dixon supports this, arguing that there is a very fine distinction between errors in the register and errors in the transactions which precede registration.[253] In his view, any assessments are subjective, amounting to matters of 'perspective' as opposed to substance.[254] He cites both *Walker v Burton* and *Baxter v Mannion* in support of this. In *Walker,* it was held that there was a mistake for the purposes of the statute; the Burtons had acquired the deeds to a farmhouse and formed the erroneous view that the transaction also bestowed entitlements to both the Lordship of the Manor and an adjoining fell (the fell being waste of the manor).[255] The Burtons were subsequently registered as the proprietors of both the incorporeal hereditament and the fell. In many respects, the error may appear to have been confined to the underlying disposition, which did not confer the rights which the Burtons anticipated; there was a discrepancy between the transaction's actual and intended effect. The registrar recognised that a valid transaction had taken place and so the registration does not appear to be inherently flawed. Equally however, it could be argued that the registrar erred in registering the Burtons with non-existent entitlements. Similarly, in *Baxter v Mannion*, it might be thought that the mistake arose in the background facts; the squatter incorrectly calculated the period of adverse possession. The registry correctly ascertained the principles governing the limitation period and applied this knowledge to the information with which it had been supplied. Perhaps, the error can be solely imputed to pre-registration events. Alternatively, it

[252] Roger Smith, 'Assessing Rectification and Indemnity: After *Gold Harp* and *Swift 1st'* in Amy Goymour, Stephen Watterson, and Martin Dixon (eds), *New Perspectives on Land Registration: Contemporary problems and solutions* (Hart Publishing 2018) 129, 136.
[253] Martin Dixon, 'Mistakes about Mistakes' (2023) 2 Conv 125, 127.
[254] Ibid.
[255] *Walker v Burton* [2013] EWCA Civ 1228.

may be argued that the register itself was mistaken as it conferred privileges to which the proprietor was not entitled as a matter of law. This demonstrates that there is not necessarily a clear and apparent distinction between errors in the register and errors in underlying dispositions. As such, it is not obvious that the 'in register' qualification – which limits the scope of mistake - should be imported into the statute.

Doubt may be cast over the void versus voidable distinction if mistakes do not solely exist within register entries. The registration of a voidable disposition is not deemed to constitute a mistake provided that the disposition has not been rescinded at the time that the entry is made. Here, the entry accurately reflects the legal effectiveness of the underlying disposition, such that it is not tainted by error. The key focus is on the entry itself, rather than the flaws underpinning the voidable disposition. If the 'in the entry in the register' approach is discarded however, there may be scope to impugn the registration of a voidable disposition, perhaps because it is vulnerable to rescission.[256] Alternatively, a behavioural standard may be adopted. While the thesis does not necessarily endorse this approach (for reasons which will be established in chapter 5), it should be noted that it is a possibility under the statute. Indeed, the statute does not appear to unequivocally endorse the void versus voidable distinction. Schedule 4 does not necessarily retain those aspects of the LRA 1925 which were receptive towards the distinction. Smith supports this, noting that section 82(1)(g) of the LRA 1925 implied that the categorisation of an underlying disposition could influence whether the register was susceptible to rectification.[257] The provision stated that rectification was available 'where a legal estate has been registered in the name of a person who if the land had not been registered would not have been the estate owner'.[258] This applies when the underlying disposition is incapable of effectively transferring rights but not where it retains its validity. Hence, while the registration of void dispositions could give rise to rectification, voidable dispositions may have been better insulated from corrective action prior to rescission. As Smith observes, the LRA 2002 does not contain an equivalent provision.[259] In this respect, it does not appear to draw a similar distinction.

Smith also acknowledges the possibility that mistakes may arise whenever the register fails to reflect the extraneous off register position as determined by general property law

[256] Smith (n 252) 136.
[257] Smith (n 252) 137.
[258] LRA 1925, s 82(1)(g).
[259] Smith (n 252) 138.

principles.[260] Arguably, this would be unwelcome; a key aim of the LRA 2002 is to orchestrate a shift away from the principles governing unregistered conveyancing. The Law Commission are opposed to this proposal and Smith notes that 'many will have sympathy for the proposition that we should not treat unregistered land as the holy grail of what is obviously correct'.[261] However, statutory vagueness leaves open this possibility, irrespective of its merits. The fact that the statute does not explicitly prohibit this approach is perhaps the most poignant sign that the registrar and the courts should enjoy considerable discretion to interpret mistake (rather than being constrained by an overly prescriptive statute).

The presumption in favour of proprietors in possession

When the proprietor is in possession of the disputed land, the statute establishes a presumption against rectification. The general rule is that proprietors' titles should not be susceptible to rectification, such that they enjoy enhanced levels of protection against non-consensual appropriations of property. Any deviations from the presumption are necessarily exceptional, illustrating that the LRA 2002 confers enhanced title security upon proprietors in possession.

For O'Connor, the statute has created a 'presumptive rule of static security' where non-possessing proprietors are concerned.[262] She contrasts this with the 'presumptive rule of dynamic security' which operates in favour of proprietors in possession.[263] She construes it as a 'major concession to dynamic security' which confers 'qualified' and 'mild wide immunity' against rectification.[264] Similarly, Cooke contends that the presumption has given rise to qualified indefeasibility; an entire category of proprietor is largely insulated from rectification, limiting the judiciary's discretion to order rectification whenever it may appear to be appropriate.[265] In Cooke's view, this has been compounded by the broad construction of 'proprietor in possession'. Pursuant to section 131 of the LRA 2002, it does not merely refer to registered owners who are physically present but also to individuals who can be considered to represent or embody the absent proprietor, namely tenants (if the proprietor is a landlord), mortgagees (if the proprietor is a mortgagor), licensees (in the event that the proprietor is a

[260] Smith (n 252) 136.
[261] Ibid.
[262] O'Connor (n 19) 50.
[263] Ibid.
[264] Ibid.
[265] Cooke (n 95).

licensor) and beneficiaries (if the proprietor is a trustee).[266] The presumption can thus apply in several scenarios.

Even so, the presumption is not absolute. As the authors of Ruoff & Roper acknowledge, it has been fettered by two protection disqualifying exceptions.[267] If these exceptions are satisfied, rectification will be ordered, illustrating that proprietors in possession do not enjoy immediate indefeasibility. Moreover, while the exceptions have not necessarily been liberally interpreted, they may not impose the highly exacting threshold which first meets the eye. Indeed, if anything, they are vaguely drafted, giving rise to considerable judicial discretion and with it, flexibility for the courts to incrementally shape the ambit of the exceptions (and by extension rectification).

The second exception is testament to this. It provides that rectification can be ordered against proprietors in possession if it would be unjust not to do so. Undoubtedly, this confers enhanced protections upon proprietors in possession; the provision establishes that it must be positively unjust to refuse to depart from the general rule.[268] It is not sufficient that equitable considerations support a shift in proprietary entitlements (in other words, it cannot merely be just to rectify). Rather, the onus is on the applicant to demonstrate that the status quo is unconscionable. This may constitute an exacting threshold, with Dixon arguing that a ‘high hurdle' must be surmounted to authorise something which is not ordinarily sanctioned.[269] For Dixon, it imposes a more strenuous burden upon proprietors than the exceptional circumstances test; the latter qualifies an action which is ordinarily carried out whereas the former permits a course of action which is exceptionally carried out.[270] In his eyes, the two exceptions operate at ‘different levels of intensity', a position which is supported by the Law Commission.[271] The authors of Ruoff & Roper argue that the double negative ‘indicates the general policy of the 2002 Act that there is a strong presumption against rectification without the consent of a registered proprietor who is in possession of the land’.[272]
However, the second exception may not necessarily be incredibly difficult to satisfy. This is primarily due to its vagueness; it does not provide any indication as to how unjust should be

[266] LRA 2002, s 131(2)(a-d).
[267] Cavill and others (n 24) [46.015].
[268] Ibid.
[269] Dixon (n 242) 424.
[270] Ibid.
[271] Ibid.
[272] Cavill and others (n 24) [46.015].

construed. For instance, there is no discussion of the circumstances which could establish the necessary degree of injustice. The statute is not prescriptive in this regard, which means that the judiciary enjoy significant discretion when it comes to determining which events can trigger the exception. While a high threshold is established in principle, its exactingness can be materially shaped by the judiciary. Far from rigidly conditioning the scope for rectification, the statute therefore designates considerable latitude to the courts. Lees supports this, arguing that the absence of a definition has contributed towards an ambiguous and piecemeal approach towards title guarantee; there is no authoritative guidance on how unjust should be interpreted, affording the judiciary flexibility to adopt a plethora of approaches.[273] If anything, she argues that injustice has often been deemed to arise whenever the former proprietor is entitled to the land and wishes to restore the initial proprietary entitlements (something which it may appear to be instinctively inequitable to deny). She likens this to a 'fluctuating preference for the original owner'.[274] In turn, the register may be rectified if the previous owner is entitled to the property 'but for s58' (namely in the event of a void disposition) - circumstances which almost always constitute mistakes for the purposes of Schedule 4. If this approach is adopted, the pre-requisites for rectification (namely the presence of a mistake) could sometimes de facto determine whether it is ordered, with the presumption in favour of proprietors in possession playing a more limited and subordinated role than was perhaps intended. Once available, rectification is generally ordered. For Lees, the statutory silence has allowed the judiciary to develop a broad corrective power, limiting title security.

Lees' observations appear to be partially borne out in the case law. *Baxter v Mannion* is perhaps the most striking example of how the exception's vagueness can authorise - or at least passively permit – an expansive interpretation of 'unjust'.[275] Here, Baxter was registered as proprietor on the basis that he had purportedly satisfied the adverse possession requirements; however, he had not occupied the land for the duration of the ten-year limitation period prior to making his application. In determining that the second exception applied, Jacob LJ attributed significant emphasis to whether Baxter was entitled to the land. Given that Baxter failed to satisfy the doctrine's requirements, it was held that he had no legitimate right to

[273] Emma Lees, 'Guaranteed Title: No Title Guaranteed' in Stephen Watterson, Amy Goymour, and Martin Dixon (eds), *New Perspectives on Land Registration: Contemporary problems and solutions* (Hart Publishing 2018) 97, 107.
[274] Ibid 106.
[275] *Baxter* (n 17) at [41].

make an application to be registered as proprietor. This rendered his application an 'unjustified attempt to get himself title'.[276] In these circumstances, the original owner should be restored as a 'matter of simple justice' unless there are strong countervailing factors.[277] For Jacob LJ, the new proprietor's lack of entitlement was therefore paramount and certainly outweighed the procedural consideration that Manion failed to respond to the Land Registry's notification within the required sixty-five-day period: 'Mere failure to operate the bureaucratic machinery is a thistledown to Mr Manion losing his land and Mr Baxter getting it when he had never been in adverse possession. There is nothing in this point'.[278] Goymour posits that this approach is unfaithful to the statute; it essentially stipulates that rectification should be ordered in the event of a mistaken registration, despite the fact that the presumption is designed to protect proprietors in possession who are mistakenly registered.[279] For Goymour, the defence is circumvented and 'emptied of its content'.[280] However, by deploying broad and contested terms such as 'unjust', the statute invites flexible interpretations as to how the second exception operates.

The prior entitlement approach also manifested itself in *Parshall v Hackney*.[281] The disputed land had formed part of the Parshall's property for approximately a century; in 1980, it was erroneously incorporated into the registered titles of both parties, giving rise to concurrent registration. Hackney subsequently assumed possession of the disputed strip in 1988. In 2000, a further land registry error culminated in the exclusion of the strip from Parshall's title. Upon discovering this, Parshall applied for rectification of the register, in the hope that the strip would be removed from Hackney's title. Hackney argued that he had been in adverse possession of the strip for the requisite time period, statute barring Parshall's claim. A key issue was whether the title dispute should be adjudicated by reference to the Schedule 4 rectification provisions or the adverse possession framework. The Court of Appeal overturned the High Court's assessment that Hackney enjoyed a superior possessory title. It was held that concurrent registration vests property in two proprietors, albeit mistakenly. At this stage, each proprietor assumes the status of the legal owner and so cannot adversely possess the property; the doctrine involves tortious conduct blossoming into a superior

[276] *Baxter* (n 17) at [41].
[277] *Baxter* (n 17) at [41].
[278] *Baxter* (n 17) at [42].
[279] Goymour (n 39) 629.
[280] Ibid.
[281] *Parshall v Hackney* [2013] EWCA Civ 1084.

possessory title, whereas here the basis of the occupation is not unlawful. Relativity of title is immaterial. Rather, this was a case of two equal concurrent titles, which coexisted in the register until one was removed.[282] To determine which proprietor assumed precedence, it was therefore necessary to resort to the rectification provisions: the 'determination of the question of rectification is logically prior to the determination of the question of possessory title'.[283] This commitment was reiterated at paragraph [95]: 'The land register is a system of state guaranteed registered title. Mistakes may be made. If they are, the legislation caters for that by providing machinery for their correction and for indemnification with safeguards to protect the interests of the proprietor in possession and to prevent injustice. That is the machinery which has to be used to establish the true title to registered land before any question of establishing possessory title to registered land'.[284] When discussing how the rectification question should be determined, the Court ruled that 'it has to be decided who was entitled to be registered as proprietor of the disputed land before it can be decided whether the right of the proprietor to recover the disputed land is statute barred'.[285] In other words, entitlement to be registered as proprietor of the disputed land was regarded as a key trigger for rectification. In electing to rectify the register, the Court also criticised Hackney's desire to take advantage of a Land Registry error which could not be attributed to Parshall's carelessness.[286]

However, this trend is not universal; rectification is not simply ordered whenever the original proprietor is the true owner according to general property law, as evidenced by *Walker v Burton*.[287] After acquiring a farmhouse, the Burtons were registered as the proprietors of both the lordship of the manor (incorporeal hereditament) and an adjoining fell (which constituted waste of the manor). It transpired that the Burtons had been erroneously registered as proprietors of the incorporeal hereditament; the lordship had either been extinguished or passed to the Crown, such that there was no title for the Burtons to acquire. It followed that the Burtons' registration as proprietors of the fell was also mistaken. However, rectification was not merely ordered on the grounds that the Burtons lacked a valid entitlement to the fell. Rather, a broader range of factors were considered, namely that the Crown had displayed no

[282] Ibid at [85].
[283] *Parshall* (n 281) at [89].
[284] *Parshall* (n 281) at [95].
[285] *Parshall* (n 281) at [89].
[286] *Parshall* (n 281) at [97].
[287] *Walker* (n 255).

desire to assert title against the Burtons.[288] Neither did the Appellants possess a valid claim to the Fell.[289] As such, the deregistration of the existing proprietor would not necessarily culminate in a new application for proprietorship, instead consigning the fell to an undesirable state of 'limbo' and title uncertainty.[290] The applicant's delay in applying for rectification was also taken into account, as was the Burton's profound commitment to the fell (this was evidenced by the time and funds which had been invested into procuring improvements and discouraging harmful practices).[291] If anything, it was held that it would be unjust to modify the register, notwithstanding the fact that the Burtons did not constitute the true owners according to unregistered land principles. For Dixon, the case illustrates that original owner entitlement alone cannot satisfy the second exception; rather, the facts must illustrate that the perpetuation of the existing arrangements would create a specific injustice.[292] In this sense, it militates against the view that Schedule 4 represents an 'at large discretionary jurisdiction' to align the register with the unregistered land position. Instead, the case construes the statute as a 'self-contained guarantee of title into which pre-registration principles may not intrude'.[293] However, *Walker* was a peculiar case which can be distinguished from *Baxter*, in that the true owner had no intention of regaining title. Where the opposite applies however, it may seem instinctively unjust to refuse rectification; after all, a wrongfully dispossessed owner is being denied the opportunity to reclaim land which they may feel a deep affinity for, perhaps because they have developed a profound connection to it or require it for socio-economic purposes. A significant loss may be imposed by preserving the existing arrangements, which could be unconscionable and so can rationalise the outcomes in *Baxter*. Therefore, the position adopted in the prior entitlement cases is not inherently unsupportable. More broadly, the juxtapositions in the case law demonstrate that the assessment of 'injustice' is heavily fact sensitive. Arguably, this is how the statute envisaged that such decisions should be made, primarily guided by context as opposed to absolute rules. Dixon lends credence to this, noting that the statute merely permits rectification in the event of a mistake; it does not stipulate that the courts are required to modify the register (or vice versa), thus providing scope to consider whether rectification can be warranted by the specific factual circumstances.[294] A case-by-case assessment plays a

[288] Ibid at [103].
[289] *Walker* (n 255) at [102].
[290] Ibid.
[291] *Walker* (n 255) at [104]-[105].
[292] Martin Dixon, 'The Past, the present, and the future of land registration' (2013) 6 Conv 463.
[293] Ibid 467.
[294] Dixon (n 253) 127.

pivotal role; as Dixon points out, 'no answer is required by the legislation: all answers are possible'.[295] Neither indefeasibility nor the universal correction of mistakes is prescribed. This reflects the nuanced nature of the LRA, which does not succumb to either extreme, instead employing what Dixon describes as a 'sui generis' approach.[296] Flexibility and responsiveness to individual circumstances is key and this should not be fettered by an unduly narrow interpretation of either the rectification provisions or mistake more specifically.

