

A TANGLED WEB INDEED: THE ENGLISH LAND REGISTRATION ACT AND COMPARISONS WITH THE AUSTRALIAN TORRENS SYSTEM

PENNY CARRUTHERS*

I INTRODUCTION

Both England and Wales,¹ and the Australian states and territories,² have positive systems of registered land title under which the state guarantees that the register is conclusive and that the rights and interests shown on the register are valid.³ The systems are also ‘bijural’, ‘in the sense that they straddle two bodies of law – the positive system and the ordinary rules of property law’.⁴ In practice, most instruments lodged for registration are, according to the ordinary property rules, valid documents and so bijuralism is not problematic. However, difficulties arise where there is a ‘bijural inaccuracy’,⁵ that is, where the instrument lodged for registration is invalid under the property rules, and therefore ineffective to pass an interest, yet according to the positive title registration system, the instrument is effectively validated. In relation to any positive system of registered land title the question arises: how is the problem of bijural inaccuracy to be resolved?

A simplified, though classic, bijural inaccuracy scenario occurs where A is the registered proprietor of an interest in land and pursuant to an invalid instrument, B becomes the registered proprietor of A’s interest.⁶ The instrument may be invalid for various reasons including forgery or non est factum. Assuming both A and B are innocent, who, of A or B, is to be preferred and entitled to the land? A further question arises when B, prior to action by A,

* Lecturer, Faculty of Law, University of Western Australia.

1 For convenience, the land title registration system in England and Wales will be referred to as the English system. As at 2012, HM Land Registry estimated that over 85 per cent of titles were registered: Martin Dixon, *Modern Land Law* (Routledge, 8th ed, 2012) 29.

2 The *Real Property Act 1858* (SA) was the first registered land title legislation in Australia. Over the ensuing years all jurisdictions in Australia adopted similar, though not identical, legislation.

3 A negative system, on the other hand, operates within the general property law rules so that if a void instrument is registered it is not cured by registration.

4 Pamela O’Connor, ‘Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems’ (2009) 13 *Edinburgh Law Review* 194, 195.

5 Ibid 196.

6 B may become registered of A’s full interest or of a derivative interest, eg, a mortgage.

executes a transfer of his or her interest to C and C becomes registered. Who, of A or C, is to be preferred in this situation?

The answer to these questions will be determined by the extent to which the particular system prefers 'static' security, which 'allows assets to be securely held',⁷ or 'dynamic' security which 'allows assets to pass securely to new owners'.⁸ Both these forms of security are desirable;⁹ however, 'they are to some extent antithetical'.¹⁰ In our A-B-C scenario, static security would give the land to A, but dynamic security would give the land to B and C.

Under the system of registered land title in Australia, known as the Torrens system,¹¹ a land lawyer could, with reasonable confidence, predict the outcome of the A-B-C scenario. Assuming that neither B nor C were involved in fraud in becoming registered, either B or C would be entitled to the land and A would be left to seek compensation.¹²

However, the answer under the English legislation is far from clear. In 2002, the *Land Registration Act 2002* (UK) c 9 ('LRA 2002') was enacted, largely repealing the *Land Registration Act 1925*, 15 & 16 Geo 5, c 21 ('LRA 1925'). The enactment of the *LRA 2002* followed an extensive process of consultation and the production of a joint Law Commission and Land Registry report, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*¹³ ('Report'). Importantly, the *Report* stated: 'It will be the fact of registration and registration alone that confers title. This is entirely in accordance with the fundamental principle of a conclusive register which underpins the Bill'.¹⁴

This notion, that the register is 'conclusive', is entirely consistent with the Torrens system and suggests the same outcome for the A-B-C scenario. However, this is not the case. According to recent English case law, the most likely outcome is that A will be entitled to the land.¹⁵ For an Australian, the scheme introduced by the English system is complicated and recent conflicting decisions render the system even more confusing. Scholars well versed with the English system have described these recent decisions as 'disastrous for the

7 O'Connor, 'Deferred and Immediate Indefeasibility', above n 4, 198.

8 Ibid.

9 'The system must therefore find an acceptable compromise between dynamic and static security; but different systems find the balance at different points': Elizabeth Cooke, *The New Law of Land Registration* (Hart Publishing, 2003) 100.

