

Rectifying the Register under the LRA 2002

The Malory 2 argument: a non-problem¹

In *Updating the Land Registration Act 2002: A Consultation Paper*,² the Law Commission examine the Court of Appeal's decision in *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd*³ and find it broadly inconsistent with the principles underlying the Land Registration Act 2002. As the Commission explain, the court in *Malory* made two significant findings. The *Malory 1* argument – that registration as estate holder confers only a bare legal title if the transfer to the registered proprietor was void under the general law – has been consigned to history by the decision in *Swift 1st v Chief Land Registrar*.⁴ In this respect, *Swift 1st* decides that the effect of s.58 LRA 2002 is to confer absolute estate ownership on a registered proprietor, subject only to the possibility of rectification of the register under Schedule 4 of the LRA 2002.⁵ There is no room under the statutory scheme for the argument that registration confers only a bare legal title, even if triggered by an impugned transaction, and so no room for the consequence that the former owner somehow retains an equitable title that might go on to take priority over the transferee.⁶ As is well known, however, *Malory* also accepted that the former innocent registered proprietor's "right to rectify" the register amounted to a proprietary right.⁷ In turn, if coupled with "actual occupation", it would override any new registered proprietor under the former s.70(1)(g) LRA 1925, and perhaps have the same consequence under the current para.2, Schedule 3 LRA 2002. This is the *Malory 2* argument⁸ and it has serious consequences for a new registered proprietor in those cases where the former owner remains in actual occupation despite the transfer to the new proprietor.⁹ It also comes into play in the *Swift 1st* type case where a chargee can be said to be bound by the deceived owner's "right to rectify" the forged charge, and these cases may well be relatively common given that the deceived person is likely to remain in occupation in blissful ignorance that their land has been charged. The apparent and serious consequences of *Malory 2* are: first, being enhanced by overriding status, alteration of the register to the detriment of the new proprietor or duped chargee appears irresistible given that it seems to spring from a right that has priority; second, if the "right to rectify" overrides and the register is altered, the person prejudiced (the new registered proprietor or the lender whose charge is deleted) cannot claim an indemnity because of the *Re Chowood*¹⁰ principle. This is the idea

¹ I am very grateful to the peer reviewers (many of whose suggestions I have adopted) who reviewed this in ignorance of the author's identity.

² Law Com Consultation Paper No. 227, March 2016.

³ [2002] EWCA Civ 151, [2002] Ch 216.

⁴ [2015] EWCA Civ 330, [2015] Ch 602.

⁵ This has been welcomed generally as an accurate interpretation of the LRA 2002, but not everyone agrees: contrast Cooke [2013] Conv. 344 and Lees [2015] L.Q.R. 515 with *Emmet & Farrand on Title*, Vol.1 Chap 9, para. 9.009.01.

⁶ For example, if they were in discoverable actual occupation within Schedule 3, para. 2 LRA 2002. Note also, some scholars question whether, even if *Malory 1* was correct, that there should be an overriding interest here on the (entirely logical) basis that priority is meant to protect a pre-existing interest, not an interest created out of the impugned transaction. That criticism is not material now that *Malory 1* has been resolved. This and some of the issues raised in this piece are considered in Goymour, *Mistaken registrations of land: exploding the myth of "title by registration"* (2013) 74 CLJ 617.

⁷ The Law Commission have some doubts about this, but recognise that the Court of Appeal decision stands as good law, Consultation paper para.13.61.

⁸ But see below, footnote 27, as to whether the case law prior to *Malory* supports two strands of reasoning.

⁹ This scenario may be uncommon because the new proprietor should inspect the land prior to completing their transaction and, on discovering the person in actual occupation, should seek an explanation before proceeding.