In practice, there are a number of occasions on which the courts have determined that the second exception is satisfied. This often occurs when a failure to rectify the register would generate an unanticipated windfall for the proprietor. In *Sainbsury's Supermarkets Limited v Olympia Homes Limited*, the proprietor anticipated that it would acquire property subject to the claimant's option.[297] However, owing to a mistaken omission, the option was not registered, placing the proprietor in an advantageous position which it had not bargained for. Similarly, in *James Hay Pension Trustees v Cooper Estates Ltd*, a failure to modify the register would have enabled the proprietor to retain a parcel of land which it had not intended to acquire at the time of the conveyance (and by extension, obtain ransom payments from the former owner).[298] Conversely, in *Rees v 82 Portland Place Investments,* rectification was refused for the opposite reason, namely that an unwarranted windfall would not be bestowed upon the proprietor.[299] Here, the land registry mistakenly failed to register a unilateral notice against the freehold reversionary title, which protected the tenant's right to procure a lease extension (by virtue of a s42 notice under the Leasehold Reform, Housing and Urban Development Act 1993). This meant that the respondent was not encumbered by the section 42 lease extension notice, with the tenant being forced to pay an inflated £1.8 million premium to obtain an extended lease. The applicant claimed that the register should have been rectified to incorporate the omitted unilateral notice. In determining that it would not be unjust to refuse rectification, the Court held that the size of the applicant's loss was not especially relevant; a colliery of the land registration provisions was that unregistered interests may lose protection, irrespective of their value. This was a mere 'function of the legislation'.[300] A more material consideration was whether the proprietor would obtain an

[295] Ibid.
[296] Dixon (n 253) 126.
[297] *Sainsbury's Supermarkets Limited v Olympia Homes Limited and others* [2005] EWHC 1235.
[298] *James Hay Pension Trustees Limited v Cooper Estates Limited* [2005] EWHC 36.
[299] *Rees v 82 Portland Place Investments LLP and 82 Portland Place (Freehold) Limited* [2020] EWHC 1177.
[300] Ibid at [72].

unexpected windfall, which failed to correspond with the terms of the party's bargain.[301] This was not the case, as the respondent was unable to acquire the superior lease at a discounted price (to reflect the potential for a lease extension). Neither did the respondent form the view that they would be bound by the section 42 notice. If the opposite had applied, rectification would most likely have been ordered.

While the statute arguably promotes a flexible approach towards rectification, this may be undermined by the Law Commission's proposal for a statutory long stop on rectification claims.[302] At present, claims are not subject to a limitation period. In principle, proprietors' titles may therefore be indefinitely vulnerable to rectification. The Law Commission argues that there is a need for greater finality, which may sometimes override the equitable considerations favouring the restoration of the original proprietor.[303] Unless the previous owner remains in possession of the disputed land, the Commission has recommended that proprietors' titles should become impervious to challenge after ten years. An exception would apply if the proprietor caused or substantially contributed towards their mistaken registration through fraud or lack of care. The Commission has rejected the notion that this could prevent the registry from adopting case sensitive approaches to rectification claims which advance the specific interests of justice. It points to the fact that the rule would be subject to qualifications, not least when the original owner remains in possession. As such, title disputes could continue to be resolved in favour of the party which purportedly attributes the most significance to the land, as determined by the possession proxy.[304] An indemnity would also be available to the original owner irrespective of how much time has elapsed. However, it is not difficult to see how this approach could facilitate the perpetuation of deeply inequitable title allocations, simply because of the passage of time. In these circumstances, judicial discretion would be stifled in favour of a de facto indefeasibility rule which is entirely at odds with the flexible nature of rectification. The proposal should therefore not be adopted.

Ultimately, Schedule 4 does not substantially restrict the scope of rectification. Undoubtedly, the statute seeks to limit the circumstances in which proprietors in possession may lose their land. However, this rule is not absolute. If anything, the vague manner in which the exceptions to the presumption against rectification are drafted grants the judiciary

[301] *Rees* (n 299) at [77].
[302] Law Commission (n 26) [13.99].
[303] Law Commission (n 26) [13.90].
[304] Ibid.

considerable flexibility to influence the scope for departing from the presumption. The statute is not overly prescriptive. It is conceivable that the judiciary could interpret these exceptions liberally, something which has been borne out in some of the recent case law. If so, rectification may play a prominent role in the English and Welsh registered land system - in sharp contrast to jurisdictions which endorse indefeasibility. This is compounded by the fact that the statute does not impose any explicit limits on the meaning or scope of mistake. This reflects the fact that the rectification provisions may need to be applied to a wide range of situations, including peculiar and challenging circumstances which cannot be readily anticipated. Flexibility is key to the way that the corrective power operates, something which should not be fettered by artificially narrow constructions of either mistake or the rectification provisions more generally.

In the event that rectification is ordered, the registry will ordinarily be expected to indemnify dispossessed proprietors. The next section evaluates the impact that the indemnity scheme has on proprietors' title security.

Schedule 8

The last of the title security provisions relates to the indemnity scheme. Schedule 8 establishes that proprietors are entitled to an indemnity if they are prejudicially affected by rectification.[305] The previous owner can also obtain compensation if rectification is refused.[306] As such, the availability of rectification is an essential pre-requisite for indemnification; there is a causative link between the two.[307]

Schedule 8 demonstrates that section 58's title promise is not absolute. There is no guarantee that proprietors will be able to retain the land which they have acquired. Rather, the statute establishes that proprietors can obtain monetary compensation in lieu of mud, ensuring that they are not subjected to a financial detriment if they are divested of property.[308] In principle, it is therefore perfectly permissible for proprietors' titles to be exposed to rectification. This is compatible with the statute's title guarantee, indicating that indefeasibility is not embraced by the LRA 2002.

Schedule 8 does not merely suggest that a broad interpretation of mistake is permissible; it is also integral to the title guarantee. While the provision establishes that the title guarantee does not necessarily need to manifest itself in land, monetary compensation is the sole alternative. Presently, indemnities are only payable where rectification is available; to ensure that parties who lose land are compensated, it is therefore important to construe rectification in a sufficiently broad manner. This means that mistake should not be restrictively interpreted. To achieve this, it is necessary to discard the approach towards voidable dispositions which manifested itself in *NRAM* and *Antoine*. Indeed, a proprietor who suffers a loss due to the rescission of a voidable disposition is presently unable to access an indemnity, instead being subjected to a double whammy loss. This is because *NRAM* states that entries cannot retrospectively become mistaken if they were correct at the time of being made; on this view, an entry made in pursuance of a voidable disposition cannot be impugned as a mistake once the transaction has been avoided. The removal of the entry is therefore not governed by the discretionary rectification procedure. Rather, rescission gives rise to an

[305] LRA 2002 sch 8 para 1(1)(a)
[306] LRA 2002 sch 8 para 1(1)(b)
[307] Smith (n 252) 131.
[308] Watterson and Goymour (n 158) 300.

administrative alteration of the register for the purpose of bringing it up to date. This is not deemed to prejudice the dispossessed proprietor, meaning that compensation is not available in lieu of land. The *NRAM* and *Antoine* approach thus fetters the title guarantee which is collectively established by the title security provisions; Dixon contends that it 'runs counter to the title guarantee system itself because it artificially limits the availability of an indemnity' based on historic differences between what are ultimately flawed transactions.[309] It ought to be reconfigured so that an entry recording a voidable disposition becomes mistaken once the disposition has been rescinded.

Unfortunately, this is not the only instance in which the courts have undermined the title guarantee which is intrinsic to the LRA 2002. The Court of Appeal's decision in *Swift 1st Ltd v Chief Land Registrar* also threatens to artificially limit the availability of indemnities.[310] Here, a third-party fraudster forged a charge in favour of Swift 1st Ltd which was subsequently registered. The registered proprietor of the property – who remained in actual occupation throughout –successfully applied for the register to be rectified pursuant to a consent order. The chargee sought an indemnity. While Patten LJ overturned the *Malory* 1 argument, he accepted that the registered proprietor enjoyed a proprietary right to rectify the register which was capable of binding subsequent transferees and chargees for value.[311] Given the proprietor's actual occupation, this amounted to an overriding interest and thus assumed priority over the subsequent forged disposition. The proprietor of the forged charge was deregistered to give effect to this overriding interest. Pursuant to the principle in *Re Chowood*, this loss did not stem from the alteration of the register but rather the fact that the title was encumbered by an adverse interest which assumed priority.[312] The change to the register merely recognised the existing state of affairs.[313] As such, the alteration did not specifically prejudice the proprietor and so did not amount to rectification. As a general rule, indemnities are not available in these circumstances. However, the Court of Appeal ruled that proprietors of forged charges are deemed to suffer losses if rectification is ordered, enabling them to avail of indemnities.[314] Patten LJ relied on paragraph 1(2)(b) of Schedule 8, which stipulates that: 'the proprietor of a registered estate or charge claiming in good faith under a

[309] Dixon (n 253) 126.
[310] *Swift 1st Ltd* (n 217).
[311] *Swift 1st Ltd* (n 217) at [36].
[312] *Re Chowood* [1933] 1 Ch 574.
[313] Dixon (n 177) 382.
[314] *Swift 1st Ltd* (n 217) at [51].

forged disposition is, where the register is rectified, to be regarded as having suffered a loss by reason of such rectification as if the disposition had not been forged'.[315]

The judgment is highly problematic for several reasons. Perhaps most contentiously, it endorses *Malory*'s finding that there is a proprietary right to rectify the register which may amount to an overriding interest. This was also later reiterated in *Bakrania*.[316] This cannot be the case, not least because parties are not absolutely entitled to obtain rectification orders in their favour. Indeed, even when it is available, courts need not order rectification if there are 'exceptional circumstances'.[317] This qualification demonstrates that there is no guarantee that rectification will be granted in any given case –it is a discretionary remedy. The right to rectify is non-existent and therefore cannot amount to a proprietary entitlement, yet alone an overriding interest. Dixon supports this, arguing that the purported right is 'meaningless', irrespective of whether it is presented as an overriding interest or not.[318] As he argues, this should have no impact on the courts' determinations in any given case and may stem from a misplaced view that newly registered proprietors should be punished if their registration is based on a mistake.[319] However, until this approach is overturned, dispossessed proprietors may be deprived of indemnities, contravening the title guarantee. It is unclear how long this unsatisfactory situation will endure for; while the Law Commission has recommended that the so called right to rectify should not be capable of amounting to either a proprietary right or an overriding interest, no legislative amendments have yet been implemented.[320]

Moreover, the Court of Appeal's reliance on paragraph 1(2)(b) of Schedule 8 is deeply alarming. This acted as a get out of jail card in so far that it was used to supply an indemnity to an entirely innocent chargee; the provision assumes that innocent chargees who are registered pursuant to forged dispositions suffer a loss if alteration is ordered, giving rise to rectification. To an extent, this should be welcomed – after all, the title guarantee is preserved. However, the provision may be unable to achieve these results on a broader scale, making it an unsuitable safety net. As Lees contends, the statutory deeming of loss only

[315] LRA 2002 sch8 para 1(2)(b)
[316] *Bakrania v Lloyds Bank Plc* [2017] 4 WLUK 347 (FTT).
[317] LRA 2002, sch4 para3(3)
[318] Dixon (n 177) 385.
[319] Martin Dixon, 'Fraud, rectification and land registration: A Choice' (2017) 3 Conv 161, 164.
[320] Law Commission (n 26) [13.32].

applies when the chargee is registered on the basis of a forged disposition.[321] It does not necessarily arise when a chargee's title is void on other grounds, such as *non est factum* or the defective execution of the mortgage deed. There are therefore several scenarios in which it would be unable to generate an indemnity, exposing proprietors to a double whammy loss. Even in cases of forgery, its utility may be limited. The provision only protects good faith proprietors who 'take under a forged disposition'. It appears that the proprietor's registration must directly stem from a forged transaction. However, as Milne argues, there may be cases in which a fraudster transfers the property to themselves before granting a charge in favour of the bona fide chargee.[322] Here, the disposition would not be directly induced by forgery but would instead be the consequence of earlier fraudulent activity. As Milne notes, a 'strained' interpretation of 'taking under the disposition' would have to be adopted in order for the proprietor of the charge to be caught by the presumption of loss, failing which their position would be incredibly precarious.[323] The approach adopted in *Swift* therefore presents a major challenge to the statute's title guarantee – a further demonstration that the courts have sometimes distorted the policy of the statute as embodied in both Schedules 4 and 8. This ought to be discarded in favour of an approach which is more faithful to the statutory provisions governing title security. Indeed, while they do not promote indefeasibility –instead permitting rectification to play a prominent role in registered land – they do generally require that compensation is paid to dispossessed proprietors (subject to limited exceptions).

[321] Emma Lees, 'Registration make-believe and forgery – *Swift 1st Ltd v Chief Land Registrar'* (2015) 131 LQR 515, 517.
[322] Patrick Milne, 'Guarantee of title and void dispositions: work in progress' (2015) 4 Conv 356, 364.
[323] Ibid.

Conclusion: How much title security does the LRA engender?

The cumulative effect of the statutory provisions is to establish a qualified form of title security, which can be realised in either land or monetary compensation. This is tantamount to a non-absolute title guarantee but not indefeasibility.

Arguably, Section 58 engenders limited title security. It would be disingenuous to claim that the provision confers no protections upon registered proprietors at all. If anything, it represents an improvement on its predecessor, establishing that registration is the source of a proprietor's entitlement, regardless of the validity of the underlying transaction. Gone are the days in which the register would be automatically adjusted to reflect the unregistered land position. The provision also confers absolute beneficial ownership upon proprietors; it does not simply bestow a bare legal title which can be lost by virtue of an indemnity precluding alteration. However, beyond this, the provision does little to protect proprietors; crucially, it does nothing to insulate proprietors from rectification.

To ascertain how impervious a registered proprietor's title is, it is therefore necessary to consult Schedule 4. An initial examination of the provision may create the impression that the LRA 2002 engenders profound title security, not least because there is a presumption against rectification where proprietors in possession are concerned. The opposite applies when the proprietor is out of possession. Nevertheless, beyond establishing these broad principles, the provision does not adopt a prescriptive approach towards rectification. This is best epitomised by the statute's unwillingness to more particularly describe the circumstances which a) amount to mistakes and b) would render it unjust to refuse rectification. Rather, these matters can be resolved on a case-by-case basis, reflecting the fact sensitive and flexible nature of the rectification doctrine. To claim that the statute necessitates a narrow construction of either mistake or the rectification provisions more broadly would therefore be misplaced.

Chapter 4

The impact of the LRA's Priority Provisions

Introduction

The preceding chapter assessed whether the LRA's title security provisions are receptive towards rectification. It primarily focused on situations in which the registrar erroneously registers an individual as the proprietor of a registered estate; the register is impugned on the basis of a positive entry or commission. This chapter examines whether the register should also be susceptible to rectification when it fails to record information about an estate. Most commonly, the registrar may omit to enter a notice which details the burden of a third-party interest affecting a registered estate. They may erroneously delete an entry which records a third-party encumbrance. In each scenario, an interest loses or fails to acquire priority which it may otherwise enjoy. In response, disaffected interest holders may lodge rectification applications. The availability of rectification is contingent upon whether these omissions and deletions can be construed as mistakes.

This question is likely to arise in two scenarios. When assembling the register at first registration, the registrar may fail to record an interest which encumbers the unregistered estate. The absence of a notice means that the interest is incapable of binding the newly registered estate unless it constitutes an overriding interest. The beneficiary of the now latent right may apply for rectification. Secondly, once an estate has been registered, the registrar may erroneously delete a notice protecting X's interest. Following this, the registered proprietor Y may effect a disposition of the estate to a transferee for value (Z). X may seek to have the interest reinstated so that it once again encumbers the estate.