10 O'Connor, 'Deferred and Immediate Indefeasibility', above n 4, 198.

11 All Australian jurisdictions have their own Torrens legislation. For present purposes, there are no significant differences and the legislation in all jurisdictions will be referred to as the 'Torrens system'.

12 This assumes also that there are no other exceptions to indefeasibility with regard to B's and C's registered title.

13 Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, Report No 271 (2001).

14 Ibid 4 [1.10].

15 See, eg, *Ajibade v Bank of Scotland plc* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Rhys, 8 April 2008); *Fitzwilliam v Richall Holdings Services Ltd* [2013] EWHC 86 (Ch).

integrity of the statute',¹⁶ and as 'steadily derailing the orthodox, formalist interpretation of the statute'.¹⁷

This article explores the English land title legislation and the recent case law dealing with bijural inaccuracy. It is argued that the English courts and adjudicators have increasingly tended to resolve bijural inaccuracy by resorting to general property law rules.¹⁸ Hand-in-hand with this development is the apparent failure of the courts and adjudicators to take a holistic view of three key aspects of the English legislation, namely: (1) the nature of registered title; (2) rectification of the register; and (3) indemnity. This omission has meant the essential interconnectedness of different parts of the legislation has not been properly considered and the apparent intention behind the legislation has been thwarted.

Another main aim of this article is to provide a comparative analysis of the English system with the Australian Torrens system in an attempt to 'deepen our understanding of our own system'.¹⁹

Part II of this article provides a brief overview of the key features of the Torrens system. Part III considers in some detail the relevant sections and schedules of the *LRA 2002* and suggests a comprehensive '*LRA 2002* methodology' for resolving A-B-C disputes. Parts IV and V analyse the recent conflicting English decisions and compare the developing situation in England with the position under the Torrens system.

II THE TORRENS SYSTEM IN OUTLINE

A Indefeasible Title

The Torrens system has been described as a system of 'title by registration'.²⁰ Title to land passes on registration of an instrument regardless of any invalidity or defect in the registered instrument. The registered proprietor's title is said to be 'indefeasible'. The most emphatic expression of the nature of indefeasibility is set out in the 'paramountcy' provision.²¹ This provision provides, in essence, that notwithstanding the existence of any estate or interest which but for the Torrens legislation might be held to be paramount, the registered proprietor shall, except

16 Elizabeth Cooke, 'The Register's Guarantee of Title' [2013] *Conveyancer and Property Lawyer* 344, 350.

17 Amy Goymour, 'Mistaken Registrations of Land: Exploding the Myth of "Title by Registration"' (2013) 72 *Cambridge Law Journal* 617, 646.

18 Consequently, the English system is becoming increasingly 'negative' in nature: see above n 3. A notable exception to this trend is the Court of Appeal's recent decision in *Swift 1st Ltd v Chief Land Registrar* [2015] 3 WLR 239 ('*Swift*'). For further discussion of this case see Part V.

19 Pamela O'Connor, 'Registration of Title in England and Australia: A Theoretical and Comparative Analysis' in Elizabeth Cooke (ed), *Modern Studies in Property Law* (Hart Publishing, 2003) vol 2, 81, 83.

20 *Breskvar v Wall* (1971) 126 CLR 376, 385 (Barwick CJ).

21 See, eg, *Land Titles Act 1925* (ACT) s 58; *Real Property Act 1900* (NSW) s 42(1); *Land Title Act 2000* (NT) ss 188–9; *Land Title Act 1994* (Qld) ss 184–5; *Real Property Act 1886* (SA) ss 69–70; *Land Titles Act 1980* (Tas) s 40; *Transfer of Land Act 1958* (Vic) s 42(1); *Transfer of Land Act 1893* (WA) s 68.

in case of fraud, hold the land absolutely free from any estate or interest other than those specifically excepted. Accordingly, indefeasibility applies ‘immediately’²² to the non-fraudulent registered proprietor’s title.

The Torrens system, therefore, clearly adopts dynamic security and prefers security of transaction for B and C over security of title for A.