¹⁰ [1933] 1 Ch 574

that where there is an overriding interest which causes the register to be changed, it is not the *rectification* that causes loss, because the title is already compromised by the overriding interest. The rectification merely recognises an existing state of affairs: the priority of an adverse right. Thus no indemnity is payable, because indemnity only compensates for loss caused by a *rectification* (or refusal to rectify where one could have been made).¹¹ In *Swift Ist*, the Court accepted without argument the idea that the “right to rectify” could override by reason of the right holder’s actual occupation, but avoided the conclusion that no indemnity was payable by relying on the “forgery” provision in para. 1(2)(b) Schedule 8 LRA 2002.¹² As the Law Commission explain, this sidestep will not work in all cases, and is unprincipled.¹³ Further, even if it were capable of applying because the challenged disposition happened to have been forged, the solution rather begs the question. As discussed below, the Land Registry’s argument in *Swift Ist* was subtler than simple reliance on *Re Chowood*. In fact, the Registry argued that this was not a case of rectification at all and this is why no indemnity was payable.¹⁴ This is because a “rectification” is where an alteration would prejudicially affect the title of a proprietor,¹⁵ but in cases where there is an overriding interest, the title is already prejudicially affected by the adverse interest. In recognition that the *Swift Ist* analysis is only just tenable on a generous reading of the 2002 Act and is only a partial solution, the Commission suggest amending the legislation to ensure that the “right to rectify” cannot qualify as an overriding interest, thereby reversing *Malory 2* and ensuring that an indemnity is payable.¹⁶ This paper explains why that is unnecessary because the *Malory 2* problem is illusory.

First, as a preliminary point, it is worth bearing in mind that *Re Chowood* and *Malory* were decided under the rectification provisions of the Land Registration Act 1925, primarily section 82. These old provisions do not draw a distinction between a “rectification” and an “alteration”: everything was a rectification within section 82 LRA 1925 and the concept of “alteration” was not employed. Other changes to a register could be made – for example to bring it up to date – but this was implied from the management powers of the registrar found elsewhere in the Act.¹⁷ Thus, the 2002 Act is not merely a rephrase of its predecessor, despite employing some of the same language and the *Re Chowood* analysis, in respect of legislation where indemnity was triggered by rectification broadly defined, is not conclusive as to the position under the 2002 Act. The relevance of this point is that we should not assume that the guarantee/rectification/alteration provisions of the two Acts should work in the same way, despite this being the (perhaps erroneous) view taken in *Fitzwilliam v Richall Holdings Services*.¹⁸ In any event, although we refer to the *Malory 2* problem as springing from *Re Chowood* as if the LRA 1925 and LRA 2002 should be treated in the same way, this was not quite the Land Registry’s position in *Swift Ist*. As noted above, the Registry were well aware that an “alteration” and a “rectification” are different things under the 2002 Act, and they did not contend per se that no indemnity was payable because the rectification caused no loss (there being an overriding interest – which is pure *Re Chowood*), but rather that there was no “rectification” properly understood at all. The deletion of the charge was, the Registry

¹¹ Of course, an indemnity may be paid if the decision is not to rectify, but there must still be a qualifying rectification event.

¹² That a person taking in good faith under a forged disposition – as in *Swift Ist* – is deemed to suffer loss by reason of the *rectification* [emphasis added] as if the disposition had not been forged.

¹³ Consultation Paper, para.13.83 et seq.

¹⁴ *Swift Ist* para.6

¹⁵ Schedule 4 LRA 2002, para.1.

¹⁶ The *Re Chowood* principle itself would remain.

¹⁷ See *Land Registration for the 21st Century*, Law Commission Report No.271, Part 10, esp. para.10.2

¹⁸ [2013] EWHC 86 (Ch). Now overruled, given that it applied *Malory 1* to the 2002 Act.

alleged, an *alteration* because it did not prejudicially affect the title of a registered proprietor and did not trigger indemnity for that reason. Consequently, one might argue that solving the *Re Chowood/Malory 2* issue by saying that a forgery in a *rectification* case permits indemnity does not meet the Land Registry's argument.¹⁹ This is, perhaps, a small point, but it has been overlooked. It is not used here to argue that *Swift 1st* was wrongly decided, but to illustrate that not only is there confusion about the interaction between alteration, rectification and indemnity under the 2002 Act, but also that it is not safe to reason from pre-2002 Act cases. Although this author would agree with the sense of the Law Commission's consultation proposals which seek to prevent the "right to rectify" from distorting the rectification/indemnity provisions of the LRA 2002, the point below is that, properly understood, there is already a solution.