The statute does not unequivocally confirm whether rectification is possible in these circumstances. Therefore, property lawyers should consult statutory provisions which implicitly influence the scope for modifying the register here. The priority provisions are likely to be an important point of reference. These provisions determine the circumstances in which interests are capable of binding estates. They therefore provide an insight into whether it is possible for omitted and deleted interests to be entered into the register such that they encumber the freehold or leasehold estate in question (and thereby prejudice a transferee for

value who was unaware of their existence at the time of acquisition). If the priority rules are not particularly hospitable towards this outcome, it may indicate that the scope for rectification should be limited. If so, we should perhaps be more hesitant about adopting a broad construction of mistake. This is unless there are countervailing provisions which nonetheless authorise rectification in these circumstances. The priority rules applicable to first registration and already registered estates are different; the former are governed by Sections 11 and 12 of the LRA 2002 whilst the latter can be found in Sections 28 and 29. Accordingly, each scenario shall be addressed separately.

This chapter will be structured as follows. Firstly, it will assess whether, in principle, erroneous omissions and deletions are capable of constituting mistakes. Having established that this is the case, it will examine – with reference to sections 11 and 12 – whether omissions at first registration should be susceptible to rectification. The chapter will then consider whether the priority rules applicable to already registered estates give rise to the same conclusion, this time focusing on both omissions and mistaken deletions from the register. A broad scope to rectify erroneous omissions and deletions would indicate that they can be liberally construed as mistakes. In this event, one might legitimately ask whether the narrow registrar centric approach employed by *NRAM* and *Antoine* is correct, or alternatively whether the omissions of non-registry actors – for instance, conveyancers or public bodies – can result in rectification. The final section of this chapter will explore whether the statute permits this more expansive approach.

Ultimately, erroneous omissions and deletions from the register are often capable of constituting mistakes. Indeed, at first registration, the correction of omissions is arguably promoted by the priority provisions, which aim to preserve encumbrances that previously affected the unregistered estate. The picture may appear to be less clear cut once an estate has already been registered; section 29 does not generally allow interests to prejudice a registered proprietor for value unless they appeared in the register at the time that the estate was acquired. Nevertheless, this outcome is authorised by Schedule 4, which not only permits interests to be reinstated with priority against the estate but also other derivative interests. The priority rules are subject to this qualification, enabling rectification to play a prominent role. If anything, this exposes a tension between the alteration and priority rules, which is reflective of wider conflicts between statutory objectives. However, it does not follow that the corrective power should be subordinated to a priority rule which fails to garner unequivocal support across the statute. As such, the statute arguably enables several erroneous omissions

and deletions to be construed as mistakes. While the policy of the LRA 2002 does not support categorising all omissions in this manner, it can be reconciled with extending current understandings of who can make a mistake. The notion that mistakes can only be committed by registry actors is therefore doubtful at best.

Are omissions and deletions capable of constituting mistakes?

It is important to firstly explore whether omissions are capable of being construed as mistakes. A detailed analysis of the priority rules would be superfluous if other provisions of the statute expressly preclude an omission from forming the subject of a rectification claim. Ultimately, the statute does not impose any such prohibitions; if anything, it endorses the notion that mistakes are not limited to positive actions or commissions.

Schedule 4 does not explicitly categorise omissions as mistakes. Neither does it expressly prevent omissions from being susceptible to rectification. As a term which is left undefined by the statute, there is every possibility that mistake could be interpreted sufficiently broadly to encompass both omissions and positive conduct. Other elements of the statute are receptive towards this possibility. Schedule 8 provides perhaps the clearest indication that omissions should be included within the remit of mistake. To qualify for an indemnity, claimants must suffer loss by virtue of a) rectification of the register or b) 'a mistake whose correction would involve rectification of the register'.[324] Unlike Schedule 4, the provision more particularly describes the circumstances in which a mistake can arise, noting that 'references to mistake in something include anything mistakenly omitted from it'.[325] This indicates that omissions from the register can constitute mistakes. It is peculiar that Schedule 8 provides details about how rectification's prerequisites can be interpreted while Schedule 4 remains silent. One may think that this function would be designated to the provision which establishes when rectification occurs, rather than the one which deliberates on its consequences. However, as Cooper notes, both provisions employ mistake in the same context, namely when discussing the availability of rectification and associated remedies for disaffected parties.[326] As such, it

[324] LRA 2002 sch 8 para 1(1)(b)
[325] LRA 2002 sch 8 para 11(1)

[326] Simon Cooper, 'Correction of the register and mistake by omission', Conv 3 (2018) 225, 227.

would be odd for Schedule 8 to adopt an entirely different interpretation of the concept. This means that Schedule 8 may offer an important clarification as to how mistake can be interpreted for the purposes of Schedule 4.

The LRA 1925 explicitly recognised that rectification could occur in response to registrar omissions. Schedule 4 is silent on the matter. One may think that this signifies a shift in how contemporary land law treats erroneous omissions. However, as Cooper argues, such a material alteration to the law would most likely have been explicitly considered and notified by the Law Commission, not least for purposes of legal certainty.[327] This is not the case - the Commission's 2001 report did not announce that omissions from the register should no longer be susceptible to rectification. The statutory silence does therefore not mean that omissions are excluded from the ambit of mistake, particularly when considering that the alteration provisions in the LRA 2002 were reframed to 'reflect the current practice in relation to rectification and amendment of the register'.[328]

It should be noted that erroneous deletions from the register are deemed to be mistaken. This was confirmed in *Gold Harp*, where it was held that the closure of leasehold titles (and the deletion the corresponding entries) on the basis of invalid forfeiture amounted to a mistake.[329] There are significant parallels between this type of situation and an omission from the register; the core problem is the same, namely that the register fails to record information about a third-party encumbrance. The circumstances are analogous. It would be peculiar to treat an almost homogenous defect differently by excluding omissions from the scope of mistake. Rather, the two fundamentally similar scenarios should be addressed in the same manner.

Thus, while the statute does not expressly categorise omissions as mistakes, there are several indications that it embraces this broader interpretation. The focus now turns to whether this possibility should transpire in practice, both at the point of first registration and when an estate has already been registered.

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[327] Ibid.

[328] Law Commission (n 1) [10.6].
[329] *Gold Harp Properties Ltd v Macleod & Others* {2014} EWCA Civ 1084.

Omissions at First Registration

Having established that omissions are capable of amounting to mistakes, the question inevitably arises – should they be categorised as mistakes in practice? At the point of first registration – when the registrar assigns a title number to an estate and compiles a first edition of the register – this enquiry is likely to be particularly pressing. Not only is the registrar expected to assemble information about a plethora of third-party encumbrances which bind the unregistered estate but also to enter notices in the charges register. Due to human error and asymmetric information, it may well be the case that the registrar is unaware of an interest or fails to protect it by virtue of a notice. The consequences for the interest holder may be bleak – their interest may be extinguished because of the administrative shortcomings of the registration apparatus. This section explores whether the enforceability of these interests can be revived through rectification. Primarily, it will explore the priority rules which govern the enforceability of interests at the point of first registration. Having done so, it will examine whether these rules enable omitted interests to be admitted into the register. Arguably, the priority rules promote rectification here as part of an effort to preserve the pre-registration ordering of interests. Moreover, the correction of omissions at first registration supports other objectives of the land registration project, namely the production of a more comprehensive register.

Priority Rules

The priority rules applicable at first registration can be found in sections 11 (for freehold estates) and 12 (for leasehold estates) of the LRA 2002. The provisions are largely identical and the way in which they operate is well illustrated by the rules applicable to the highest grade of title to the most superior form of estate: absolute title to the freehold estate. The governing provision is section 11(4) which stipulates that:[330]

> The estate is vested in the proprietor subject only to the following interests affecting the estate at the time of registration –
>
> (a) Interests which are the subject of an entry in the register in relation to the estate
> (b) Unregistered interests which fall within any of the paragraphs of Schedule 1 and
> (c) Interests acquired under the Limitation Act 1980… of which the proprietor has notice.

[330] LRA 2002, s 11(4).

The provision determines which third party interests are enforceable against the first registered proprietor. To bind the proprietor, the interests must:

a) Bind the estate at the time of registration – this means that they must encumber the unregistered estate at the time that it is subjected to registration.
b) Fulfil one of the conditions outlined in subsections a-c – for instance, an encumbrance may be protected by a notice.

The implications for rectification

Arguably, the provision's overarching intention is to preserve pre-existing encumbrances, rather than altering the pre-registration ordering of interests. The omission of third-party interests at first registration undermines these efforts, contravening the intention of the statute. It follows that any omissions should be susceptible to rectification and thus construed as mistakes.

Section 11(4) is primarily designed to retain interests which bind the unregistered estate. It stipulates that the first registered proprietor can only be bound by interests which affected the estate at the time of registration. This demonstrates that the registered estate should generally remain subject to existing encumbrances, provided that the conditions in subsections a-c are satisfied. As Watterson and Goymour argue, a transposition of the pre-registration position is generally intended, as opposed to a reconfiguration of priorities.[331] This is highlighted by the fact that unregistered conveyancing principles play a key role in determining which interests affect the estate at the time of registration and are therefore capable of binding the first proprietor. This is due to the way in which first registration arises. If registration is initiated voluntarily, the applicant will most likely have acquired the estate many years ago in accordance with unregistered land principles. Disputes regarding the priority of competing derivative interests will have been resolved by reference to these principles. Similarly, registration may have been compulsorily triggered by the disposition of an unregistered estate. Here, the estate is acquired by virtue of a transaction which predates registration. Questions as to which interests affect the estate are necessarily determined at the time of the disposition and thus by recourse to the applicable unregistered land principles. At the time of

[331] Stephen Watterson and Amy Goymour, 'A Tale of Three Promises (2): The Priority Promise' in Stephen Watterson, Amy Goymour, and Martin Dixon (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (Hart Publishing 2018) 313, 317.

first registration, the pool of potential encumbrances is therefore primarily governed by general property law rules. Far from altering the pre-registration position, section 11(4) appears intent on mirroring the priority outcomes of the general law. Harpum and Bignall observe that 'As a general principle…. First registration does not affect priorities but merely reflects priorities that have already been determined. First registration may be voluntary so that there may have been no disposition to trigger registration. In any event, even when there is some disposition, that disposition precedes registration and any issue of competing priorities will be resolved at the time of the disposition. That resolution will depend upon the principles of unregistered conveyancing that necessarily apply to that disposition'.[332] Goymour and Watterson support this, contending that the provision has a neutral or parasitic effect; the retention of encumbrances is the key objective.[333]

That is not to say that section 11(4) always has an entirely neutral effect. Indeed, the neutrality of section 11(4) may be called into question by subsections a-c. The fact that an interest encumbers the unregistered estate does not automatically mean that its priority will continue to be protected following first registration. This is an insufficient albeit necessary characteristic. The interest should also adhere to one of the conditions established by subsections a-c. Otherwise, the priority of the interest holder's interest will not be preserved. On its face, the statute may therefore not facilitate an absolute transposition of encumbrances; some interests may be removed. Goymour and Watterson refer to this as the 'filtering effect' of section 11(4), which is tantamount to a clearing operation.[334]

In theory, section 11(4)(c) provides the clearest example of how this could operate. It stipulates that the estate can be encumbered by interests acquired under the Limitation Act 1980 of which the first registered proprietor has notice. This provision addresses scenarios in which the title of a paper owner Y is barred by a successful period of adverse possession on the part of a third-party encroacher (X); at this point, X acquires a paramount freehold title. Y may subsequently regain possession of the land and voluntarily apply to be registered as first proprietor with absolute title. Alternatively, Y may convey the estate to a transferee for value (Z), triggering compulsory registration. According to general property law principles, Y obtains a possessory title at best following the resumption of possession; the superior

[332] Charles Harpum and Janet Bignall, *Registered Land: Law and Practice Under the Land Registration Act 2002* (Jordans 2004) paragraph 4.1.
[333] Watterson and Goymour (n 331) 316.
[334] Watterson and Goymour (n 331) 317.

unregistered title is vested in X.[335] However, pursuant to subsection (c), the applicant for first registration may acquire the freehold estate free from X's title if they are unaware of its existence. Ordinarily, this occurs if the squatter is no longer in actual occupation, something which also prevents X's interest from constituting an overriding interest and satisfying subsection (b). It is possible that subsection (c) could therefore demote X's title at first registration. In turn, the priority determinations made by unregistered land principles are modified, with section 11(4)(c) favouring the first proprietor.[336] X's title is subject to statutory filtering. This is consistent with the policy of the LRA 2002. Indeed, subsection c was deliberately crafted to demote the squatter's title in certain circumstances; the Law Commission expressed a desire to subordinate the rights of squatters who had gone out of possession to the first proprietor's security of title.[337] This corresponds with the LRA's more restrictive approach towards adverse possession (as was more extensively discussed in chapter 2).[338] A contrary interpretation could only be credibly advanced following an amendment to the statute. Thus, section 11(4) could theoretically perform a filtering function – it does not necessarily retain the pre-registration position.

In view of this, it might be thought that section 11(4) cannot be designed to preserve the pre-registration position. However, this is arguably misplaced. The overarching aim of the provision is to do precisely that.

In theory, section 11(4), particularly subsection c, can remove a competing non-derivative title. However, the subsection only does so in very peculiar circumstances, which are highly unlikely to arise in practice. A better view is that the provision intends to retain the pre-existing position, subject to an academic or hypothetical qualification. The scenario in question would require a squatter to renege on their actual occupation of the estate. This is unlikely to occur as adverse possessors tend to foster a material connection to the land in question. Indeed, squatters must enjoy uninterrupted possession for the duration of a lengthy twelve-year limitation period. In the process, they expose themselves to the risk of civil action and the financial consequences which may ensue (for instance, damages may be imposed if they are successfully sued for trespass). In view of this, it would be rare, although

[335] Watterson and Goymour (n 331) 327.
[336] Ibid.
[337] Law Commission (n 1) [3.45]-[3.47].
[338] Charles Harpum, 'Response to Law Commission Consultation Paper No 227 – Updating the Land Registration Act' < http://www.falcon-chambers.com/publications/articles > paras [166]-[169].

not impossible, for X to go out of possession.[339] The scenario would also involve Y resuming possession of the estate and effecting a disposition to a transferee for value. However, Y is unlikely to have any impetus to regain the land in question – Y's title is barred precisely because they failed to occupy, or monitor, the estate for the entirety of the limitation period.[340] Thus, subsection c may only perform a clearing operation in a very limited number of circumstances. In general, the provision is unlikely to be engaged and the applicant's title would – very often - be encumbered by X's superior competing title.[341]

Moreover, despite appearances, subsections (a) and (b) aim to retain interests which affect the unregistered estate. There is nothing in the text of the subsections which objects to the preservation of an existing encumbrance; they merely stipulate that encumbrances should be lodged as protective notices (save for the overriding interests exception). In this respect, the subsections provide administrative guidance about how to record interests. They impose formality requirements which can be adhered to when the registrar compiles the first edition of the register. Any interest which enjoys priority under the general law should therefore continue to do so once the estate has been registered.[342] As Watterson and Goymour contend, the overarching aspiration is to preserve interests which bind the unregistered estate but to achieve this objective 'through legal mechanisms that are consistent with, and necessarily employ the language of, the priority rules that will in future be governing' the estate.[343]

As such, section 11(4) primarily aims to preserve the pre-registration ordering of interests. Following first registration, the register should reflect the encumbrances which bound the unregistered estate; the statute intends to achieve a neutral transposition of interests. The omission of an entry relating to X's interest undermines this objective, detracting from the purpose of the statute. The only way to alleviate this is to ensure that such omissions are not irreversible; they should be susceptible to rectification. This has been recognised by the Law Commission, which acknowledged that section 11's operation should be subject to Schedule 4 in its 2016 Consultation Paper.[344] Therefore, the priority rules applicable to first registration

[339] Watterson and Goymour (n 331) 318.
[340] Ibid.
[341] Ibid.
[342] Watterson and Goymour (n 331) 317.
[343] Ibid.
[344] Law Commission (n 132) [13.180]-[13.181].

can be reconciled with a broad construction of mistake which encompasses erroneous omissions.

This categorisation is consistent with the balance of responsibilities at first registration. Individuals can lodge a caution against first registration, which notifies the registrar about the existence of a potential encumbrance. However, as Cooper observes, there is no obligation to do so.[345] Neither are interest holders required to make an application for a notice to be entered in the register. Rather, the onus falls on the registry to preserve interests; as part of its pre-registration investigations, the registry is expected to conduct inquiries into the existence of third-party encumbrances.[346] Upon discovery, the registrar must protect an interest via a notice unless a) it is precluded from forming the subject matter of a notice by section 33 of the LRA 2002 or b) it constitutes an overriding interest. The statute does not permit the registrar to refuse to pursue this course of action.[347] Failure to enter a notice in relation to X's interest therefore breaches the standards expected of the registry, giving rise to a clear error which should be corrected through rectification. In many respects, this is entirely reasonable. As Watterson and Goymour observe, individuals who acquire interests in unregistered estates develop a legitimate expectation that the interests will continue to be protected in accordance with the applicable general law principles.[348] As such, they should not be prejudiced by the introduction of an entirely new set of priority rules. Moreover, as first proprietors do not rely upon the register prior to acquiring an estate, the argument that they should be unencumbered by unregistered interests is significantly weaker than in a registered land context.