1 *Deferred Indefeasibility*

For some years an alternative view of indefeasibility, termed ‘deferred’ indefeasibility, had been adopted by the Australian courts.²³ Under the deferred approach, a person becoming registered pursuant to a void document would only obtain a defeasible title and the former registered proprietor would be entitled to bring an action to be restored to the register. However, if, prior to the former owner taking action, the person who was registered pursuant to the void document were to transfer the interest to a third person, this third person would obtain an indefeasible title upon registration.²⁴

Arguably, the deferred approach better captures a balance between dynamic and static security. Provided A brings an action against B before B’s transaction with C, A will be entitled to be restored to the register. Static security is realised. However, if C is already registered by the time of A’s action, dynamic security applies and C will be entitled to remain as the registered owner. In this case, A is restricted to an action against the wrongdoer, or, provided the requirements are satisfied, to a claim for compensation against the registrar.

22 *Frazer v Walker* [1967] 1 AC 569, 579, 584, 585 (Lord Wilberforce); *Breskvar v Wall* (1971) 126 CLR 376, 385 (Barwick CJ). The paramountcy provision provides statutory support for the immediate indefeasibility approach.

23 *Gibbs v Messer* [1891] AC 248; *Clements v Ellis* (1934) 51 CLR 217. Recent amendments to the Torrens legislation in Queensland, NSW and Victoria have effectively introduced a hybrid form of deferred indefeasibility, referred to as ‘qualified indefeasibility’, in relation to registered forged mortgages: see *Real Property Act 1900* (NSW) s 56C; *Land Title Act 1994* (Qld) ss 11A(2), 11B(2), 185(1A); *Transfer of Land Act 1958* (Vic) ss 87A, 87B.

24 For a detailed discussion of the adoption of the deferred approach in overseas Torrens jurisdictions, see O’Connor, ‘Deferred and Immediate Indefeasibility’, above n 4. For a specific discussion of recent developments in Malaysia, see Teo Keang Sood, ‘All Because of a Proviso – A Nine-Year Wait To Right the Wrong’ in Penny Carruthers, Sharon Mascher and Natalie Skead (eds), *Property & Sustainability: Selected Essays* (Thomson Reuters, 2011) 161.

B Exceptions to Indefeasibility

1 Express Exceptions

There are a number of express exceptions to indefeasibility contained in the Torrens statutes.²⁵ The most relevant express exception for present purposes is the ‘fraud’ exception. The fraud exception applies where the current registered proprietor, or his or her agent, was guilty of fraud in becoming registered. ‘Fraud’, though not defined in the Torrens legislation, has been defined narrowly in the case law to mean ‘actual fraud, ie, dishonesty of some sort’ by the registered proprietor.²⁶ This narrow definition of fraud is reinforced by the ‘notice’ provision²⁷ in the Torrens legislation which provides that a registered transferee of an interest in land is not to be affected by actual or constructive notice of any pre-existing unregistered interest or trust.²⁸

Applying this very narrow definition of fraud to the A-B scenario means that B’s title can only be challenged if B engaged in sufficiently egregious conduct so as to amount to Torrens fraud. The simple fact of becoming registered pursuant to an invalid instrument, by itself, does not amount to fraud, and consistently with the Torrens preference for security of transaction, B’s title is secure.²⁹

Another potential express exception to indefeasibility, referred to as ‘qualified indefeasibility’, exists in Queensland, New South Wales and Victoria as a result of recent amendments to the Torrens legislation regarding registered forged mortgages.³⁰ The amendments introduce a requirement for mortgagees to take reasonable steps to verify the identity of the mortgagor.³¹ If these steps are not complied with and the mortgage is a forgery, in Queensland the mortgagee

25 The more standard express exceptions include: registered encumbrances; the interest of a proprietor under a prior registered certificate of title; an interest which has been included in the registered proprietor’s title by wrong description of land; and the interest of a tenant in actual possession under an unregistered lease. The registered proprietor’s title may also be subject to unregistered easements or to an adverse possession claim: see *Land Titles Act 1925* (ACT) s 58(1); *Real Property Act 1900* (NSW) s 42(1); *Land Title Act 2000* (NT) s 189(1); *Land Title Act 1994* (Qld) s 185(1); *Real Property Act 1886* (SA) s 69; *Land Titles Act 1980* (Tas) s 40; *Transfer of Land Act 1958* (Vic) s 42(1); *Transfer of Land Act 1893* (WA) ss 68(1)–(2).