To track back, the *Malory 2* argument is that the "right to rectify" the register is a proprietary right capable of binding a transferee through the normal operation of the priority rules of the LRA 2002 – section 29 et al. If this is true, as it stands, a person with such a "right" can take priority over a transferee for value (assuming, say, actual occupation²⁰). Moreover, when the "right" to rectify has priority, then presumably it can be enforced or enjoyed by forcing a rectification – and the innocent person's interest which is thereby compromised gets no indemnity because of *Re Chowood* (absent a forgery). There are two reasons why this appears to be a mistaken view of the operation of the provisions, aside from the policy position (which is the Law Commission's argument) that such an innocent should not lose the claim to an indemnity.

First, there are no circumstances under Schedule 4 where a person is *entitled* to a rectification (properly so called) in their favour. If the Court or Registrar has power to order a rectification (whether generally or in the narrower circumstances as against a proprietor in possession), then it must do so "unless there are exceptional circumstances" justifying not doing so.²¹ The meaning of "exceptional circumstances" has to some extent been explained in *Paton v Todd*²² as not being circumstances which are simply unusual, but the court confirms that there is no absolute entitlement to rectification of the register even if the jurisdiction to do so is made out.²³ As such, it is difficult to see what substance there is to the "right" to rectification and why it matters that it overrides. An overriding "right to rectification" does not give the "right holder" anything greater than any other person who seeks rectification under Schedule 4.²⁴ The new registered proprietor/deleted chargee is not bound – as a matter of priority – to suffer the rectification, for that is a matter for the court or registrar to determine under the Schedule. So, for this "right" to override as a proprietary right adds absolutely nothing to its effect. There are many situations where a person may claim rectification on the relevant grounds without having an overriding interest and they are in no worse or better position than one who has such status.

¹⁹ Because the forgery exception applies "where the register is rectified", and where the loss is caused by "such rectification", Schedule 8, para 1(2)(b).

²⁰ Presumably, if this is accurate, this "right" could also be entered on the register by means of a Notice.

²¹ Schedule 4 LRA 2002, para 3(3) for the court, para.6(3) for the registrar.

²² [2012] EWHC 1248 (Ch).

²³ Morgan J makes it clear that there is a need for a structured approach to the question. It is clear that the applicant has no right to rectify. The registrar can be thought of as having a duty to make a rectification if the application is made out, which is displaced if there are exceptional circumstances, at para.66. The circumstances must be both exceptional and they must be the causally linked to the refusal to rectify.

²⁴ Again, see below footnote 27 that there may be confusion with the underlying right that the rectification could have (prior to *Malory 1*) protected. The underlying right would, of course, have had priority in a true sense.

Secondly, any person may seek rectification of the register.²⁵ It is not necessary even to have a proprietary interest or claim against the title that one is seeking to rectify – *Walker v Burton*.²⁶ So, it is possible to claim that the register might be rectified against X, without necessarily claiming that this would benefit Y (the applicant). The absence of such a proprietary right in the claimant might conceivably weigh against ordering the rectification even the power exists (it may be an exceptional circumstance perhaps) but even that limited consequence is tenuous and there is no authority for it. Again, given this, it is immaterial whether the claimant can establish the priority of their “right to rectify” as an overriding interest. Indeed, it is immaterial whether we can say that they have a “right” to rectify at all! To first discover, and then invest with proprietary and priority status, a “right” to rectify under the 2002 Act misunderstands its provisions. Everyone can apply – does everyone have this right? This way of thinking may have been relevant under the 1925 Act, but not the current one. There is no purpose in having such a right, nor that it might override.

