

Registration Make-Believe and Forgery – Swift 1st v Chief Land Registrar

As was perhaps inevitable following the High Court decisions in *Fitzwilliam v Richall Holdings* ([2013] EWHC 86 (Ch); [2013] 1 P. & C.R. 19), and *Swift 1st v Chief Land Registrar* ([2014] All E.R. (D) 12 (Feb)), the Court of Appeal has finally been given the opportunity to consider the guarantees provided by registration of title; the meaning of rectification of the register; and the process of indemnity, in the appeal in *Swift 1st* ([2015] EWCA Civ 330). The court, in deciding that whenever B derives title under a forged disposition, B will be entitled to an indemnity following the rectification of the register, concluded that *Malory v Cheshire Homes* ([2002] EWCA Civ 151; [2002] Ch. 216) was decided *per incuriam*. This will be welcomed by many. There are, however, still some unanswered questions, not least the position of a registered proprietor who loses title but where they have not relied on a forgery in good faith. In addition, the general tenor of the case is somewhat at odds with *Gold Harp Properties v McLeod & Others* ([2014] EWCA Civ 1084; [2015] 1 W.L.R. 1249), the other recent decision of the Court of Appeal in this area, and there is a potential for conflict when the two cases are read together. Thus we still await a court willing to draw together the tentacles of land registration, giving us a complete picture as to what the statutory magic of guaranteed title achieves. Perhaps, however, the provisions contained in the Land Registration Act 2002 (LRA 2002) are not amenable to the creation of a single picture of the scope of their power.

Mrs Rani was registered proprietor of the property in question. Unbeknownst to her, a fraudulent charge was executed and registered in favour of Swift 1st. Once the forgery came to light (following an application seeking possession by Swift 1st), Mrs Rani requested, and Swift 1st consented to, the removal of the forged charge from the register. Swift 1st applied to the Land Registry for an indemnity to cover their losses. The High Court decided that notwithstanding the decision in *Fitzwilliam*, and the Court of Appeal decision in *Malory*, Swift 1st was entitled to such an indemnity because of the statutory fiction employed by schedule 8, paragraph 1(2)(b) LRA 2002, which states that where registration has taken place on the basis of a forged disposition, the disposition should be treated as valid for the purposes of assessing loss. The Chief Registrar appealed against this decision.

Patten L.J., giving the sole judgment, held that paragraph 1(2)(b) did entitle Swift 1st to an indemnity, at [51]. To reach this conclusion, he reasoned, firstly, that, in order to obtain an indemnity, it needed to be shown that the removal of Swift 1st's charge constituted rectification of the register due to some prejudicial effect on them upon losing their charge, at [27, 39]. To demonstrate this, it needed to be shown that Swift 1st had more than a bare legal title to their charge, at [39], a title which was always subject to Mrs Rani's right to rectify (which overrode the charge thanks to her actual occupation, LRA 2002, Schedule 3, paragraph 2 and at [45]). This required some assessment as to the authority of *Malory*. The judge held that whilst it was not possible to distinguish *Malory*, at [40], the decision should be considered *per incuriam*, at [45]. Furthermore, although Mrs Rani appeared to have an overriding interest to rectify the register, it was held that paragraph 1(2)(b) meant that Swift's charge must be treated as though it was not a forgery for the purposes of calculating their losses, at [51]. As a result, Swift 1st had suffered a substantial loss for the purposes of schedule 4 and 8 of the LRA 2002.

The starting point for discussion of this decision is *Malory v Cheshire Homes*. Although the judge at first instance had managed to construe the statutory provisions in such a way as to ‘work around’ *Malory* (at [39] and [44] of that judgment), the Court of Appeal has reached a more satisfactory outcome by finding that the conclusion that a new registered proprietor would hold on trust for the old proprietor where the transfer was forged was reached *per incuriam*, at [41]. In *Malory*, Arden L.J. held that although legal title was guaranteed by (the then) s 69 Land Registration Act 1925 (now, in a different form, s 58 LRA 2002), equitable title was not, at [65]. Thus, following a void disposition, although legal title would be vested in the new registered proprietor, they would hold on trust for the former registered proprietor. The decision had been subject to much and sustained criticism (E. Cooke, ‘Chickens coming home to roost’ [2014] Conv. 444; E. Cooke, ‘The register’s guarantee of title’ [2013] Conv. 344; M. Dixon, ‘A not so conclusive title register?’ (2013) 129 L.Q.R. 320; E. Lees, ‘*Richall Holdings v Fitzwilliam: Malory v Cheshire Homes* and the LRA 2002’ (2013) 76 M.L.R. 924).