Categorising omissions as mistakes may also further the objectives of the land registration project more broadly. In particular, it may support the registry's efforts to develop a more comprehensive register. If omitted interests are susceptible to rectification, the first registered proprietor may qualify for an indemnity. Indemnities may also be bestowed upon interest holders where the court refuses to grant rectification. The availability of indemnities may contribute towards the development of a more efficient registry, which can better execute its functions. This stems from the impact that indemnities have on registry behaviour. As Cooper contends, the availability of compensation can abridge the registry's examination of

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[345] Cooper (n 328) 241.

[346] Ibid.
[347] Watterson and Goymour (n 331) 325.
[348] Ibid.

unregistered estates at the point of first registration.[349] This is because interest holders can receive financial support if encumbrances go undetected (and are subsequently rendered unenforceable), mitigating the negative impact of registry oversights. These less protracted investigations can enable resources to be dedicated towards other tasks. For instance, the registry may be able to process other first registration applications more expediently. Applications to register new titles or unilateral notices may also be completed more promptly. As such, the register may provide a more accurate and comprehensive insight into the state of a title at any one time. In turn, prospective purchasers can increasingly rely upon the register, limiting the volume of extraneous title investigations which need to be undertaken. Ultimately, this expedites the conveyancing process – the overarching aim of the land registration project. Cooper attributes this to the multi-faceted and versatile role that indemnities can play. In his view, the indemnity scheme does not merely supplement the state guarantee of title; it also pursues a range of other aims, such as engendering confidence in young registration systems and enhancing reliance on the register.[350] Of course, in practice this does not necessarily mean that the registry will operate in a highly efficient manner. The Registry is experiencing significant backlogs, something which may potentially be attributed to a lack of caseworkers.[351] Currently, it takes 15 months to complete all but some first registrations and approximately 21 months to complete the vast majority of applications to divide existing titles.[352] However, the availability of indemnities can result in a more efficient Registry than may otherwise be the case.

Indeed, the indemnity scheme was developed for this very purpose. In 1857, a panel of commissioners was appointed to consider how estates should be incorporated into the registration system.[353] While it rejected the notion that the judiciary should hold an inquisitorial inquiry into each parcel of land – with a view to determining the enforceability of latent interests – it expressed concerns that a less meticulous approach could result in the non-detection of adverse encumbrances.[354] The Commission's solution was to offer

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[349] Simon Cooper, 'The Versatility of State Indemnity' in Martin Dixon (ed*)*, *Modern Studies in Property Law* (5th edn, Hart Publishing 2009) 44.
[350] Ibid.
[351] Martin Dixon, 'HM Land Registry: how did it come to this?' (2023) 3 Conv 213, 214.
[352] UK Government, 'HM Land Registry: processing times' (Gov.Uk, 11 January 2023) < https://www.gov.uk/guidance/hm-land-registry-processing-times > accessed 2nd January 2024.

[353] Simon Cooper, 'Removing Title Blemishes as a Function of Registration', in Arkadiusz Wudarski (ed), *Functions of Land Registers in a European Comparative Law Perspective* (Duncker & Humblot 2016).

[354] Ibid.

compensation to the holders of extinguished interests– this would allow the registry to conduct efficient examinations while at the same time protecting third parties. These proposals were initially rejected. In the absence of such a scheme, first registration was characterised by overly burdensome and protracted enquiries. The Land Transfer Act 1875 sought to alleviate this by enabling the registry to accept safe holding titles for registration; the fact that an estate was potentially subject to adverse interests would not prevent registration, provided that the title was unlikely to be disturbed.[355] Even so, investigations remained inexpedient. As a subsequent Royal Commission stated, 'Nor, except by a system of state guarantees or insurance, do we see how it is possible to commence a registry of indefeasible titles without rigid examination such as that which exists under the Act of 1862'.[356] In response, the Land Transfer Act 1897 introduced compensation for the holders of extinguished latent interests.[357] This allowed the registry to conduct more efficient investigations into unregistered estates and therefore register an increased volume of safe holding titles.[358] Brickdale observed that 'By an extensive reliance on the insurance principle, the general practice can be rendered extremely convenient and elastic, and the once formidable difficulty of first registration with absolute title can be almost entirely eliminated'.[359] Construing omissions at first registration as mistakes can therefore empower the registry to advance the objectives of the land registration project more effectively.

Ultimately, the rectification of omissions at first registration is supported by both the priority rules and key objectives of the land registration regime. The focus now turns to whether the same approach should be pursued in relation to already registered estates.

[355] Land Transfer Act 1875, s 17(3).
[356] Royal Commission, Report of the Royal Commissioners Appointed to Inquire into the Operation of the Land Transfer Act (1870) para 61.
[357] Land Transfer Act 1897, s 7.

[358] Cooper (n 253) 143.

[359] C.F. Brickdale & J.S. Stewart-Wallace, *The Land Registration Act 1925* (3rd edn, Stevens 1927) 274.

Already Registered Estates

Matters may appear to be more complex once an estate has been registered. In principle, the priority rules (chiefly sections 28 and 29) do not generally permit registered proprietors for value to be prejudiced by unregistered interests (subject to narrow exceptions). It might be thought that this reduces the scope for rectifying erroneous omissions and deletions. However, it would be rash to reach this conclusion as section 29's priority solutions are contradicted by Schedule 4. Not only does Schedule 4 enable erroneously deleted interests to be re-entered into the register but also to assume precedence against derivative interests affecting the registered estate. This demonstrates that there is an inherent conflict between the alteration and priority provisions; the statute does not unequivocally endorse section 29's priority promise to the detriment of a broad corrective power. If anything, it is heavily qualified by Schedule 4.

The applicable priority rules

Once an estate has been registered, the registrar may erroneously delete a notice relating to a third-party encumbrance (belonging to X). During this period of de-registration, the registered proprietor Y may convey the estate to a transferee for value (Z). X may seek to have the interest reinstated so that it binds Z's estate. The priority rules which influence whether this is possible can be found in sections 28 and 29.

a) Section 28

Section 28 establishes a basic rule of priority.[360] It stipulates that:

(i)Except as provided by Sections 29 and 30, the priority of an interest affecting a registered estate is not affected by a disposition of the estate

(ii) It makes no difference for the purposes of this section whether the interest or disposition is registered

There are two principal interpretations of section 28. On one hand, the provision may perpetuate the priority rules of general property law, subject to the effect of section 29.[361] It may provide that a disposition of a registered estate has no influence on the ordering of interests established by unregistered land principles. If so, section 28 would not amount to an autonomous rule but would merely embody the instincts and tendencies of general property law. There may be no distinct rule at all. This is rejected by Watterson and Goymour, who

[360] LRA 2002, s 28.
[361] Watterson and Goymour (n 331) 334.

argue that the parasitic incorporation of the general law's rankings was not envisaged by the Law Commission.[362] The Commission expressed reservations about the way in which unregistered land's priority rules discriminated between different types of interest; for instance, mere equities were more vulnerable to displacement in priority disputes than equitable interests, a position which the Commission rejected.[363] It sought to develop a common first in time rule which would be applicable to all interests, irrespective of their technical categorisation.[364] To this end, the Commission clarified that, for the purposes of the statute, mere equities constituted 'interests capable of binding successors in title'.[365] This demonstrates that section 28 was not designed to simply preserve the general law's approach towards priority disputes.

Alternatively, the provision may be deemed to establish a basic first in time rule. Subject to the effect of sections 29 and 30, it may preserve the priority of X's interest in the face of a disposition from Y to Z. X's prior interest should continue to enjoy precedence, irrespective of the transfer. At first, this rule may appear to be absolute and unqualified. However, it is better regarded as a common or universally applicable first in time rule.[366] The statute cannot ensure that the priority of X's pre-existing interest will always be preserved vis a vis a subsequent disposition (subject to the section 29 qualification).[367] As Watterson and Goymour highlight, there may be circumstances in which the interest loses priority due to the operation of extraneous general property law doctrines which are not curtailed by the statute.[368] For instance, X's interest may be overreached, such that it no longer binds the estate. These doctrines can implicitly fetter the basic rule.

[362] Ibid.
[363] Law Commission (n 1) [5.32]-[5.36].
[364] Law Commission (n 1) [5.36(2)].
[365] LRA 2002, s 116.
[366] Watterson and Goymour (n 331) 335.
[367] Watterson and Goymour (n 331) 336.
[368] Ibid.

b) Section 29

Section 28 gives rise to a basic first in time rule. However, it is qualified by section 29(1), which represents a major exception to the general rule.[369] The provision holds that:

(1) If a registrable disposition of a registered estate 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 estate immediately before the disposition whose priority is not protected at the time of registration.

Four conditions must be satisfied to trigger Section 29. There must be a) a registrable disposition between Y and Z, b) of a registered estate, c) for valuable consideration (it cannot be nil or nominal), which is d) completed by registration. In the event that s29 is triggered, a privileged group of transferees are insulated from unprotected interests which affect the estate at the time of the disposition. These interests are no longer enforceable against the new registered proprietor. Section 29(2) establishes which interests are protected. These include overriding interests (as detailed in Schedule 3), interests which form the subject matter of a notice, and interests which are otherwise excepted from registration.[370]

An inherent incompatibility?

It is not clear that section 29 can support the reinstatement of X's erroneously deleted interest to the register. The foundational premise of section 29 is that purchasers for value should - subject to the overriding interests exception and other qualifications detailed in section 29(2)(a)(i), (iii) and (b) - be immune from interests which do not appear in the register at the time of the disposition. The provision aims to enhance the register's ability to accurately reflect the totality of enforceable third-party interests. However, readmitting an erroneously deleted interest to the register would subject the proprietor to an encumbrance which was not visible in the register at the time that they acquired the estate. The proprietor would be prejudiced by the retrospective re-emergence of the encumbrance, even though the interest in question should – according to section 29 – have been suspended to the interest under the disposition. Here, rectification may frustrate the implementation of the priority rules. Summers argues that this is unwarranted – the priority outcomes envisaged by section 29 are usurped, even though it is specifically designed to govern ranking disputes between third party interests and registered estates.[371] For Summers, this renders section 29 a 'dead letter'

[369] LRA 2002, s 29(1).
[370] LRA 2002, s 29(2).
[371] Summers (n 13) 209.

with the statute's priority solutions instead being modified by a provision (Schedule 4) which has an entirely different remit.[372] He describes this as an 'abuse of the mechanisms' of the Act, which may be exploited by opportunistic litigants who 'having lost the priority battle under section 29 and Schedule 3 would effectively have a second bite of the cherry under Schedule 4'.[373] While Summers recognises that Schedule 4 may exceptionally need to alter priorities in order to fully reverse registry errors, he argues that further intrusion should be limited.[374]

Moreover, Summers contends that this approach circumvents the statute's desire to resolve priority disputes by reference to clear rules.[375] Section 29 unequivocally outlines the conditions which must be satisfied in order for third party interests to enjoy priority vis-a-vis a subsequent registered proprietor. In theory, prospective purchasers and their agents can readily familiarise themselves with these accessible rules and reasonably anticipate the extent of adverse encumbrances. For Summers, the provisions were consciously designed in this way to preserve the marketability of titles and enhance property's alienability. He argues that this intention may be undermined if priority disputes are relitigated by reference to Schedule 4. This is because Schedule 4 is an inherently discretionary provision, which enables the judiciary to flexibly determine whether rectification should be granted on a case-by-case basis (albeit subject to general rules and presumptions). Rigid rules would not play a decisive role in the determination of priority disputes, frustrating the legislature's purported intentions.

An extensive interpretation of mistake cannot be easily reconciled with section 29. Initially, the two appear to be entirely incompatible. This may suggest that the statute's corrective power ought to be confined. However, the LRA 2002 arguably permits an array of omitted and deleted interests to be admitted into the register, notwithstanding the reservations of the priority rules. There are two principal grounds on which this argument can be made.

Firstly, the statute does not unreservedly promote the principle underpinning the priority rules. In general, section 29 subscribes to the notion that registered proprietors should not be bound by undetectable interests. In its purest form, this mirror principle would preclude

[372] Ibid.
[373] Ibid.
[374] Summers (n 13) 208.
[375] Summers (n 13) 210.

purchasers from being prejudiced by any unregistered interests. However, the provision is deliberately drafted to avoid this outcome; certain unrecorded encumbrances can override dispositions and retain priority against the subsequent proprietor. The governing principle is subject to a material qualification and cannot be absolutely realised. Section 29 is therefore not entirely averse to the possibility that a proprietor's legitimate expectations may be usurped.

Crucially, the priority solutions prescribed by section 29 are not intended to be conclusive or irreversible. Through Schedule 4, the statute has developed a means of reviewing and, where appropriate, modifying these outcomes. Schedule 4 explicitly enables mistakes to be corrected in a manner which prejudices registered proprietors. This is a major feature of rectification. Therefore, the statute does not unequivocally reject the possibility that a proprietor may be encumbered by a reinstated interest which they were previously unaware of - there is a countervailing provision which gives rise to this very outcome. Far from amounting to a circumvention of the statute, this scenario appears to have been contemplated and authorised by the LRA 2002 itself. This indicates that section 29 is qualified by Schedule 4's rectification scheme.[376] At the very least, there is a conflict between the alteration and priority provisions, which is not easily resolvable.[377] However, does not follow from this that the scope for rectification should be automatically subordinated to the section 29 priority rule; the statute, on this view, would not attribute precedence to either provision. This means that it is unnecessary - and arguably premature - to adopt an artificially narrow interpretation of mistake. Thus, the statute does not necessarily prevent erroneously omitted and deleted interests from being entered into the register so that they encumber estates. The next section will demonstrate that Schedule 4 can also reconfigure the section 29 priority solutions in more profound ways.

[376] Watterson and Goymour (n 331) 360.
[377] Amy Goymour, 'Resolving the tension between the Land Registration Act 2002's 'priority' and 'alteration' provisions (2015) 3 Conv 253, 262.

Paragraph 8 of Schedule 4 – the fallout from *Gold Harp*

Indeed, Schedule 4 does not stop there. It arguably has a much more profound revisionary effect on section 29's priority rankings by enabling a reinstated interest to assume priority vis-a-vis a competing derivative interest affecting the registered estate. This is facilitated by paragraph 8 of Schedule 4. The provision provides that, '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'.[378]

The provision has courted considerable debate. It is accepted that rectification can affect the ordering of derivative interests. The key point of contention is whether the provision enables the courts and the registrar to enter encumbrances in priority to existing derivative interests. This very much depends on whether retrospective rectification is possible. This occurs when omitted or deleted interests are entered into the register so that they encumber both the registered estate and priorly registered interests.[379] This includes interests which were created during the period that the deleted interest was erroneously excluded from the register (and which therefore enjoy precedence over subsequently registered interests). Rectification can usurp priorities which have already been ascertained. This change may be backdated to the time of deregistration. As Dixon observes, this may be acceptable to those who believe that the register is a reflection of a pre-existing state of affairs, which can be modified to reflect the true off register position.[380] On this view, erroneously deleted interests can be reinstated with the priority they would have enjoyed had the mistake not occurred. However, retrospective rectification is rejected by those who perceive the register as an authoritative source of proprietary entitlements (and who are therefore reluctant to contest the narrative of the past which is established by the register).[381] Rather, they may endorse prospective rectification. Here, reinstated interests can only affect encumbrances arising after the date of rectification; the ordering of pre-existing interests cannot be amended.[382] This analysis is not

[378] LRA 2002 sch 4 para 8

[379] Emma Lees, 'Rectification of the register - prospective or retrospective?' (2015) 78(2) MLR 361.

[380] Martin Dixon, 'Rectification and priority: further skirmishes in the land registration war' (2015) 131 LQR 207, 210.