26 *Assets Co Ltd v Mere Roihi* [1905] AC 176, 210 (Lord Lindley).

27 See, eg, *Land Titles Act 1925* (ACT) ss 59, 60(2); *Real Property Act 1900* (NSW) s 43(1); *Land Title Act 2000* (NT) ss 188(2)–(3); *Land Title Act 1994* (Qld) s 184(1); *Real Property Act 1886* (SA) ss 186–7; *Land Titles Act 1980* (Tas) s 41; *Transfer of Land Act 1958* (Vic) s 43; *Transfer of Land Act 1893* (WA) s 134.

28 Indeed, even where the person who becomes registered is aware that registration will defeat the prior unregistered interest, this too is not fraud: *Mills v Stockman* (1967) 116 CLR 61, 78 (Kitto J).

29 If the invalid instrument was a forged document and B knew of the forgery, this would give rise to the fraud exception as knowledge of fraud constitutes fraud: *Assets Co Ltd v Mere Roihi* [1905] AC 176, 210 (Lord Lindley).

30 The amendments came into effect in Queensland in November 2005 as amended by *Natural Resources and Other Legislation Amendment Act 2005* (Qld) s 53, in NSW in November 2011 (pursuant to amendments made in 2009) as amended by *Real Property and Conveyancing Legislation Amendment Act 2009* (NSW) sch 1, item 4, and in Victoria in September 2014 as amended by *Transfer of Land Amendment Act 2014* (Vic) s 17.

31 *Real Property Act 1900* (NSW) s 56C(1); *Land Title Act 1994* (Qld) ss 11A(2), 11B(2); *Transfer of Land Act 1958* (Vic) s 87A(1).

will not obtain the benefits of an immediately indefeasible title,³² and in New South Wales³³ and Victoria,³⁴ the Registrar-General or Registrar (respectively) has a discretion as to whether to cancel the registered mortgage.³⁵

2 Other Exceptions

In addition to these express exceptions there are four other potential exceptions to the registered proprietor's title. A registered proprietor's title may be challenged on the basis of an in personam claim founded in law or in equity which gives rise to a remedy concerning the land,³⁶ the registrar's power to correct the register,³⁷ and overriding legislation. In addition, where the registered proprietor did not provide valuable consideration for his or her interest, in some jurisdictions, the 'volunteer' registered proprietor will not obtain an indefeasible title and will be subject to the same unregistered interests that affected the donor's title.³⁸ Accordingly, in these jurisdictions, a volunteer who has become registered pursuant to a void instrument will obtain a defeasible title and the register entry can be set aside.

32 *Land Title Act 1994* (Qld) s 185(1A).

33 The Registrar-General may cancel the recording: *Real Property Act 1900* (NSW) s 56C(6).

34 *Transfer of Land Act 1958* (Vic) ss 87A–87B. Pursuant to s 87A(3)(b), the Registrar may remove the mortgage from the Register.

35 In addition, in each jurisdiction, the mortgagee is not entitled to compensation from the state for any loss attributable to the failure to comply with the requirement: *Real Property Act 1900* (NSW) s 129(2)(j); *Land Title Act 1994* (Qld) s 189(1)(ab); *Transfer of Land Act 1958* (Vic) s 110(4)(c).

36 *Frazer v Walker* [1967] 1 AC 569, 585 (Lord Wilberforce). The claim may be based on: a contract with the registered proprietor regarding the grant of an interest in the land; an express, resulting or constructive trust over the land (as occurred in *Bahr v Nicolay [No 2]* (1988) 164 CLR 604) or pursuant to a recognised equitable doctrine that may be enforced against the registered proprietor.

