Chapter 18

Question 1: What were the aims of the Land Registration Act 2002?

It is useful to see the specific aims of the LRA 2002 within the wider context of registration systems as a whole. In particular, the 2002 Act aims to further the chief goal of a land registration system: to protect C, a third party acquiring a right in land, from the risk of being bound by a pre-existing but hidden property right of B. To meet that goal, the 2002 Act has, as its 'fundamental objective', the desire to establish a register that is a 'complete and accurate reflection of the state of the title of the land at any given time' (see the extract from Law Commission Report No 271 in section 18.1.1). In turn, that fundamental objective leads to more specific aims, such as the reduction of the list of overriding interests. A particularly important tactic of the 2002 Act, in its drive for a 'complete and accurate' register, is the use of electronic conveyancing.

Question 2: Following the enactment of the 2002 Act, is it true to say that the register is now 'complete and accurate'? If not, will it be so once e-conveyancing rules have been introduced?

As noted in the answer to Question 1 above, the 2002 Act aims to establish a 'complete and accurate' register: such a register would record all pre-existing property rights that exist in relation to land. It should be noted that, at the start of the extract set out in section 18.1.1, the Law Commission states that such a complete and accurate register will exist 'under the system of electronic dealing with land' that the 2002 Act seeks to create.

It is certainly the case that the 2002 Act itself, coming into effect before the full adoption of e-conveyancing, has not created a complete and accurate register. For example, the very possibility of rectification is inconsistent with the idea that the register is complete and accurate: changes prejudicially affecting the title of a registered proprietor would be unnecessary if the register were wholly accurate. Moreover, it is still possible, in certain cases, for B to acquire a legal estate or interest in registered land without having registered that right. In such a case, B's right will almost always count as an overriding interest and so be capable of binding C, even if C later acquires for value, and registers, a legal property right in the registered land. Further, registration is never necessary for the acquisition of an equitable interest in registered land. Moreover, an equitable interest in land, even if not protected by the entry of a notice on the register, will count as an overriding interest (and so be immune to the lack of registration defence) if its holder is in actual occupation of the registered land at the relevant time.

Although the 2002 Act came into force in October 2003, the e-conveyancing system is still far from fully operational and there are no current plans to introduce a general requirement to complete conveyances electronically. Even were such a system to exist, the register would still not be complete and accurate. There are certain to be cases in which B will be able to acquire a legal estate or interest in land, or an equitable interest in land, despite failing to register that right. Moreover, even under an e-conveyancing system, the possibility of rectification and the continued existence of overriding interests would demonstrate that a register can never be complete and accurate.

Question 3: Do you agree with the Law Commission's statement in its 2001 Report that overriding interests are an inherently 'unsatisfactory' aspect of a registration system?

In the Law Commission Report No 271, at [8.6], overriding interests are described as an 'unsatisfactory feature of the system of registered conveyancing'. The problem, according to the Law Commission, is that such rights 'bind any person who acquires any interest in registered land'. Of course, that is not quite right: if a pre-existing property right is an overriding interest, that does not mean that it will bind all third parties: it simply means that a third party will not be able to use the lack of registration defence against the pre-existing property right (see section 16.4.1). The Law Commission's concern is therefore that overriding interests are immune to the lack of registration defence.

Certainly, from the point of view of C, a third party acquiring a right in registered land, it will be frustrating if B has a pre-existing property right which, despite its lack of registration, can still bind C. In that way, the existence of overriding interests may be unsatisfactory to C. In particular, the courts' willingness to recognise that B has informally acquired an equitable interest, for example by means of proprietary estoppel or a constructive trust, may cause problems to C where B is in actual occupation of the registered land.

However, it can be argued that we need to take a more general view when considering the appropriateness of overriding interests: we cannot take only C's views into account. It may be argued, contrary to the Law Commission's view, that overriding interests are necessary precisely because there may be situations in which, despite B's failure to register a pre-existing property right, B deserves protection; or in which, despite the fact that B's right is not recorded on the register, C does not deserve to be free from that right.