[381] Ibid.
[382] Ibid.

exhaustive. Other adjustments may have a more nuanced impact; for instance, while interests may be entered in priority to priorly registered encumbrances, these changes may only take effect from the date of the rectification order. This outcome does not neatly fit into either category. Dixon characterises the act of rectification as prospective but notes that the consequences are inherently retrospective.[383]

In *Gold Harp,* the Court of Appeal was tasked with interpreting paragraph 8.[384] The facts were as follows. A group of teachers purchased a leasehold estate consisting of the top floor of a property (though they were not in occupation). By 1999, the lower floors had been acquired by a property developer who aspired to convert the entire building. He persuaded his son to acquire the freehold estate and to instigate possession proceedings against the teachers because their ground rent was overdue by approximately eleven weeks. An application was lodged to close the teachers' leasehold titles on the grounds of forfeiture. This was accepted by HMLR. Subsequently, the freeholder granted a long lease of the top floor to a company owned by an associate. This lease was soon assigned to a company owned and controlled by the property developer (though not for valuable consideration). In response, the teachers sought to have the register rectified. They claimed that the closure of their leasehold title amounted to a mistake as the lease had not been validly determined; ground rent had been proffered by cheque, albeit late. This was accepted at first instance. The disaffected leaseholders further argued that their deregistered lease should be reinstated into the freehold title register's Schedule of Leases in priority to the subsequently created lease. They relied on paragraph 8 of Schedule 4. HH Judge Gerald ruled that this was the most plausible interpretation of paragraph 8. Gold Harp Properties Ltd- which now enjoyed a mere reversionary lease - appealed.

Underhill LJ upheld the first instance ruling. He construed paragraph 8 as a power conferring provision, which confirms that the courts and the registrar are not limited to restoring a mistakenly deregistered interest to the register (interest A). The power in this situation also extends to altering the priority which would otherwise exist between interest A and another derivative interest affecting the estate. This is necessarily limited by the qualifying phrase 'for the future'. Underhill LJ held that this qualification does not prevent interest A from

[383] Dixon (n 380) 212.
[384] *Gold Harp* (n 329).

being entered in priority to priorly registered encumbrances. He cited several reasons. In particular, paragraph 8 is designed to address scenarios in which a) interest A is mistakenly deleted from the register and b) the registered proprietor subsequently grants a derivative interest to another interest holder. The provision aims to alter priorities in this context. In other words, it seeks to accord X's interest the priority it would have enjoyed had it remained in the register. This can be achieved by adjusting the rankings as between interests A and B.[385] Moreover, Underhill LJ ruled that the corrective power would be rendered redundant if it could not restore the position which pertained prior to the mistake.[386] He also considered that the Appellant's construction could not be easily reconciled with the statutory language, particularly the proper meaning of priority.[387] It should be noted that this is not exhaustive and further reasons were provided. Crucially, Underhill LJ considered that the qualifying phrase 'for the future' could be readily given effect by holding that such changes are only effective from the date of the rectification order.[388] Consequently, the proprietor of a competing derivative lease cannot be sued for occupying the disputed land in the period between mistaken deregistration and rectification.

Arguably, this is the most coherent interpretation of paragraph 8. The implications for section 29's priority promise are profound; far from being impervious to challenge, it can be reconfigured by Schedule 4. Therefore, the statute does not merely entertain the notion that a range of omissions and deletions can constitute mistakes; it also provides that they can be fully corrected. This is a further sign that the statute does not seek to artificially curtail the ambit of rectification. Rather, it can play a bespoke and expansive role.

The merits of the judgment primarily depend upon the correct interpretation of the phrase 'for the future'. On one hand, this clause may be deemed to preclude rectification which has retrospective consequences. The reasoning is as follows. Given that the changes instituted by rectification operate 'for the future', they must only be capable of affecting the estate from the date of the rectification order. If so, rectification may only affect interests created after this point in time; the priority of an already acquired interest is not susceptible to adjustment. Harpum supports this, arguing that the qualifying phrase 'for the future' was deliberately inserted into paragraph 8 to clarify that any changes are not effective from the date of the

[385] *Gold Harp* (n 329) at [94].
[386] *Gold Harp* (n 329) at [95].
[387] *Gold Harp* (n 329) at [96].
[388] Ibid.

original error; rather, they operate prospectively from the time that an interest is reinstated into the register.[389] It follows that rectification cannot impugn the priority of any interest which was created in the intervening period. Its effects are limited to a narrower subset of interests, namely those which are yet to arise. This construction was endorsed in the 8th edition of Megarry & Wade.[390] At paragraph 7-136, the authors contend that:

> 'The powers relating to rectification extend to changing for the future the priority of any interest affecting the registered estate or charge concerned. Because the effect of rectification is therefore prospective from the date of order, where the court orders rectification of the register:
> (i) It affects the proprietor of the registered estate or charge from the time that rectification is ordered.
> (ii) It affects the priority of an interest affecting the registered estate or charge concerned that is created or arises after rectification is ordered.
> (iii) It does not affect the priority of derivative interests that were created between the time of the mistake and the order for rectification'.

Support for this view can be found in *Piper Trust v Caruso*.[391] While the Deputy Adjudicator restored a mistakenly deleted charge to the register, he refused to elevate its priority vis-a-vis a subsequently created charge. He ruled that paragraph 8 fettered his ability to adjust the priority which otherwise existed between the competing interests:[392]

> 'By stating that the powers extend to changing for the future the priority of any interest affecting the registered estate, Parliament was stating that the powers to do so do not extend to changing the priority of an interest retrospectively. In this case, the priorities as between the Applicant's charge and the Respondent's charge were determined when the Respondent's charge was registered. Under section 29, the Applicant's charge was postponed to the Respondent's charge at the date of the registration of the Respondent's charge. To change the priorities between those two charges now would be to do so retrospectively and would thus be beyond the limitation of the registrar's powers imposed by paragraph 8 of Schedule 4'.

This interpretation was reiterated in *DB UK Bank Ltd v Santander UK plc.*[393]

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[389] Harpum (n 3) 126.
[390] Charles Harpum, Stuart Bridge, and Martin Dixon, *Megarry & Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) 7-136.
[391] *Piper Trust Ltd v Caruso (UK) Ltd* [2010] EWLandRA 2009/0623.
[392] Ibid [11].
[393] *DB UK Bank Limited v Santander UK plc* [2012] EWLandRA 2011/1169.

However, this construction of paragraph 8 should not be accepted as it stifles the very purpose of the provision. Paragraph 8 clearly envisages that the priority of derivative interests can be amended by rectification. This ambition cannot be realised if Harpum's interpretation of paragraph 8 prevails. As Lees highlights, this stems from the fact that the priorities of competing interests are determined by the time of their creation, with a first in time rule applying.[394] A reinstated interest automatically ranks above subsequently registered encumbrances; this position is not arrived at by modifying rankings. If rectification can only affect interests which arise after the date of the correction order, there would therefore be no change in priorities at all. As Lees argues, this is a difficult to reconcile with a provision which explicitly authorises a departure from the priority rules. To achieve this, rectification must be capable of affecting existing encumbrances. Otherwise, the provision plays a redundant and superfluous role. More broadly, Harpum's construction may result in a strained and incoherent interpretation of paragraph 8. This is supported by Goymour who observes that the provision permits changes to the priority of interests 'affecting the registered estate or charge'.[395] The use of the present tense provides a strong indication that contemporaneous interests which already encumber the registered estate are susceptible to ranking changes. These changes are not solely reserved for interests which are yet to arise. Had this been intended, the drafters may have formulated the clause differently so that it refers to 'interests which will affect the registered estate or charge'.

Gold Harp offers a much more plausible interpretation of paragraph 8. On one hand, it alters the priority which would otherwise exist between a) re-registered interests and b) derivative leasehold interests which arise during periods of mistaken de-registration. A rigid application of the section 29 priority rules would result in the erroneously deleted interest being suspended to the leasehold interest under the disposition (if valuable consideration was forthcoming); *Gold Harp* reverses this by attributing precedence to the re-registered encumbrance. At the same time, it ensures that such changes are effective from the date of the rectification order. This means that they can only affect the estate at subsequent points in time. This interpretation therefore also recognises the temporal limits imposed by the qualifying phrase 'for the future'. If anything, this demonstrates that the modification of

[394] Lees (n 379) 365.

[395] Goymour (n 377) 261.

acquired priorities is entirely consistent with prospective rectification. As Dixon observes, such changes can only take effect in the future (i.e. from this day forwards) - until they are made, the impugned interest prevails.[396] To arbitrarily categorise such alterations as retrospective is therefore wrong. In Dixon's view, this stems from the tendency to conflate the act of rectification with its consequences; while the effect may be to retrospectively reconfigure determined priorities, the act is always prospective as it operates from the date of the judgment. For Dixon, this demonstrates that the retrospective versus prospective distinction is superficial; it fails to comprehend that the purpose of rectification is to correct mistakes, something which may necessitate an adjustment to existing priorities albeit operating in the future. Underhill LJ recognises this nuance and adopts an interpretation which respects the various tenets of paragraph 8.

Furthermore, the measures ordered by the Court of Appeal are entirely consistent with Schedule 4. Schedule 4 provides jurisdiction to correct mistakes if the courts or registrar believe that rectification is warranted on the facts of a case. There is no prescribed formula here; the statute does not exhaustively outline all available courses of action or seek to rigidly dictate the court's response to specific errors. Rather, courts can exercise discretion to determine which measures are required to reverse the mistake in question. In the absence of such flexibility, correction may not occur, rendering the power obsolete. As Dixon highlights, 'an interpretation of Schedule 4 which seeks to lay down in advance what sort of change to the register might be required to correct the mistake misunderstands the nature of rectification'.[397] In *Sainsbury's v Olympia*, Mann J expressed a similar view.[398] Here, the proprietor of the freehold estate, Olympia, argued that it could not be retrospectively bound by an option which was erroneously omitted from the register at the time it acquired its interest. Mann J considered that this would prevent the courts from unravelling the effects of the mistaken omission, such that there may never be a 'useful' rectification: 'Rectification is allowed to bring the situation into line with what it should have been had the mistake not been made at the time of registration. To allow the registration itself to bar the effect of that would be to let the tail wag the dog'.[399] Context is therefore intrinsic to the proper

[396] Dixon (n 380) 212.

[397] Ibid.

[398] *Sainsbury's Supermarkets Ltd* (n 297) at [96].
[399] Ibid.

functioning of Schedule 4's corrective power; the courts can do whatever is necessary to correct the mistake. In some circumstances, this may require the removal of a proprietor from the register. In others such as *Gold Harp*, it required the courts to replicate the scenario which would have arisen if the lease had remained in the register and assumed priority against subsequently created leases. The crucial point is that this is authorised by Schedule 4.

While Underhill LJ did not categorise the grant of the subsequent lease to Gold Harp Properties Limited as an independent mistake, he recognised that it stemmed from the earlier error to close MacLeod's leasehold title. The Court of Appeal decided to fully correct the error by reversing both the mistake and its consequences. To do so, it could either a) reinstate MacLeod's lease and close Gold Harp's lease or b) retain Gold Harp's lease but ensure that it ranked below MacLeod's re-registered lease. Ultimately, the latter course of action was chosen. In any event, the court implicitly endorsed a broader construction of 'correcting a mistake'– both the deletion itself and subsequent dispositions were unravelled. It appears that a similar approach has been employed in ABC title disputes, not least in *Ajibade v Bank of Scotland plc*. Here, Ms Ajibade was the registered proprietor of a leasehold property.[400] Her sister forged a power of attorney and transferred the property to Mr Abiola, who was duly registered as proprietor. Abiola subsequently charged the property in favour of both Halifax Building Society and Endeavour. It was accepted that the forged transfer to Mr Abiola amounted to a mistake which should be rectified by reinstating the original proprietor. Endeavour argued that its charge should remain in the register, notwithstanding the fact that the Ms Ajibade would not have taken out a mortgage. Rhys J ruled that the retention of the charge would unduly frustrate efforts to correct the mistake. He held that the corrective power should not be construed so restrictively that it only involves the reversal of some consequences of a mistake. Rather, there should be a restoration of the pre-mistake position when appropriate: 'It seems to me that it would be perverse to limit the registrar's power to rectify the register to the correction of only one consequence of the mistake, leaving uncorrected the other direct consequences of the original mistake'.[401] This view was rejected in *Stewart v Lancashire Mortgage Corporation*.[402] The Deputy Adjudicator ruled that, pursuant to sections 58 and 23, registered proprietors are entitled to charge their property, even if they acquire it fraudulently. As such, the subsequent disposition could not be classed as a mistake or be impugned by rectification. However, in *Knights Construction (March Ltd)*

[400] *Ajibade v Bank of Scotland plc* [2008] EWLandRA 2006/0613 [12].
[401] Ibid.
[402] *Stewart v Lancashire Mortgage Corporation* [2010] EWLandRA 2009/86.

v Roberto Mac Ltd, the Deputy Adjudicator resolved this conflict in favour of *Ajibade*.[403] In this case, the Salvation Army successfully applied to be registered as the first proprietor of land adjacent to its chapel. The freehold title was subsequently conveyed to Roberto Mac Limited, which was duly registered as proprietor. It later transpired that, at first registration, the title erroneously included land belonging to Knights Construction (March) Limited. Knights Construction applied for the register to be rectified so as to remove the excess land from Roberto Mac's title. The Deputy Adjudicator ruled that this conclusion could be legitimately reached in three ways. Firstly, the original registration of the Salvation Army as proprietor of the excess land may be classed as a mistake; to correct this error, the land could be removed from the title of Roberto Mac.[404] Alternatively, the registration of Roberto Mac may form 'part and parcel of the mistake' as it directly flows from the original error.[405] It may also be an independent mistake. In any event, a disposition which stems from the immediate mistake can be prejudiced by rectification. This corresponds with the approach taken in *Gold Harp*.

Post *Gold Harp*, there is therefore an increased parity between the resolution of ABC title disputes and XYZ priority disputes. Goymour welcomes this on the basis that they are permutations of the same legal problem.[406] In both cases, the core issue is the same – can interests or estates which are created during a period of mistaken de-registration be prejudiced by the reinstatement of the erroneously deleted interest or estate to the register? For legal certainty purposes, they should be resolved in a similar manner. Lees expresses concerns that the approach to such disputes is inconsistent.[407] While *Gold Harp* uses paragraph 8 to reverse the consequences of the initial error, other cases - namely *Knights Construction* and *Ajibade* – explicitly rely on a broad view of 'correcting the mistake' or an expansive interpretation of mistake itself. Conversely, *Stewart* and *Odogwu* prefer a narrower construction of the corrective power. In view of the plethora of solutions to the 'who loses out' problem, she warns that parties may be unable to anticipate which approach – with their respective implications for title security – is most likely to succeed in litigation. It should be noted that while the approaches are by no means homogeneous, *Gold Harp* seeks to closely

[403] *Knights Construction* (n 10).
[404] *Knights Construction* (n 10) at [132].
[405] Ibid.

[406] Goymour (n 377) 262.

[407] Lees (n 379) 367.

align the outcome of XYZ priority disputes with the prevailing approach towards ABC title disputes. If anything, it is therefore mitigating such uncertainty.

Gold Harp has been criticised for prejudicing derivative interest holders who rely upon the register. A key aim of the LRA 2002 is to ensure that the register provides an accurate and complete insight into the state of a title (to the extent that this is possible). This cannot be achieved if official searches of the register, which were correct at the time of being issued, become inaccurate due to the readmission of encumbrances. Equally, the priority of third-party interests may be retrospectively usurped by encumbrances which did not previously appear on the register. For the authors of Megarry and Wade, this would do 'violence to the integrity of the register', limiting the extent to which it can be relied upon.[408] Harpum warns that the judgment undermines the legitimate expectations of proprietors more broadly.[409] Pursuant to sections 23-26, the proprietors of both freehold and leasehold estates enjoy broad powers of disposition, subject to any restrictions which can be gleaned from the register. This ensures that transferees are not prejudiced by limitations on proprietors' powers which are difficult to discover. However, this discretion may be sporadically fettered if interests such as restrictive covenants are readmitted into the register with priority over a derivative lease. For instance, proprietors may suddenly be subjected to a requirement to obtain written consent from a third party before charging the property. For Harpum, this demonstrates that retrospective rectification cannot be reconciled with a statute which generally aims to enhance purchaser protections.

However, *Gold Harp* does not unduly prejudice derivative leaseholders who have relied upon the register. Underhill LJ emphasised that rectification is not inevitable as a presumption against rectification applies when the proprietor of the estate is in possession.[410] Indemnities are also available if rectification is ordered.[411] A more plausible view is that the judgment struck a sensible balance between the original interest holders and the proprietor of the subsequently created leasehold estate. Underhill LJ does not subscribe to the general law's view that the priority of the unregistered prior in time interest always prevails, irrespective of

[408] Harpum, Bridge, and Dixon (n 390) 7-136.
[409] Harpum (n 3) 127.
[410] *Gold Harp* (n 329) at [98].