37 The registrar has power to correct obvious clerical errors: see *Land Titles Act 1925* (ACT) ss 14(1)(e), 160; *Real Property Act 1900* (NSW) ss 12(1)(d), (3)(a)–(d); *Land Title Act 2000* (NT) ss 17(1), (3); *Land Title Act 1994* (Qld) s 15(3); *Real Property Act 1886* (SA) s 220(f); *Land Titles Act 1980* (Tas) s 139(2)(a); *Transfer of Land Act 1958* (Vic) s 103(2)(a); *Transfer of Land Act 1893* (WA) ss 188(1), (3), 189(1). In addition, in all jurisdictions other than Victoria and the ACT, the registrar is said to have a more substantive power to correct the register and instruments: see *Real Property Act 1900* (NSW) ss 136–7; *Land Title Act 2000* (NT) ss 20, 158; *Land Title Act 1994* (Qld) ss 15(2)(b), 19, 160; *Real Property Act 1886* (SA) ss 60–3; *Land Titles Act 1980* (Tas) ss 163–4; *Transfer of Land Act 1893* (WA) ss 76–7. For further detailed discussion of the powers of the registrar in Australia, see Natalie Skead and Penny Carruthers, 'The Registrar's Powers of Correction: "Alive and Well", though Perhaps "Unwelcome"? Part I: The Slip Provision' (2010) 18 *Australian Property Law Journal* 32; Penny Carruthers and Natalie Skead, 'The Registrar's Powers of Correction: "Alive and Well", though Perhaps "Unwelcome"? Part II: The Substantive Provision' (2010) 18 *Australian Property Law Journal* 132.

38 The jurisdiction that most consistently denies indefeasibility to registered volunteers is Victoria: see *King v Smal* [1958] VR 273; *Rasmussen v Rasmussen* [1995] 1 VR 613; *Valoutin v Furst* (1998) 154 ALR 119. WA and NSW take a contrary view: see *Conlan v Registrar of Titles* (2001) 24 WAR 299; *Bogdanovic v Koteff* (1988) 12 NSWLR 472. In Queensland and the NT there are specific provisions granting the volunteer registered proprietor an indefeasible title: see *Land Title Act 2000* (NT) s 183; *Land Title Act 1994* (Qld) s 180.

C Compensation

One of the effects of immediate indefeasibility is that an innocent landowner may be deprived of his or her interest in the land. In all Australian jurisdictions, compensation provisions are incorporated into the Torrens legislation to enable a person sustaining loss through the operation of the system to obtain compensation from an assurance fund.³⁹ The compensation provisions are, in the main, poorly drafted and vary across the Australian jurisdictions. There are two broad models: the ‘last resort’⁴⁰ and ‘first resort’⁴¹ models. Under the last resort model, actions for compensation for deprivation of an interest in land are, in most cases, to be brought initially against the person liable for the deprivation. It is only in limited circumstances that access to the assurance fund may be available. Under the first resort model, a person deprived of an interest in land is entitled to claim directly against the assurance fund.

In essence, under either model, in order for a person to be able to claim compensation, he or she must have been deprived of an interest in land in one of four circumstances: (1) in consequence of fraud; (2) through bringing land under the Torrens system; (3) through any error, omission, or mis-description in the register; or (4) through the registration of any other person as proprietor.

In considering the A-B-C scenario, if A were to lose title through the registration of B and C, in the first resort jurisdictions A would be entitled to claim compensation from the assurance fund. In the last resort jurisdictions A would be entitled to claim against the assurance fund in two circumstances: (1) where the person liable for the deprivation of A’s interest is dead, bankrupt or cannot be found within the jurisdiction;⁴² and (2) where a person, who has sustained ‘loss’ in one or other of three circumstances,⁴³ is barred by the indefeasibility principle from recovering the land and who is also unable to recover compensation from the person liable for the loss.⁴⁴

39 In most jurisdictions the separate assurance fund has been abolished and claims are made directly against the Commonwealth, territory or state or paid from the Consolidated Fund or the Consolidated Account. However, for ease of reference, the term assurance fund is used in this article.

40 The last resort jurisdictions are the ACT, SA, WA and Tasmania: see *Land Titles Act 1925* (ACT) ss 143–51, 154–5; *Real Property Act 1886* (SA) ss 201–19; *Land Titles Act 1980* (Tas) ss 127–8, 150–9; *Transfer of Land Act 1893* (WA) ss 201, 205–11. For a discussion of the compensation provisions in the last resort jurisdictions, see Penny Carruthers and Natalie Skead, ‘150 Years On: The Torrens Compensation Provisions in the “Last Resort” Jurisdictions’ (2011) 19 *Australian Property Law Journal* 1.