Question 4: What differences are there in the rhetoric of the Law Commission's 2016 Consultation Paper and 2018 Report, as compared to its 2001 Report?

This point is introduced in section 18.1, and then referred to at various places throughout the Chapter. The main point is that, whilst the 2001 Report spoke of a 'conveyancing revolution' which would aim for a 'complete and accurate register', the 2016 Consultation Paper (and see now the July 2018 Law Commission Report No 380) more clearly recognises the importance of balancing protection for C, a party acquiring registered title, against other concerns (such as protection for B, a party with a pre-existing but unregistered right). So, to take just one example, both the 2016 CP and 2018 Report carefully consider the appropriate scope of rectification, and possible approaches that might be taken – in particular in difficult 'three-party' cases; whereas the 2002 Act as it currently stands, following the 2001 Report, provides relatively little guidance as to the operation of rectification, even though it is a key concept in land registration.

Question 5: What different approaches can be taken to interpreting the term 'mistake' in Sch 4 of the 2002 Act? Which approach is preferable?

Surprisingly, the LRA 2002 gives very little assistance as to the meaning of the key term 'mistake', which regulates the scope of rectification and indemnity. The rhetoric of the 2001 Report, with its emphasis on protecting C, would argue in favour of a narrow view of mistake. The effect of such a view can be seen by considering the three-party cases dealt with in section 18.3.1.2. If X, a fraudster, is mistakenly registered in place of B, and X then transfers the registered estate, or grants a charge over it, to C, who is innocent of the fraud, then the narrow view of mistake means that (whilst the registration of X in place of B clearly was a mistake) the registration of C is *not* a mistake. The idea is that C dealt with X, who at that point had legal title (as a result of X's registration: see s 58 of the LRA 2002) and who had owner's powers, including the power to transfer the estate to C, or to grant a charge over it to C (see ss 23 and 24 of the LRA 2002). On a broad view of mistake, in contrast, it could be said that C's registration, as well as X's registration, is a mistake, on the simple basis that B did not in any way consent to C's acquisition of a right in the land and, absent the registration provisions, X would have no power to grant C such a right.

It is important to decide between the narrow and broad views of mistake: if C's registration is not a mistake (or at least, capable of being seen as part of the original mistake by which X was registered) then (i) there is no chance of rectification being ordered against C and in favour of B; and (ii) the registration of C (unlike the registration of X) is not in itself an event that can give B an indemnity. The advantage of the narrow view is that it increases the protection available to C, and so is consistent with the aim of having a 'complete and accurate' register. The disadvantage is that, by denying B any chance of reinstatement, it allows B to lose a property right as a result of fraud. Moreover, even if the broad view is adopted, this does not mean that C will necessarily lose out, as the LRA 2002, for example, limits the circumstances in which rectification is available against a registered party in possession of the land (and, as *Barclay's Bank v Dhillon* demonstrates, rectification may not be available even where C in possession caused/substantially contributed to the mistake, if there are 'exceptional circumstances' that justify not doing so). The move to a broad view of mistake, as adopted by the Court of Appeal in *Gold Harp* and *NRAM v Evans* therefore has much to recommend it, and was accepted as correct by

the Law Commission in its 2016 CP and 2018 Report. Indeed, as noted at [13.133] of the 2018 Report, none of the respondents to the Consultation Paper thought that rectification should be ruled out in this three-party case. As a result, the Report recommends adding a new paragraph 4B into Sch 4 of the 2002 Act to clarify that where the registration of X is held to be a mistake, the registration of any subsequent transfers of the land by X, or grants of a right in the land by X, are also to be classed as a mistake: see section 18.3.1.4.

Question 6: What is the '*Malory* 2' argument? What problems does it cause? What is the best solution to those problems?