[411] Roger Smith, 'Land Registration: Rectification and Purchasers' (2015) 74(1) CLJ 10.

its registration status. If so, the subsequent lessees could be sued for periods of occupation prior to rectification. The judgment explicitly rejects this by ruling that the changes in priority only operate prospectively. At the same time, it does not unreservedly defer to the section 29 solution, which would favour the proprietor of the subsequent lease. As Goymour argues, the judgment therefore strikes a compromise between both parties.[412] In any event, it is entirely permissible for the priority of third-party interests to be prejudiced by rectification. The register is not designed to be conclusive.[413] This would mean that the registration project promotes absolute indefeasibility, a term which does not appear in the Act. As argued in Chapter 3, this cannot be the aim of the LRA; otherwise, there would be no power to modify the register in the event of a mistake. It follows that the rectification provisions should not be interpreted so restrictively that the register becomes de facto irrevocable. As Dixon puts it, absolute indefeasibility should not be ushered in through the 'back door'.[414]

Ultimately, *Gold Harp* represents a natural and sensible interpretation of paragraph 8. This sentiment is shared by the Law Commission, which endorsed the judgment and suggested that it should be placed on a statutory footing in its 2018 Report: 'We recommend that where a derivative interest in land is mistakenly omitted or removed from the register and consequently loses priority to another derivative interest, the court and the registrar should have the power to restore the interest to the register with the priority it would have had if the mistake had not been made'.[415]

The consequences for section 29's priority promise are profound; far from being incontrovertible, it can be readily diluted by Schedule 4. For Goymour, this exposes a significant tension between the alteration and priority provisions.[416] In view of this, the Act does not unequivocally affirm that the priority promise should prevail to the detriment of excluded encumbrances. If anything, it appears that paragraph 8 can fetter the realisation of

[412] Goymour (n 377) 264.

[413] *Gold Harp* (n 329) at [98].

[414] Dixon (n 380) 213.

[415] Law Commission (n 26) [13.193].

[416] Goymour (n 377) 264.

the priority promise. Section 29's ranking rules are susceptible to rectification – not the other way round! It would therefore be premature to conclude that the rectification is heavily conditioned by the priority rules. Goymour argues that it is misleading and disingenuous for section 29 to make such a strong priority promise to derivative leaseholders; its strength can be sapped by a provision which they may be unaware of, owing to Schedule 4's less prominent positioning within the statute. It is not at all clear that Z will be favoured in XYZ priority disputes. Increasingly, X is favoured (though Goymour partly attributes this to creative judicial interpretations), mirroring the outcomes endorsed by general property law rules. This prompts Goymour to question whether the Act should even make such a promise in the first place.[417]

Crucially, paragraph 8 of Schedule 4 demonstrates that interests which are omitted and deleted from the register are not only capable of being reinstated into the register but also fully corrected. Rectification can play a prominent role here, something which should be underpinned by a broad and flexible approach towards mistake.

[417] Goymour (n 377) 265.

The omissions of non-registry actors

The preceding sections demonstrate it is perfectly plausible for a number of erroneously omitted and deleted interests to be inserted into the register via rectification. This analysis primarily focused on the errors of the land registry. However, other parties may also make omissions which contribute towards the fact that the register does not note the burden of a third-party interest. For instance, interest holders may fail to inform the registry that they have acquired an easement over a property which ought to be protected via a unilateral notice. Solicitors and conveyancers may neglect to make an application for a notice to be entered in the register which details the burden of a client's restrictive covenant. This section will focus on whether these omissions are capable of constituting mistakes.

The Act does not exhaustively outline which parties can commit mistakes. In principle, there is no limit on who can do so. However, the policy of the LRA 2002 may necessitate the imposition of some limits. It is clear that the negligent omissions of individual interest holders do not amount to mistakes. The LRA 2002 seeks to ensure that the register can provide–as far as possible – a complete and accurate insight into the state of a title at any one time. The register ought to reflect the totality of third-party encumbrances, save for those which are overriding. To achieve this, the Act generally ensures that interests can only bind an estate if they protected via a notice. This prompts individuals to notify the registry about any interests which they have acquired. Crucially, the onus is on individuals and their agents to lodge applications with the registry; if they fail to comply, the enforceability of the interest may be extinguished. Watterson and Goymour regard this as an 'important disciplining function' which enhances both the comprehensiveness and reliability of the register.[418] These ambitions would be undermined if interest holders' negligence could be remedied via rectification. Individuals could passively ignore the requirement to liaise with the registry, knowing that the interest's priority could later be revived. The policy of the LRA 2002 therefore cannot be reconciled with an interpretation of mistake which is so vast that it encompasses all omissions.

It is less clear whether the omissions of solicitors and conveyancers – who often act as agents for third party interest holders – can amount to mistakes. On balance, this is unlikely to be the

[418] Watterson and Goymour (n 331) 320.

case as the actions of agents can be readily imputed to principals, particularly when considering that interest holders are able to select legal representatives.[419] This means that they assume some responsibility for the oversights of negligent officials. In practice, solicitors are thus tantamount to individual interest holders who fail to communicate with the registry. Rectification may increasingly represent a 'get out of jail card' for passive solicitors, consuming invaluable registry resources. Like negligent interest holders, they should be unable to exploit the rectification provisions to alleviate the effects of their carelessness. Rather, it would be more appropriate for interest holders to pursue personal remedies against negligent practitioners (through professional negligence proceedings).

On this basis, it may be argued that the registrar centric approach is correct after all. However, this would be misplaced. Other institutions may make omissions which could be readily construed as mistakes under the policy of the Act. Public bodies are a key example. Judicial institutions, such as the First Tier Tribunal, may be obliged to notify the Land Registry of rulings which affect proprietary entitlements.[420] For instance, if the Tribunal determines that an individual enjoys the benefit of a restrictive covenant, it may be expected to inform the registry.[421] Here, the public body is subject to a legal duty to transmit registrable material to the registrar. This enables the registry to make the necessary adjustments to the register. Failure to do so can compromise the comprehensiveness of the register. It might be thought that the interest holder ought to be held liable here – after all, they could have elected to lodge an application for registration after receiving the Tribunal's verdict, rather than simply relying upon the Tribunal to communicate with the Registry. This may be synonymous with situations in which interest holders neglect to initiate a dialogue with the registry about the existence of a right. However, these oversights should not be attributed to interest holders' carelessness. As Cooper contends, individuals develop a legitimate expectation that public bodies will diligently exercise their functions in compliance with legislation.[422] Individuals are entitled to rely upon these assurances and should not be held accountable for what are ultimately the failures of an external agency. Hence, the

[419] Cooper (n 328) 238.
[420] Ibid.
[421] Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013/1169, r 40(1).

[422] Cooper (n 328) 239.

interest loses priority through no fault of the individual or their agents. In this case, the Act's disciplinary incentives for individual interest holders would not be undermined by rectification. It may therefore be permissible for the oversights of certain public bodies to constitute mistakes; this possibility is not precluded by the policy of the LRA 2002. Ultimately, a registrar centric approach is not strictly necessitated by the legislation. A further consequence of this is that errors may not solely exist in the registration – or non-registration – of an interest. Rather, they may arise at an earlier stage, namely in the background facts.

Conclusion

Ultimately, the LRA 2002 does not prevent erroneous omissions and deletions from constituting mistakes. At first registration, the priority provisions arguably seek to achieve a neutral transposition of priorities, replicating the pre-registration position. The registrar's omissions undermine this and so should be susceptible to rectification. Once an estate has been registered, matters become more nuanced. The applicable priority rules generally stipulate that omitted or mistakenly deleted interests are suspended to subsequent dispositions, such that they no longer encumber the estate. At first, it may appear that the scope for rectification is significantly limited. However, one should exercise caution before succumbing to this view. There are countervailing provisions – namely Schedule 4 – which permit rectification in these very circumstances. Moreover, mistakes can be fully corrected once reinstated into the register. To the extent that this exposes a tension between the alteration and priority provisions, it demonstrates that the statute does not avowedly endorse the priority promise to the detriment of a broad corrective power. If anything, rectification substantially qualifies the priority rules. Thus, there is broad scope to construe erroneous omissions and deletions as mistakes. These errors are primarily made by the registrar. While the policy of the LRA 2002 does not allow the oversights of interest holders and their agents to constitute mistakes, it indicates that the registrar centric approach of *NRAM* and *Antoine* is not strictly necessary.

Chapter 5

Towards a broader construction of mistake

Introduction

It has been argued that the LRA 2002 can be reconciled with a broad construction of mistake. Far from establishing indefeasibility of title, the statute contemplates that the corrective power may be exercised against proprietors if warranted by the circumstances. If so, dispossessed proprietors should generally be able to obtain an indemnity (save where they have contributed to the mistake through fraud or substantial lack of care) – relief which may be compromised by the Court of Appeal's treatment of voidable dispositions in *NRAM* and *Antoine*. Similarly, Chapter 4 contends that the registrar's erroneous omissions and deletions are frequently susceptible to rectification, both at the point of first registration and when an estate is already registered. It also argues that the LRA 2002 does not necessitate a strictly registrar centric approach; the omissions of certain non-registry actors, namely public bodies, may be impugned as mistakes. Ultimately, this means that there is scope to construe mistake broadly, and to discard some of the qualifications established in *NRAM* and *Antoine*.

This chapter examines how mistake ought to be interpreted**.** Primarily, the chapter evaluates whether mistake should be construed in the most expansive way possible, such that it is not governed by any discernible rules. Whilst rejecting this option, the chapter also criticises Cooper's proposal that it should be subject to a rigid statutory definition. Rather, mistake should be governed by general principles which the judiciary can apply on a case-by-case basis. These principles could be condensed into a statement which appears in the leading textbooks; crucially, they should establish the broad parameters of mistake without exhaustively articulating how it operates (such that the scope of mistake can be incrementally expanded in response to novel circumstances). The chapter subsequently assesses how these principles should be determined.

Ultimately, the chapter argues that a change to the register should be construed as a mistake if it is not underpinned by a valid entitlement to make said change. However, contrary to the *NRAM* and *Antoine* analysis, this is not the only point at which a mistake should arise –an entry recording an interest should also be susceptible to rectification if the supporting

entitlement is nullified by a supervening event. Entries recording voidable dispositions should thus become mistaken once the disposition has been rescinded. Moreover, omissions from the register should be classed as mistakes whenever they stem from the registrar's failure to administer a lodged application or to comply with subsequent obligations during the registration process. The same should apply whenever a public body breaches a legal duty to relay registrable material to the registrar, the result of which is that the interest is not registered. Arguably, these principles can be used to develop a construction of mistake which is broader than the *NRAM* and *Antoine* formulation.

The flaws of a statutory definition

On a proper reading of the LRA 2002, the judiciary enjoys discretion to expansively interpret mistake. This raises questions about whether it should be construed in the broadest possible fashion. If so, it would not be governed by any fixed rules or guiding principles; rather, it would resemble an amorphous concept whose characteristics could not be readily discerned.[423] The courts and registry actors could exercise considerable control over the application of the corrective power, with titles being usurped on a sporadic and unpredictable basis. Legal certainty would be heavily subordinated to ad hoc decision making. Cooper notes that mistake may operate according to an 'open textured evaluative standard' which could be used to reverse register entries in circumstances where the acquisition of title is regarded as egregious.[424] It may be underpinned by a broad behavioural standard, which incorporates considerations of morality, justice, and the distributional fairness of maintaining the current allocation of proprietary entitlements. If so, it may operate in a similar manner to the doctrine of unconscionability, which can prevent morally dubious outcomes that would otherwise be reached by the general law. However, this approach would be highly problematic. Whilst an open-ended concept of mistake may promote responsiveness to individual circumstances, it would also render titles unduly vulnerable to an indeterminate corrective power. The existence of rectification can already undermine title security and reduce the reliability of the register as an information source. While this is acceptable in principle– not least to provide redress to victims of property fraud– prospective proprietors should be able to reasonably anticipate the circumstances in which proprietary entitlements may be usurped; this would be incredibly difficult to achieve if these entitlements could be rejigged in an unpredictable fashion. In turn, prospective purchasers may be less inclined to

[423] Cooper (n 8) 344.
[424] Ibid.

acquire property; at the very least, professionals may need to be employed to rigorously investigate the risk of title usurpation.[425] As Cooper contends, this may increase transaction costs, culminating in market drag.[426] Furthermore, as Cooper argues, an open-ended behavioural standard may be poorly suited to title disputes which do not involve direct communication between A and B - and with it, the risk that a transferee may exploit a transferor's vulnerability through undue influence or misrepresentation.[427] In many cases, the disputed allocation of title may occur for other reasons, such as the intervention of a third-party fraudster or a registry error; both parties may be equally innocent. Here, it would be superfluous to supervise disputes by reference to a 'vague value standard' or general notions of morality.[428] Therefore, even if it were normatively desirable, this approach is unlikely to provide a universally applicable framework for mistake.

Cooper instead argues that mistake should be governed by a rigid or 'hard edged' rule.[429] He is an advocate of a statutory definition which directly states the precise principle upon which mistake is based.[430] For Cooper, this would enable 'better forecasting of the occasions for correction and ensure improved information about risk, thus removing a potential deterrent to entering the land market'.[431] However, this too should be rejected. Problematically, a statutory definition would prove to be impracticable. This is supported by the Law Commission, which expressed doubt that a definition could be 'accurate, comprehensive, and informative, and yet not give rise to undesirable consequences'.[432] The definition offered by the authors of Ruoff & Roper is a pertinent example, with its focus on the course of action which the registrar would have taken had they been acquainted with the full facts. It does not clarify which facts would be sufficiently material to alter the registrar's trajectory and thus impugn an entry, omission, or deletion as a mistake. This can lead to uncertainty as to the circumstances in which rectification is available. Moreover, rectification has been the subject of considerable litigation, and it is likely that courts will continue to be faced with an array of novel and peculiar circumstances. It would be incredibly difficult for legislation to comprehensively anticipate all these scenarios and provide definitive guidance on whether a mistake has arisen. As such, it is highly unlikely that an exhaustive definition could ever

[425] Ibid.
[426] Ibid.
[427] Cooper (n 8) 345.
[428] Ibid.
[429] Cooper (n 8) 346.
[430] Law Commission (n 26) [13.17].
[431] Cooper (n 8) 346.
[432] Law Commission (n 26) [13.18].

materialise. As the Law Commission noted in its 2016 Consultation Paper, any definition would likely replicate section 82 of the LRA 1925, which supplemented specific examples of mistake with a 'catch all' provision: 'the concept of mistake thus appears intentionally broad as it enables the court to respond flexibly to new issues as and when they arise'.[433] This was reiterated in the 2018 Report, which stipulated that the 'courts should be left some flexibility in applying the concept to difficult cases'.[434] Arguably, this flexibility is intrinsic to the rectification provisions. Dixon supports this, arguing that the Act does not adopt the binary position that registry errors should either always or never be susceptible to reversal – rather, the registrar can correct errors when the circumstances warrant it, employing a context led approach.[435] This reflects the unique nature of the LRA 2002 which subscribes to neither indefeasibility nor mere registration of title. Indeed, while the registrar is constrained by possession related presumptions, these are subject to both exceptions and discretion. Fact sensitivity and responsiveness to individual circumstances are therefore key aspects of the rectification scheme and should not be fettered by a rigid definition of mistake which artificially limits the availability of alteration. As Dixon contends, this would unduly encroach upon the 'empty space deliberately left by the Act'.[436]

Rather, mistake should be governed by general principles which broadly establish how it operates; these could guide the judiciary on a case-by-case basis and may be condensed into a statement which appears in Ruoff & Roper or Megarry & Wade. The authors of Ruoff & Roper note that the summary statement could be analogous to the general boundary rule in so far that it does not provide a precise or exact meaning.[437] The authors of both Megarry & Wade and Ruoff & Roper have supplied such statements. The statements are almost homogenous and stipulate that mistakes arise whenever the registrar would have done something differently had they known the true facts at the time of making an entry, omission, or deletion from the register. As the authors of Megarry & Wade posit:

'it is suggested that there will be a mistake whenever the Registrar (i) makes an entry in the register that he would not have made; (ii) makes an entry in the register that 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

[433] Law Commission (n 132) [13.81].
[434] Law Commission (n 26) [13.17].
[435] Dixon (n 253) 126.
[436] Ibid 125.
[437] Cavill and others (n 24) 46.009.03.