41 The first resort jurisdictions are the NSW, NT, Queensland and Victoria: see *Real Property Act 1900* (NSW) ss 120, 128–35; *Land Title Act 2000* (NT) ss 192–6; *Land Title Act 1994* (Qld) ss 188–90; *Transfer of Land Act 1958* (Vic) ss 108–11.

42 *Land Titles Act 1925* (ACT) s 143(b); *Real Property Act 1886* (SA) s 205; *Land Titles Act 1980* (Tas) ss 152(7)–(8); *Transfer of Land Act 1893* (WA) s 201(3).

43 The three circumstances under the ‘loss’ provisions are: (a) through any omission, mistake or misfeasance of the Registrar or any of his or her officers or clerks in the execution of their respective duties under the Act; (b) by any error, omission or mis-description in any grant, certificate of title or any entry or memorandum in the register; or (c) by the registration of any other person as proprietor of land.

44 *Land Titles Act 1925* (ACT) s 155; *Real Property Act 1886* (SA) s 208; *Land Titles Act 1980* (Tas) s 153; *Transfer of Land Act 1893* (WA) s 205.

It should be noted that although A is *prima facie* entitled to compensation, fault-based exclusions may preclude recovery from the assurance fund where A, or A's agent, contributed to the loss by fraud, neglect or wilful default.⁴⁵

D A 'Torrens Methodology'

This brief outline suggests the following 'Torrens methodology' for dealing with any A-B-C problem in the Torrens system:

1. Identify the general position regarding the nature of the current registered proprietor's title, that is, that it is indefeasible;
2. identify whether an exception to the registered proprietor's title is available; and
3. in the event a person suffers loss as a result of the operation of the system, determine whether compensation is available.

Doubtless, there may be difficulties in applying the law under the Torrens system to the facts in particular cases. However, the law itself, and the methodology for dealing with the A-B-C problem are clear. As will be seen, at the current time, the same cannot be said for the situation in England.

III LAND TITLE REGISTRATION IN ENGLAND: THE LEGISLATION

A Background to Title Registration in England

Land title registration in England began in 1862, four years after the enactment of the first Torrens legislation in Australia. In 1875 and 1897, there were two further title registration statutes,⁴⁶ and in 1925, the *LRA 1925* was enacted.

One of the main features setting apart the *LRA 1925* from the Torrens statutes was the greater range of 'overriding interests' that existed under the *LRA 1925*. Overriding interests are interests that bind a registered estate even though they are unregistered. The overriding interests under the *LRA 1925* included certain easements,⁴⁷ the accrued rights of squatters,⁴⁸ and leases with terms of 21 years or less.⁴⁹ These particular overriding interests are similar to some of the express exceptions to indefeasibility under the Torrens system. Importantly, however, there was an additional overriding interest that is not reflected in the Torrens exceptions: 'The rights of every person in actual occupation of the land or in

45 *Real Property Act 1900* (NSW) s 129(2); *Land Title Act 2000* (NT) s 195(1)(b); *Land Title Act 1994* (Qld) s 189(1)(b); *Real Property Act 1886* (SA) s 216; *Transfer of Land Act 1958* (Vic) s 110(3)(a).

46 *The Land Transfer Act 1875*, 38 & 39 Vict, c 87; *Land Transfer Act 1897*, 60 & 61 Vict, c 65.

47 *LRA 1925* s 70(1)(a).

48 *LRA 1925* s 70(1)(f).

49 *LRA 1925* s 70(1)(k).

receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed'.⁵⁰

Another important distinguishing feature related to the notion of indefeasibility is that, as Cooke says, '[i]n so far as we have indefeasibility, it takes the form of a guarantee of an indemnity when title is upset, rather than any principle that registered title is unassailable'.⁵¹ The general position under the *LRA 1925* was that any event that could affect a title in unregistered land, by making it void or voidable, would have the same effect with registered land.⁵² An important qualification, however, was that a registered proprietor who was in possession of the land was protected from an action for rectification of the register.⁵³ In short, the English system under the *LRA 1925* adopted neither deferred nor immediate indefeasibility, but afforded particular protection to the registered proprietor who was in possession of the land.⁵⁴