Simply put then, whether or not the “right to rectify” (assuming such a thing exists under the 2002 Act) is a proprietary right or an overriding interest, has no bearing on the question whether the court or registrar has the power to order a rectification.²⁷ It has no bearing on whether (assuming such a power) the rectification will actually be ordered, and it has no bearing on the ability of any person to apply for the rectification. It is meaningless for this “right” to override – unless it is intended to defeat an indemnity claim! This is entirely circular and so far away from what *Re Chowood* decided as to be untenable. Of course, the question arises how we have got into this muddle. Perhaps the answer is also deceptively simple. Throughout this discussion, and in some of the cases, we have assumed that there is a “right to rectify” the register. There never has been.²⁸ There is, in a loose sense, a right to apply to have the register rectified,²⁹ but even this under the LRA 2002 has no real meaning because there is no standing test for a rectification application (around which a right to apply to rectify might be built). Following conflation of the right to apply – which is now at large – with a right to rectify, we have then taken another step and decided that this “right” is proprietary and then because it is proprietary, that it can override. However, when we look at the LRA 2002 and realise that to call this “right” an “overriding interest” has absolutely no meaning save only the circular one of denying indemnity in some cases, it becomes clear that a false step has been taken.

²⁵ This was found specifically in the adjudicator’s hearing, REF/2007/1124, given on 14 May 2009, and not challenged in the subsequent proceedings in the High Court [2012] EWHC 978 (Ch) or Court of Appeal, [2013] EWCA Civ 1228; [2013] All ER (D) 146 (Oct). See also *Wells v Pilling Parish Council* [2008] 2 EGLR 2, which was explained in *Walker*.

²⁶ Land Registry Practice Guide, No. 39, *Rectification and Indemnity*, updated 5 September 2016, states “[u]ntil January 2012, not everyone had the right to challenge a possible mistake in the register. Prior to that, Land Registry would accept applications for alteration of the register (and rectification is a form of alteration) only from someone who had or was claiming a relevant interest in the land. However, this policy has changed owing to case law developments and so anyone may apply for alteration, even though they do not themselves have what the law refers to as ‘standing’.” It is debatable whether a person ever needed “standing” under the LRA 2002, (and note that “standing” is not the same as needing to have a proprietary interest in the land) and the Practice Guide reference to the pre-2012 position refers to HMLR practice, rather than a clear statement of the law.

²⁷ See also Smith [2015] C.L.J. 2015 401 who flags the point.

²⁸ In *Blacklocks v J. B. Developments (Godalming) Ltd* [1982] Ch. 183, the right to rectify was held to be proprietary because it was ancillary to a genuine proprietary interest in the land – based on a *Malory I* argument. Perhaps, in fact, there are not really two arguments in *Malory*, and that once the underlying proprietary interest that rectification would protect no longer exists, any proprietary “right to rectify” no longer exists. Perhaps, removing *Malory I* also solves *Malory 2*

²⁹ As recognised by the Law Commission, Consultation Paper para.13.83

There is, then, no need for the Law Commission to propose that the right to rectify, if it takes “priority”, should not block an indemnity. If we were to understand, based on the LRA 2002 rather than reasoning from the LRA 1925, that there is no point in treating it as a “right” at all, and that its having priority is an empty description, then there is no problem to solve. If it still bothers that this “right to apply” might be proprietary,³⁰ and that this “right” might override, we should remember that *Re Chowood* decides that *if* an overriding interest causes the loss, rather than the rectification, an indemnity cannot be paid. A right to apply, if we are to still think of it as overriding (and this author would not), does not cause the loss. It is the order of the court or action of the Registrar in so rectifying which does so – because they could have refused the application. This is nothing more than the position in relation to all overriding interests: being overriding *per se* is irrelevant, it is the substance of what overrides that is critical. This too has been forgotten when debating *Malory 2*.

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³⁰ Although, given that it need not be related to a sufficient interest in the affected land, it is difficult to see how it could be proprietary.