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'.[438]

This statement is unsatisfactory. This is primarily due to its focus on the registrar. It may imply that the existence of a mistake is influenced by the registrar's subjective knowledge. Nevertheless, as the authors of Ruoff & Roper concede, such knowledge is often immaterial; the fact that the registrar is aware that a disposition was induced by forgery (rendering it void) has no bearing on whether it should be registered.[439] Registration is either granted or refused depending upon the status of the disposition. It should be noted that there are some circumstances in which knowledge may be a relevant factor; for instance, the question of whether a disposition is void can be contingent upon whether the transferor is sufficiently acquainted with the terms of the purported transfer (the *non est factum* doctrine). However, it is not universally determinative, something which ought to be reflected in any statement. The statement also places an emphasis on how the omniscient registrar would react to certain information. This may indicate that the existence of a mistake is influenced by how affronted the registrar is by the nature of a disposition. If so, the same set of circumstances may be categorised differently depending upon registrars' subjective responses, giving rise to legal uncertainty. This flaw was highlighted by the Privy Council in *Brelsford v Providence Estates Ltd*, where the Board noted that mistake is 'certainly not dependent upon how strongly the registrar disapproves of the conduct on the part of the proprietor whose title is being impugned'.[440]

In response to these concerns, the authors of Ruoff & Roper developed an updated statement which omits any reference to the registrar. It stipulates that:[441]

> 'a modified description of the meaning of "mistake" might be to suggest that there will be a mistake whenever the circumstances are such that, on the facts and law appertaining at the time:

- (i) an entry is made in the register that should not have been made;
- (ii) an entry is made in the register that should not have been made in the form in which it was made;
- (iii) an entry is not made in the register which should have been made; or

[438] Dixon, Bridge, and Cooke (n 21) 6-133.
[439] Cavill and others (n 24) 46.009.02.
[440] *Brelsford* (n 71) at [66].
[441] Cavill and others (n 24) 46.009.03.

- (iv) an entry is deleted which should not have been deleted'

According to this proposal, mistakes occur whenever the register should look different given the facts and law which appertained at the time that an entry, omission, or deletion was made. For the authors of Ruoff & Roper, this is the principle upon which mistake should be based. The next two sections will explore what the relevant principles should be. The first section examines the circumstances in which a change to the register should be categorised as a mistake. The second section explores when the omissions of various registration participants should be susceptible to rectification. More broadly, it will investigate whether mistakes must exist within the register or whether they can also encompass significant errors prior to the registration - or non-registration - of an interest.

Changes to the register

This section explores the circumstances in which changes to the register should be construed as mistakes. These positive commissions occur whenever entries are made or deleted. After rejecting the notion that procedural default alone should form the basis of rectification, this section will argue that the entitlements of the parties ought to be the key determinant of mistake. Indeed, the register's allocation of rights ought to be compared with the distribution of entitlements envisaged by an external framework; any discrepancy should give rise to a mistake. This section subsequently seeks to locate a viable comparator. It contends that the statutory vesting principle and the position in unregistered land would be inappropriate candidates. Rather, as Cooper postulates, a register entry should be impugned as a mistake if it is not underpinned by an entitlement to change the register which is recognised by the registered land system. An entry should also be susceptible to rectification if the supporting entitlement is nullified by a supervening event. Consequently, an entry which is made in pursuance of a voidable disposition ought to become mistaken once the disposition has been rescinded.

Procedural default as the basis of mistake?

The concept of mistake could be invoked in response to procedural default on the part of the registry. This would involve an assessment of whether the registrar made an official error when processing or examining an application. The registrar may breach a legal duty, fail to adhere to a formality requirement or exercise discretion in an ultra vires manner. A classic example would arise when the registrar receives an application for registration based on adverse possession but neglects to notify the existing proprietor, as required by Schedule 6. The focus here is not on the underlying entitlements of the parties or whether a dispositive instrument effectively vests title in an applicant.[442] Rather, the correction jurisdiction becomes available whenever the registrar has not followed due process.

Procedural default should not be the exclusive determinant of mistake. Problematically, it fails to attribute any attention to the underlying entitlements of the parties; provided that the registrar has exercised due diligence in reviewing an application, valid rights may be expunged from the register without any indemnity for the beneficiary. Property rights are unduly expropriated here. It is not difficult to see how this approach could inadvertently facilitate fraud. It ignores the circumstances surrounding transactions and fails to impugn void dispositions which are induced by forgery. As such, fraudsters may obtain an unimpeachable title, an outcome which is highly unconscionable. These criticisms are echoed by Cooper, who warns that the model attributes insufficient emphasis to the conduct of the parties and discards the careful balance that the common law strikes between moral values and utilitarianism.[443] By failing to discriminate between deserving and unmeritorious parties, he argues that it compounds the moral void inherent in the statutory vesting power.[444] For Cooper, this should be tempered by an alternative construction of mistake which is more attuned to the entitlements of the parties.[445]

The procedural default approach may also frustrate legitimately acquired proprietary entitlements. This occurs when a register change is induced by a procedural flaw despite being underpinned by a valid disposition. Here, the registry's error does not give rise to a deprivation of entitlement event which requires redress. However, if this approach is followed, the entry may be susceptible to reversal. In *Fatemi Ardakani v Taheri*, the registrar registered a transfer which had been executed by the donee of a valid power of attorney

[442] Cooper (n 8) 345.
[443] Ibid.
[444] Ibid.
[445] Cooper (n 8) 346.

without requesting a copy of the power of attorney.[446] This was not considered to constitute a mistake. Arguably, this is the correct approach; it prevents parties from opportunistically exploiting immaterial registry oversights in order to undermine legitimate transactions. As Cooper contends, 'procedural default by the registry should never constitute a basis for correction where the expression of rights in the register is in accordance with an underlying entitlement'.[447]

Fortunately, the judiciary has rejected the notion that procedural default should be the exclusive determinant of mistake. In *Baxter v Mannion*, Jacobs LJ held that mistakes are not 'limited to some official error in the examination of an application'.[448] This was reiterated in *Amirtharaja v White*.[449]

In view of this, the substantive entitlements of the parties should take centre stage when it comes to determining whether the addition or removal of an entry constitutes a mistake. The entitlements expressed in the register could be compared with what Cooper describes as freestanding property law rules which determine where titles and interests are located in registered land.[450] These rules tend to be found in the LRA 2002 and include the statutory vesting principle. This is a monojural approach, which investigates whether rights are recorded in places where the statute suggests that they do not exist. While this approach may appear to be sensible, it should be rejected as it would stultify the rectification provisions. This is because registered proprietors assume title by virtue of Section 58; in any event where a proprietor has been registered, there would be no discord between the proprietorship register's allocation of rights and the entitlements conferred by freestanding property law rules. Rectification would therefore never be available against registered proprietors, rendering Schedule 4 a dead letter. As Coper warns, titles which are underpinned by statutory vesting would be insulated from rectification due to a 'monojural fallacy'; they could benefit from indiscriminate protection, irrespective of the circumstances in which title was procured.[451] In Cooper's view, this means that a bijural solution should be adopted.[452] Here, the register's allocation of rights is compared with the entitlements envisaged by an extraneous set of rules; a mistake would occur in the event of a discrepancy between the

[446] *Fatemi-Ardakani v Taheri* [2007] EWLandRA 2006/1313.
[447] Cooper (n 8) 352.
[448] *Baxter v Mannion* (n 17) at [125].
[449] *Amirtharaja v White* [2021] EWHC 330 (Ch) [95].
[450] Cooper (n 8) 349.
[451] Cooper (n 8) 347.
[452] Ibid.

expression of rights in the register and the distribution of rights according to these rules. They are consulted as part of a 'secondary review'.[453] The remainder of this section will explore two sets of principles which could act as the relevant comparator.

Unregistered land – A flawed comparator

It might be thought that the position in unregistered land could act as the relevant comparator.[454] The register's allocation of rights would be compared with the distribution of rights according to unregistered land principles. Failure to adhere to these long-standing principles would give rise to a mistake. The LRA 2002 does not explicitly prevent unregistered land rules from playing a role in rectification proceedings, notwithstanding the Law Commission's implied reservations.[455]

Even so, one should exercise considerable caution before importing unregistered land rules into the adjudication of registered title disputes. The registered land system was primarily expanded in order to alleviate issues which taint unregistered conveyancing.[456] This is reflected in the fact that several unregistered land principles, namely the doctrine of notice, are not embraced by the LRA 2002. Rather, as Cooper contends, registration participants are encouraged to modify their conduct in accordance with a new set of rules which pursue the objectives of the registration project.[457] For instance, third parties are generally expected to apply for notices to be entered into the register in respect of the burden of interests – otherwise, the interests may fail to assume priority vis-a-vis a subsequent registered proprietor (provided that all section 29 conditions are adhered to). Purchasers should also exercise proper care when entering transactions, failing which they may forfeit the protections which are available to proprietors in possession.[458] These behavioural changes may be difficult to achieve if the statutory penalties for non-compliance can be readily fettered by unregistered land principles. This is particularly likely to displease those who regard the statute as a self-sufficient and sovereign regime (the internal rules of which should be used to settle registered title disputes).[459] On this view, the influence of external factors

[453] Ibid.
[454] Gardner (n 128) 771-773.
[455] Law Commission (n 85) [8.19].
[456] Law Commission (n 1) [1.5].
[457] Cooper (n 8) 350.
[458] LRA 2002 sch 4 para 3(2)(a)
[459] Goymour (n 39) 629.

should be limited so as to mitigate disruption to the registered land scheme's autonomy; certainly, the position in registered land should not be synchronised with the outcomes which would pertain under the general law. Smith contends that 'it would be dangerous for courts to accept a departure from unregistered land principles as being a ground for rectification' as registered land rules represent a 'self-contained, considered and appropriate resolution of problems which arise'.[460]

Moreover, an unregistered land comparator could generate considerable uncertainty. Priority disputes in unregistered land tend to depend upon whether third party interests are legal or equitable in nature. While legal interests are universally binding, the enforceability of equitable rights is more difficult to discern and may sometimes be contingent upon the subjective knowledge of transferees (in so far that the doctrine of notice is relevant).[461] A key question here is whether purchasers or mortgagees can be attributed with actual, imputed or constructive notice of a third party interest or alternatively whether they constitute equity's darling.[462] It may therefore be unclear whether an erroneously deleted interest is capable of binding subsequent transferees for value, giving rise to complex litigation.

For these reasons, mistakes should not arise due to a mere discord between the register and the unregistered land position.

[460] Roger Smith, *Property Law* (4th edn, Harlow 2003) 262.
[461] *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 WRL 783 ChD.
[462] LPA 1925, s119(1)(ii).

The transferee's substantive entitlement to procure a register change– the most convincing comparator

Thus far, this thesis has argued that mistakes should occur whenever there is a discrepancy between the allocation of rights in the register and the distribution of rights envisaged by an external set of rules. The entitlements of the parties – as determined by these rules- are key. It has also been argued that this external reference point should not be the position in unregistered land or the statutory vesting principle. Rather, mistakes could occur whenever an entry is not underpinned by an entitlement to change the register which is recognised by the registered land regime. Cooper argues that these entitlements could include a range of rights which confer an eligibility to change the register.[463] He refers to these rights as mandates; if the register is altered without the authority of a mandate, the correction jurisdiction can be engaged. Following this approach, mistakes would occur whenever a 'change is made to the register, but nobody was entitled to procure that change at the moment when it was made'.[464]

Under Cooper's model, these mandates stem from two sources.[465] Firstly, the proprietorship register can be legitimately altered in the face of a consensual disposition between A and B. For this to occur, the dispositive instrument ought to be characterised by both substantive and formal validity. The former examines whether the grantor has the capacity to execute a disposition, whether appropriate consent has been provided, and whether the transferor sufficiently understands the terms of a putative grant. Formal validity arises when the purported disposition is executed in the required form. Secondly, a valid mandate may arise due to the operation of the law. Statutory rules may entitle an applicant to be registered as the proprietor of an estate; if the register is changed in circumstances where these rules are not satisfied, an actionable mistake occurs. Hence, in *Baxter v Mannion* and *Khalifa Holdings Aktiengesellschaft v Way,* rectification was ordered as squatters had not been in adverse possession of the disputed land for duration of the statutory limitation period.[466] In *Sainsbury's Supermarkets Ltd v Olympia Homes Ltd*, a mistake was found to exist as the first proprietor of the fee simple merely possessed an equitable interest when the land was unregistered.[467]

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[463] Cooper (n 8) 355.
[464] Ibid.
[465] Ibid.
[466] *Khalifa Holdings Aktiengesellschaft v Way* [2010] EWLandRA 2008/1438.
[467] *Sainsbury's Supermarkets Ltd* (n 297).

Cooper's theory is supportive of the void and voidable distinction. Unless rescinded, voidable dispositions can effectuate a shift in proprietary interests. As such, the benefactor of a voidable disposition is entitled to be registered as the proprietor of the estate. Interestingly, Cooper argues that a mistake arises if one was not entitled to procure a change at the time the entry or deletion was made. On this view, an entry recording a non-rescinded voidable disposition does not subsequently become mistaken if the transfer is later avoided; the retrospective recategorisation of entries is prohibited, which corresponds with the approach taken in *NRAM* and *Antoine*.

Does Cooper's mandate theory represent a viable model for determining whether mistakes exist? To an extent, it does – a change to the register should be mistaken if it is not underpinned by an entitlement to make that change. However, his proposal should be expanded so that entries recording voidable dispositions become mistaken once the disposition has been avoided.

It is accepted that the registration of a voidable disposition should not give rise to rectification in and of itself. Provided that they have not been rescinded, these dispositions can create new proprietary interests - 'but for' the registration requirement, they would vest title in transferees. This is something that ought to be reflected in the register, in so far that it seeks to give effect to acquired entitlements. Lees speculates that such registrations may be considered 'unjustified' due to the egregious circumstances in which they arise.[468] This may warrant rectification if a behavioural standard is adopted. However, the registration scheme should not be called upon to adjudicate these moral battles; grantors can pursue alternative remedies to reverse any benefits which transferees gain through misrepresentation and undue influence, namely rescission of the disposition. This may be granted at the court's discretion. As Kester Lees argues, it would be inappropriate for the registrar to jump the gun and attempt to pre-empt whether such applications would be successful, or indeed whether the grantor would choose to initiate proceedings in the first place.[469] Rather, the registrar's focus should be on the entitlements of the parties– unconscionable conduct can be sanctioned through other channels.

However, the temporal qualifications imposed by Cooper's mandate theory should be discarded. Entries recording voidable dispositions should not be perpetually insulated from

[468] Lees (n 154) 70.
[469] Kester Lees, 'NRAM v Evans: there are mistakes and mistakes' (2018) 1 Conv 91.

rectification simply because the transfer was effective at the time that the entry was made. They should become mistaken if the disposition is later avoided, with their removal from the register being governed by the discretionary rectification procedure. Indeed, at this point, the disposition no longer has any legal effect– much like a void transaction. Therefore, it should be categorised in the same light, namely as a mistaken entry which is liable to rectification. As Jacobs LJ stated in *Baxter,* 'it is difficult to see why…… a transaction induced by a fraudulent misrepresentation (which would only be voidable) could not be corrected once the victim elected to treat it as void'.[470] This does not appear to be prohibited by the statute; the LRA 2002 does not stipulate that the only time for assessing whether there is a mistake is the time at which an entry is made.

This proposal was rejected in *NRAM* on the grounds that it may undermine the register's ability to provide a complete and accurate insight into the state of a title at any one time.[471] Prospective purchasers may rely upon an entry to ascertain the identity of the registered proprietor, only to later learn that it is mistaken. This may diminish the register's credibility as an information source. However, if anything, the current approach to voidable dispositions can significantly impede the register's reliability. The failure to categorise entries which record avoided dispositions as mistakes means that their removal is not governed by the discretionary rectification procedure. Rather, rescission gives rise to a claim to administratively alter the register for the purpose of bringing it up to date. On this view, rescission constitutes a supervening event which invalidates the entitlements initially conferred by the disposition.[472] In turn, there is a disparity between the rights allocated by the register and the entitlements of the proprietor, necessitating an update. This is an administrative act which is all but mandatory. As Cooper himself observes, proprietors who acquire titles pursuant to voidable dispositions therefore have no opportunity to resist the reversal of the corresponding register entries; the expectations of ownership which they develop as a result of registration are unprotected and cannot be reasonably relied upon.[473] Moreover, as Dixon highlights, this approach debases the LRA's title guarantee; in the absence of a mistake, a proprietor cannot claim an indemnity following the removal of an entry recording a voidable disposition, instead being subjected to a double whammy loss.[474]

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[470] *Baxter* (n 17) at [31].
[471] *NRAM* (n 9) at [59].
[472] Cooper (n 8) 327.
[473] Ibid.
[474] Dixon (n 253) 126.