Note that we considered the '*Malory* 1' argument in Question 6 of the Chapter 3 end-of-chapter questions. We noted there that the Court of Appeal in *Swift 1st* rejected the *Malory* 1 argument. It accepted, however, a different argument from the *Malory Enterprises* case, referred to as the '*Malory* 2' argument. That argument relates to the status of a right to have the register rectified. Consider a case in which a mistake has led to the registration of X in place of B (for example X submitted forged documents which led X to be registered in place of B). B however remains in occupation of the registered land. X then transfers the land to C, or grants a charge or other right in or over the land to C. C is innocent of the fraud. As noted in the answer to Question 5 above, C's registration can also be seen as a mistake, and so rectification may be granted to B; C does then have the chance of receiving an indemnity. If, however, B's 'right to rectify' is seen as an equitable interest in land, existing at the time of X's disposition to C, then that equitable interest, as a result of B's actual occupation of the land, will count as an overriding interest. The change to the register to remove C's interest and to reinstate B is then one that merely gives effect to B's overriding interest, and so no indemnity can be paid to C (see e.g. *re Chowood*) as it is not the change to the register itself which causes any loss to C, given C was in any case bound by B's overriding interest.

So, the '*Malory* 2' argument is that B's right to rectify may, if coupled with actual occupation, count as an overriding interest and so deny C the chance of an indemnity if rectification is ordered in favour of B. That was described by the Law Commission in its 2016 Consultation Paper at [13.62] as a 'potentially disastrous' outcome for C. In *Swift 1st* itself, the argument did not lead to C's being denied an indemnity, as the court adopted a somewhat strained interpretation of Sch 8, para 1(2)(b) of the LRA 2002; but that provision applies only where there has been a forgery, and so would not assist C in other cases. The Law Commission therefore proposed in its Consultation Paper that the right to rectify should not count as an overriding interest, even if B is in actual occupation. In its 2018 Report, and influenced in particular by an argument of Dixon ([2016] Conv 5), the Law Commission at [13.29]-[13.30] goes further still, and recommends that an amended LRA 2002 should make clear that the 'right to rectify' the register is not in itself an equitable interest in land. That may prove a somewhat controversial idea (see e.g. Cooper & Lees (2017) 37 OJLS 435 which, in a very thorough review, does seem to regard a right to rectify as a proprietary right) and a less dramatic solution would be to emphasise instead the link between rectification and indemnity. On this view, the problem with the *Malory* 2 argument is not that a right to rectify the register can bind a third party; it is rather that it can do so whilst also denying C the indemnity that is often an integral part of the justification of the very right to rectify asserted by B.

Question 7: Is it possible or desirable for the principles of a land registration system to be wholly separate from the general principles of land law?

This is clearly a very general question, which demands reflection on both the detail of the 2002 Act, as discussed in Chapter 16, and the general aims of the Act, as discussed in Chapters 3 and 18.

One way to focus the question is to consider the interpretation of 'mistake' under the LRA 2002. In three party cases, the court has a choice of adopting a narrow or broad approach when interpreting the word 'mistake'. On the one hand, in the first Court of Appeal decision in *Barclays Bank v Guy*, it was decided that even if X acted fraudulently in order to become registered as a freehold owner of land, X has the power to transfer that title to B, and therefore the registration of B is not a 'mistake'. This adopts the view that the Act establishes a wholly new set of rules and so is consistent with the idea expressed by Patten LJ in *Swift 1st* at [41] as to the aims of the LRA 2002.

On the other hand, the approach adopted by the Chief Registrar in his concession in *Odogwu v Vastguide*, and favoured by the Court of Appeal in *Gold Harp Properties Ltd v Macleod* and *NRAM v Evans*, is that B's registration is a 'mistake'; this adopts general principles of land law, favouring the pre-existing right of the former owner. Such an approach also finds some support from Lady Hale's general statement in *Scott v Southern Pacific Mortgages Ltd* at [96] that "the system of land registration is merely conveyancing machinery". A similar tension as to the extent to which general principles should play a role in the registration system can be seen in the discussion of whether adverse possession principles should have any application as regards the correction of mistakes in the register, in section 18.3.2.1. As noted in section 9.4.1.2, there is a strong argument – supported by the Law Commission's 2018 Report – that if a question arises as to whether changes to the register should be made, then it should be determined by the scheme set out by Sch 4 of the LRA 2002, and not by adverse possession principles.