Such criticism came from two perspectives. Firstly, the case fatally undermined the point of registration, since it meant that only bare legal title could ever be conferred by registration, robbing the guarantee of title provided by the register of any value (E. Cooke, ‘The register’s guarantee of title’ [2013] Conv. 344, 350). It was thus inconsistent with the principles underpinning the LRA 2002. Secondly, it was problematic because of the mechanism by which the equitable interest was said to arise (E. Lees, ‘*Richall Holdings v Fitzwilliam: Malory v Cheshire Homes* and the LRA 2002’ (2013) 76 M.L.R. 924, 930-932). There was nothing which could be said to trigger the imposition of the trust, and thus the case was at odds with *Westdeutsche Landesbank Girozentrale v Islington LBC* ([1996] 2 A.C. 669; [1996] 2 All E.R. 961). These criticisms, persuasive as they are, were not enough however to doom *Malory*. Patten L.J. highlighted however that Arden L.J.’s comments were made without reference to the earlier decision in *Argyle Building Society v Hammond* (1984) 49 P. & C.R. 148; (1984) 81 L.S.G. 3425), at [42], and without taking account of s 114 of the LRA 1925, at [43-44]. Thus, he felt able to conclude that this point was *per incuriam*, at [45].

This aspect of the decision will be almost universally welcomed (except perhaps, one assumes, by the Land Registry, for whom it will almost certainly give rise to a more uncertain, and greater, costs liability for indemnity). The “heresy” (E. Cooke, ‘Land registration: void and voidable titles - a discussion of the Scottish Law Commission’s paper’ [2004] Conv. 482, 486) of *Malory* has been put to bed.

With *Malory* out of the way, the next issue was to determine whether Swift 1st’s charge, although no longer “bare”, was nevertheless always flawed due to the fact that Mrs Rani had an interest in the form of a right to rectify the register, which, thanks to her actual occupation, was overriding under schedule 3, paragraph 2 LRA 2002. The Court of Appeal held that whilst she did have such an interest, and whilst in general, alteration to give effect to an overriding interest does not constitute rectification (*Re Chowood’s Registered Land*, [1933] 1 Ch. 574, and at [20]), in cases of forgery, paragraph 1(2)(b) deems that the alteration is prejudicial, and thus can constitute a rectification, at [51].

The provision states that:

“(b) the proprietor of a registered estate or charge claiming in good faith under a forged disposition is, where the register is rectified, to be regarded as having suffered loss by reason of such rectification as if the disposition had not been forged”.

The statutory provision provides that for the purposes of calculating loss it must be assumed that the disposition was valid. This provision is however capable of two interpretations. Firstly, it could mean that the fact of its being forged is ignored for the purposes of assessing prejudice and loss, but not for the purposes of assessing priority, so that a right to rectify could still have priority, depriving the registered interest of any value, at [50]. Secondly, it could mean that the fact of its being forged is ignored for the purposes of assessing prejudice and loss, *and*, for the purposes of priority, so that any right to rectify the register, overriding or not, would not pose a barrier to obtaining an indemnity.

The court held that the latter interpretation was correct (at [51]) on the basis that otherwise paragraph 1(2)(b) would be a circular, dead-letter provision, at [49]. There is a narrow class of circumstances where it might still be useful, at [47] – where there was no overriding right to rectify – but, the court held, this is not what was intended by the drafter of the legislation, at [51]. Rather, the court concluded:

“That a right to seek rectification in these circumstances is capable of subsisting as an overriding interest does not alter the fact that the registered proprietor seeking the indemnity is claiming in good faith under a forged disposition and is to be regarded as having suffered loss by reason of the rectification of the register *as if the disposition had not been forged* (Patten L.J.’s emphasis)”, at [51].

Patten L.J. reasoned that the Law Commission Report, and the statute itself, would have to have been much clearer had the alternative interpretation been the one intended, at [51]. Thus statutory magic – the make-believe of the valid transfer – provides for a win-win – for the parties; and lose, for the Land Registry.

The outcome of this is relatively straightforward in cases of forgery. Taken together, the result, as it was for *Swift 1st*, is that when B derives title to an estate under a forged disposition, whether or not A has the benefit of an overriding interest, B will be entitled to an indemnity following the rectification of his interest off the register since, by schedule 8 paragraph 1(2)(b), he is statutorily deemed to have suffered loss. But this relatively straightforward situation reveals complexities on further inspection. Firstly, the provision only covers cases of forgery. What is the position where no such forgery has occurred? Secondly, how does the approach work with that of the Court of Appeal in *Gold Harp* where the possibility of an overriding right to rectify was doubted, and titles were seen as being subject to much more than simply those rights which were registered, or which overrode? These fundamental questions remain unanswered by *Swift 1st*.