The availability of compensation is artificially restricted due to a technical difference between what are ultimately two flawed types of transaction. The authors of Emmet and Farrand also emphasise that this applies to transferors, who may be deprived of both rectification and an indemnity due to the fact that voidable dispositions are not deemed to be mistaken – even when avoided.[475] In their eyes, this stems from an 'outrageous' distinction between void and voidable transactions which ought to be discarded (although in practice, property would be returned to the transferor following alteration).[476]

While they are 'agnostic' about the current approach, Watterson and Goymour argue that there are cogent reasons to refuse indemnities to transferees who take under voidable dispositions.[477] They contend that these transferees are likely to contribute towards the flaws which render dispositions voidable. This is because the egregious conduct which taints these transactions tends to arise during direct communications between the contracting parties. Conversely, void dispositions may be facilitated by forgery on the part of remote third parties. Even if this distinction is accepted, these concerns could be effectively addressed by the rectification provisions. Pursuant to paragraph 3(2)(a) of Schedule 4, proprietors in possession may be unable to retain title if they procure an entry in the register through fraud. Immoral conduct on the part of these proprietors can be penalised.[478] Crucially however, rectification enables a nuanced and case sensitive approach to be adopted which considers the specific circumstances of the disposition – and indeed the wider context – without arbitrarily categorising all such proprietors as undeserving.[479]

Hence, the rescission of a voidable disposition should give rise to a mistaken entry in the register. While promising, Cooper's mandate theory only tells half the story – register entries should be underpinned by a valid entitlement at a) the time of being made and b) at all subsequent points in the future.

Ultimately, changes to the register should be construed as mistakes if they are not authorised by a substantive entitlement to make that change. Moreover, entries recording voidable dispositions should be susceptible to rectification if the dispositions are avoided.

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[475] *Emmet and Farrand on Title* (9th edn, Longman 1986) 9.027-9.028.
[476] Ibid.
[477] Watterson and Goymour (n 158) 303.
[478] Simon Cooper, 'Registered Title and the Assurance of Reliability' in Warren Barr (ed), *Modern Studies in Property Law* (8th edn, Hart Publishing 2015) 327.
[479] Ibid.

Omissions from the register

This section explores another key scenario in which mistakes may arise - when the register erroneously fails to record information about proprietary entitlements. It will explore when the omissions of registration participants – namely interest holders, the registry, and public bodies –should be susceptible to rectification, if at all. Ultimately, the registry's failure to process applications should form the basis of an actionable mistake. Arguably, rectification should also be available whenever a public body breaches a legal duty to communicate registrable material to the registrar, the consequence of which is that a corresponding entry is not made. Hence, a registrar centric approach should not be pursued.

Interest Holders

The first group of registration participants to consider are interest holders. Interest holders may neglect to lodge an application for registration. It has already been established that rectification should not act as a safety net here; otherwise, the incentive to register third party interests is undermined, to the detriment of the register's comprehensiveness. As Cooper argues, interest holders should not be able to pass the relatively insubstantial costs of lodging an application on to subsequent purchasers, who may be either a) forced to expend vast sums on rectification proceedings or b) encumbered by adverse interests which reduce title marketability.[480] The only exception applies at first registration, when the registrar is responsible for conducting an inquisitorial review of an estate and recording all detectable encumbrances in the register.

This is supported by Cooper, who contends that interest holders must, at the very least, initiate communications with the registry about the existence of a protectable interest (thereby demonstrating an intention to avoid the postponement effect of the priority rules).[481] As a minimum, an application would need to be lodged. Cooper notes that the requirements for lodging are somewhat unclear; various obligations may be imposed upon proprietors ranging from informal communication with the registry to the submission of in order applications which are untainted by substantive defects. Arguably, an interest holder should be considered to have properly lodged an application when their actions trigger the registry's duty to process said application.[482] This approach ensures that third parties are not penalised once an external agency becomes accountable for the progress of the application. The question of

[480] Cooper (n 328) 232.
[481] Ibid.
[482] Cooper (n 328) 234.

whether a mistake arises then depends upon the extent to which the registry is responsible for procuring the entry of an interest into the register. This will be addressed in the next section.

Registry Actors

At the outset, it should be noted that the registrar's omissions at first registration constitute mistakes. As outlined in Chapter 4, this is the envisaged effect of section 11 of the LRA 2002. This position is also entirely appropriate on policy grounds; as Watterson and Goymour contend, first proprietors do not rely upon the register prior to acquiring an estate and so cannot argue that their legitimate expectations are unduly undermined by the admission of omitted interests.[483] Failure to do so may result in property rights being expropriated in circumstances where interest holders could not have anticipated that the estate would be subject to a new set of priority rules. Cooper warns that this can severely damage confidence in young registration systems while also violating constitutional guarantees pertaining to property.[484]

However, once an estate has already been registered, the picture is less clear cut. At this stage, the registry may neglect to process an application. To determine whether this constitutes a mistake, it is necessary to examine how much responsibility interest holders bear for procuring the successful registration of interests. At one extreme, interest holders may assume responsibility for securing the entry of the interest into the register; third parties would remain accountable for omissions until interests are subject to protective notices.[485] If so, interest holders would not merely be expected to initiate a dialogue with the registry about the existence of the right but also to monitor the progress of applications. They may be obliged to reply to requisitions and secure confirmation that the interest has been registered. Unti this has occurred, the corrective power could not be invoked to contest the omission. However, this approach would impose an unduly exacting burden on interest holders, who would be penalised for the failures of an external agency. They would be placed in the same position as irresponsible interest holders who neglect to lodge applications, despite making more profound efforts to obtain protective entries. The approach therefore insufficiently discriminates between deserving and underserving parties. Moreover, as Cooper notes, it may be impracticable for interest holders to supervise technical registry operations.[486] Continuous

[483] Watterson and Goymour (n 331) 327.
[484] Cooper (n 349).
[485] Cooper (n 328) 236.
[486] Ibid.

requests for information may also place an additional burden on already scarce registry resources, further inhibiting the organisation's efforts to expediently register interests.

Alternatively, interest holders may be absolved of responsibility once they have lodged applications and meaningfully engaged with the registry's requests for information thereafter.[487] Here, the interest holder's duties are supplanted by the registry's responsibility to process an application prior to the entry of the interest. This approach recognises that there may be an ongoing dialogue between the registry and the interest holder following the submission of an application; Cooper observes that responsibilities may continuously shift between the parties throughout the course of these exchanges.[488] For instance, the interest holders may assume responsibility for resubmitting substantively defective applications or replying to requisitions; once these requisitions have been satisfactorily resolved, the registrar would be expected to progress the application. If the registrar fails to act at this stage, their actions are tantamount to a failure to duly process an application, giving rise to a mistaken omission. As Cooper highlights, this case sensitive approach should be preferred as it permits highly individualised responses to the causes of omissions. Consequently, diligent interest holders are not unduly prejudiced by the registry's oversights. This is reflective of the registry's broader role as the insurer of the land registration system.

Therefore, omissions from the register should constitute mistakes whenever they stem from the registry's failure to a) initially process applications and b) comply with further obligations which may be imposed on it thereafter.

Public Bodies

Public bodies may assume a legal duty to inform the registrar about interests which ought to be registered. This obligation to transmit registrable material is not particularly common. It applies whenever the First Tier Tribunal is compelled to notify the registrar of any direction which requires the registry to take action.[489] Arguably, mistaken omissions should arise whenever a breach of this duty results in the non-protection of interests.

In many respects, these breaches are synonymous with the registry's failure to process applications. There are significant parallels; in both cases, a public body fails to discharge the functions conferred on it by the legislature. Neither institution is tangibly influenced by the

[487] Ibid.
[488] Ibid.
[489] Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, SI 2013/1169 r.40(1).

interest holder (after all, they cannot nominate officials to transmit or process relevant information). In both contexts, the core issue is therefore substantially the same, namely whether a conscientious interest holder should be prejudiced by the oversights of an external agency. In view of these similarities, it would be appropriate to treat both scenarios in the same manner.

Public bodies may be liable to pay compensation in the event of a breach of duty. This may act as an appropriate substitute for rectification. Perhaps, the availability of rectification (and by extension mistake) should be dependent upon whether public bodies are obliged to pay indemnities. However, as Cooper argues, this would give rise to considerable legal uncertainty; the same conduct could be categorised differently, depending upon ad hoc assessments of compensation by an external body.[490] In turn, it may be difficult to reasonably anticipate when omissions by public bodies amount to mistakes. Moreover, it would produce the bizarre situation in which the existence of mistake is not ultimately based on flawed or erroneous conduct. For these reasons, the availability of compensation should instead be considered as part of the 'exceptional circumstances' or 'unjust not rectify' limbs of the rectification test.

Categorising these omissions as mistakes also means that title disputes can be resolved in a more equitable manner. Interest holders may have taken diligent steps to assert an interest in legal proceedings, only to be failed by an external agency. As Cooper argues, the merits may therefore be finely balanced in any title dispute between an interest holder and a subsequent purchaser (assuming that the latter's solicitors carefully inspected the register and property for third party encumbrances).[491] One party is not necessarily more deserving than the other. Rather than automatically subordinating the interest holder's claim to the priority rules, the question of entitlement should instead be subject to more detailed and conscientious deliberations. This is something which can be achieved through discretionary rectification proceedings.

Hence, omissions should constitute mistakes whenever they stem from a) a public body's breach of its duty to communicate registrable material to the registrar and b) the registry's failure to properly process and progress applications. *NRAM* and *Antoine* heavily insinuate that mistakes can only be perpetrated by registry actors; however, this is an artificially narrow

[490] Cooper (n 328) 239.

[491] Ibid.

construction which ought to be expanded. On this view, mistakes do not necessarily only exist in the registration – or non-registration – of an interest (or in other words, 'in the register'). Rather, they may also describe errors which occur in the background facts. A natural extension of this would be that mistakes could arise in transactions preceding registration.

Conclusion: A broad concept of mistake

This chapter argues that the LRA 2002 can be reconciled with a broad and flexible construction of mistake which encompasses both positive actions and omissions. In this spirit, the thesis also contends that mistake should not be the subject of a rigid statutory definition. However, it would be equally undesirable for mistake to be described so loosely that it does not possess any discernible principles at all. Rather, a 'middle ground' position should be adopted – mistake ought to be governed by general principles which the judiciary can apply on a case-by-case basis. This would enable the rectification provisions to incrementally respond to challenging new circumstances while at the same time providing proprietors and interest holders with some measure of certainty. As this chapter has argued, the following principles ought to guide the judiciary:

a) A change to the register should generally be construed as a mistake if it is not authorised by an entitlement to make that change. For instance, an individual may be registered as the proprietor of land which falls into another title (double registration). Similarly, an individual may be registered with more land than the transfer envisaged. Moreover, the entry recording the interest can retrospectively become mistaken if the supporting entitlement is nullified by a supervening event. As such, entries recording voidable dispositions should be susceptible to rectification once they have been avoided.
b) Omissions from the register do not amount to mistakes when interest holders or their agents fail to lodge applications in respect of an interest. However, rectification should be available whenever the registry fails to process an application, or a public body breaches its legal duty to transmit registrable information to the registrar (the consequence of which is that the interest does not acquire protection).

Crucially, these principles give rise to a broader construction of mistake than either *NRAM* or *Antoine.* The Court of Appeal stipulated that mistakes can only arise at the time that an entry, deletion, or omission is made. This would mean that an entry recording a disposition could be perpetually insulated from rectification, provided that it was correct at the time of being made. Entries made in pursuance of a voidable disposition could not later become mistaken, something which also appears to be endorsed by authors of Ruoff & Roper (whose most recent construction of mistake contains a similar temporal qualification). However, this approach is rejected by this thesis. The Court of Appeal judgments also heavily imply that mistakes can only be made by the registrar and so must necessarily relate to the registration – or non-registration – of interests (as opposed to errors in the background facts). The thesis disputes this, arguing that the omissions of certain non-registry actors may be impugned. This is supported by the fact that the statute does not dictate that mistakes can only exist within the register itself. Ultimately, a broader construction of mistake can and should be adopted; it is not desirable to artificially confine the scope of mistake in the manner achieved by the Court of Appeal.

Conclusion

Despite acting as a key pre-requisite for rectification, mistake is left undefined by the LRA 2002. This has given rise to considerable uncertainty, with the interpretation of mistake being incrementally developed by the judiciary on a case-by-case basis. Following the Court of Appeal judgments in *NRAM* and *Antoine*, there appears to be a strong judicial preference for a more restrictive interpretation of mistake in the A-B context. This has been achieved through the adoption of a registrar-centric approach and the importation of the void versus voidable distinction into registered title disputes. Crucially, voidable dispositions do not retrospectively become mistaken once they have been rescinded.

This approach is often rationalised on the grounds that the scope of rectification ought to be limited – otherwise, the reliability of the register may be severely compromised to the detriment of efficient conveyancing. On this view, a broad corrective power could strike at the heart of the LRA's 'fundamental objective'. However, this is misplaced. The statute neither prescribes nor promotes such a narrow interpretation. Indeed, far from establishing that proprietors' titles should be insulated from rectification, the LRA 2002 creates a title guarantee which can manifest itself in either land or monetary compensation. Indefeasibility is not the aim of the game. This is highlighted by the fact that the statutory vesting power - with its promise of title - is subject to the revisionary effect of Schedule 4. At first, Schedule 4 may appear to significantly limit the ambit of rectification where proprietors in possession are concerned. However, while it certainly confers enhanced protections upon them – in the form of a presumption against rectification – it does not immunise their titles from rectification. If anything, the exceptions to the presumption are vaguely drafted and could be expansively interpreted by the judiciary. This has been borne out in some (though certainly not all) of the case law, not least *Baxter v Mannion.* Far from adopting a rigid or prescriptive approach, Schedule 4 therefore enables the registrar and the courts to materially influence the strength of the presumption (and by extension the prevalence of rectification).

Moreover, the LRA 2002 permits an array of erroneous omissions and deletions to be corrected through rectification, not least at the point of first registration. It may seem that the priority rules applicable to already registered estates are less hospitable towards this possibility. However, a different answer is provided by the alteration provisions. The thesis argues that these priority rules are subject to Schedule 4; interests can be reinstated into the

register so that they bind both the proprietor and other derivative interests burdening the estate. At best, there is an inherent conflict between the two sets of provisions; however, this does not mean that the corrective power should be automatically subordinated to a rigid and orthodox application of the priority rules. The statute instead strikes a subtler compromise, reflecting the fact that it seeks to navigate tension between competing interest groups. In this sense, the LRA 2002 does not subscribe to the notion that dynamic security – and purchaser protections more broadly – should be realised in the most absolute or unqualified manner. When this is understood, it becomes apparent that rectification – and by extension mistake – can play a prominent role within the registered land framework.

This thesis has argued that there is discretion to depart from the narrow approach advanced by *NRAM* and *Antoine*. This possibility should be enthusiastically embraced. In particular, it would be desirable to discard the registrar-centric approach. The omissions of certain non-registry actors, namely public bodies, should be capable of constituting mistakes. This would apply when a public body breaches its legal duty to convey registrable material to the registrar, the consequence of which is that an interest fails to obtain protection. As such, mistakes should not necessarily be confined to the register itself. More fundamentally, the case law's treatment of voidable dispositions should be revised so that their rescission gives rise to mistakes. Indeed, at this point, the avoided disposition is divested of any legal effect – much like a void transaction. It should therefore be categorised in the same light, namely as a mistaken entry which is susceptible to rectification. Quite frankly, it is bizarre that void and voidable dispositions continue to be treated differently at this point in time, an approach which has profoundly negative implications for the statute's title guarantee. While the thesis has argued that the distinction should not be discarded, the current approach ought to be reconfigured.

More broadly, the thesis argues that a mistake arises whenever a change to the register is not underpinned by an entitlement to make that change. This builds on Cooper's mandate theory. Crucially however, this thesis does not suggest that the question of whether a mistake exists should be solely determined by reference to the position at the point in time that an entry, omission, or deletion is made. Moreover, while Cooper would prefer to enshrine his guiding statement into a statutory definition, the thesis contends that this would be counterintuitive. His proposal could also compromise the flexibility which is intrinsic to Schedule 4. Rather, mistake should be governed by broad principles which the judiciary can apply to novel and peculiar circumstances on a case-by-case basis.

Ultimately this thesis has argued that mistake can - and should - be broadly construed. It would be desirable for the courts to adopt this approach, rather than significantly undermining the breadth and scope of mistake.

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