Firstly, where there is no forgery involved in a mistaken registration, as, for example, in *Knights Construction v Roberto Mac* ([2011] EWLandRA 2009_1459; [2011] 2 E.G.L.R. 123), but rather a simple error, if, at the time of registration, there was an overriding interest allowing the former registered proprietor to rectify, it appears that because of that interest, the new proprietor would not be entitled to an indemnity. This means that the proprietor registered because of a non-forged, but nevertheless

mistaken conveyance, would not be entitled to an indemnity, whereas his lucky compatriot whose loss arose from forgery, rather than mistake, would be so entitled. This is not to say that there is no justification for drawing a line between forgeries and all other cases of mistaken registration, and indeed, the statute does draw such a line, but simply to highlight that the approach in *Swift 1st*, which relies so heavily in paragraph 1(2)(b), as opposed to, for example, s 58, raises this issue. In short, the court never gets to the heart of the issue raised by cases such as this: what does the fact of being registered mean that you are entitled to if that register is changed, and why?

The consequence is that under the present approach, cases of forgery are treated differently from all other cases. Whilst this is not the place fully consider whether forgery is ‘special’ – there has been extensive discussion elsewhere of the justice inherent in both strong, and flexible, interpretations of the guarantee of title provided by the register (E. Lees, ‘Title by registration- rectification, indemnity and mistake and the Land Registration Act 2002’ (2013) 76 M.L.R. 62; A. Goymour, ‘Mistaken registrations of land: exploding the myth of “title by registration”’ (2013) 72 C.L.J. 617; S. Cooper, ‘Resolving title conflicts in registered land’ (2015) 131 L.Q.R. 108), it should be noted, that forgery is not unique. A forged disposition is a void disposition. But so too is a mistaken disposition, or a disposition where the transferee did not have capacity to transfer. Similarly, although a forged disposition is deceitful and fraudulent, not all fraud involves forgery. To single out forgery as being somehow different from all other land registration problems, at the very least, requires some thought.

A second remaining issue is the possibility of the right to rectify existing as an overriding interest. The Court of Appeal accepts (albeit *obiter*) that the right is capable of being an overriding interest. This acceptance is itself notable given that the court in *Gold Harp* doubted the validity of such an argument, at [34]. It has been argued elsewhere that treating the right to rectify as governing cases of this sort produces a well-calibrated balance between innocent purchaser, and innocent proprietor, one of whom must lose out (in terms of land) in cases such as this, (E. Lees, ‘Rectification of the register – prospective or retrospective?’(2015) 78 M.L.R., 349, 367-370).

The reason why this approach has the potential to be so successful is that it protects the careful purchaser (thanks to the conditions in schedule 3, paragraph 2 relating to discoverability of actual occupation and the nature of an inquiries made), but also protects those from whom loss of their home, for example, might be particularly difficult. It is a test approximated to allocate the land to those who desire it the most. However, in such circumstances, if the right to rectify as an overriding interest prevents the grant of an indemnity, it would not produce such a satisfactory balance. Thus the reasoning of the Court of Appeal, that *Swift 1st* would not be entitled to an indemnity were it not for paragraph 1(2)(b), even though they had lost something of value, (albeit that it was something always subject to an overriding interest) is unfortunate. The decision in *Re Chowood*, upon which this conclusion is based, makes sense where the overriding interest is a substantive right – a long equitable lease for example – but it may be doubted in cases where the right is a right to rectify, not least because the right is a discretionary one with presumptions in favour of proprietors in possession etc. (LRA 2002, schedule 4). The “procedural” aspects of

this right to rectify may call into question the validity of the conclusion that a right subject to an overriding right to rectify is of no value.

Furthermore, the Court of Appeal in *Gold Harp* did not consider rectification from the perspective of overriding interests. Instead, in their opinion, rectification appeared to be a stand-alone issue unrelated to questions of priority, and that therefore even if Mrs Rani was *not* in actual occupation, rectification could have taken place. According to *Gold Harp* therefore, the fact of there being an overriding interest is not relevant to questions of rectification and loss (M. Dixon, 'Rectification and priority: further skirmishes in the land registration war' (2015) 131 L.Q.R. 207). These two approaches sit at odds, and although both contrasting approaches are *obiter*, it might have been hoped that the interaction between the two would have been subject to some discussion, even if the matter could not have been conclusively settled.

Thus, although there is much to be praised in this judgment – the aspect of the judgment relating to *Malory* is most welcome – some questions remain. These questions, however, are not really questions for the courts, who have now addressed the issues before them in an entirely sensible way, but for the drafting of the Act itself, and thus for the Law Commission in its forthcoming project (<http://lawcommission.justice.gov.uk/areas/land-registration.htm>, and at [48]). The statutory provisions, have, in this author's opinion, been interpreted 'as correctly as possible' in light of their aim, but the nature of the guarantee that the register provides is still uncertain. There is so much in this judgment which seems correct. Indeed, little criticism can be directed at the Court of Appeal here. Rather, the lack of commitment to any one understanding of registration which is apparent in the 2002 Act, is confirmed, if confirmation were needed. Whatever one's view on the power of statutory magic, it is clear still not all is well in the murky world land registration of make-believe.

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