Although the *LRA 1925* had served its purpose well,⁵⁵ the system established was 'cumbersome'⁵⁶ and 'the public rightly [sought] a more expeditious and much less stressful system of dealing with land'.⁵⁷ Accordingly, on 13 October 2003 the *LRA 2002* came into force.⁵⁸ The fundamental objective of the *LRA 2002* was 'to create the necessary legal framework in which registered conveyancing can be conducted electronically'.⁵⁹ To that end, 'the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional enquiries and inspections'.⁶⁰

50 *LRA 1925* s 70(1)(g). The operation of this overriding interest was seen in *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487.

51 Elizabeth Cooke, 'E-conveyancing in England: Enthusiasms and Reluctance' in David Grinlinton (ed), *Torrens in the Twenty-First Century* (LexisNexis, 2003) 277, 281. Although these comments were made in relation to the 1925 Act, they continue to be applicable with regard to the 2002 Act.

52 *Ibid.* However, under the *LRA 1925* s 69, the registered proprietor was granted the legal estate. Therefore, if, on unregistered land principles, the registered proprietor was not entitled to the land, then the register would need to be rectified.

53 *LRA 1925* s 82(3).

54 Cooke, 'E-conveyancing in England: Enthusiasms and Reluctance', above n 51, 281. The protection afforded to a proprietor in possession continues with the *LRA 2002*: see sch 4 paras 3(2), 6(2).

55 The *LRA 1925* is considered to have 'operated successfully for more than three-quarters of a century': Elizabeth Cooke and Pamela O'Connor, 'Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective' (2004) 120 *Law Quarterly Review* 640, 643.

56 Barbara Bogusz, 'Bringing Land Registration into the Twenty-First Century – The *Land Registration Act 2002*' (2002) 65 *Modern Law Review* 556, 557.

57 Law Commission and HM Land Registry, *Report*, above n 13, 2 [1.4].

58 In 1998, a joint working group of the Law Commission and HM Land Registry produced a consultative document. In 2001 the joint Law Commission and HM Land Registry Report was published together with a draft land registration Bill which was subsequently passed, virtually unamended, through Parliament: *Land Registration Bill* (No 48) 2001 (UK); Law Commission and HM Land Registry, *Report*, above n 13.

59 Law Commission and HM Land Registry, *Report*, above n 13, 1 [1.1].

60 *Ibid* 2 [1.5].

The unregistered interest of a person in actual occupation of land, however, continues to be protected under the *LRA 2002* as an overriding interest.⁶¹

B *LRA 2002: Registered Title, Rectification and Indemnity*

In order to understand how the English legislation resolves the A-B-C problem, one needs to appreciate that the relevant rules are derived from two different sources: the main body of the *LRA 2002* and the schedules. As Goymour has said:

These two sets of rules appear to pull in different directions ... In broad terms, the main body of the Act affords B and C titles upon registration; the Schedules then render registered titles potentially defeasible, via their provision for 'alteration' of the Register.⁶²

In discussing the legislation, a straightforward literal interpretation of the statute will be adopted, one that has been referred to as the narrow or 'orthodox' approach.⁶³

1 *The Sections of LRA 2002*

(a) *B's 'Conclusive' Registered Title*

One of the most significant provisions in determining the nature of a registered proprietor's title would appear to be section 58(1), headed 'Conclusiveness': 'If, on the 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'.

(b) *B's Power To Make Dispositions*

Section 23 ('Owner's powers') and section 24 ('Right to exercise owner's powers') deal with B's ability to make further dispositions and together provide that a registered proprietor has power to make a disposition of any kind permitted by the general law.

(c) *The Protection of C*

There are two provisions of interest in considering C's position. Section 26(1) protects disponees by providing that the exercise of owner's powers 'is to be taken to be free from any limitation affecting the validity of a disposition'.⁶⁴

61 *LRA 2002* sch 1 para 2, sch 3 para 2. Overall, the number of overriding interests has been reduced under the *LRA 2002*. The guiding principle adopted in the *Report* to reduce the number of overriding interests was that 'interests should be overriding only where it is unreasonable to expect them to be protected in the register': Law Commission and HM Land Registry, *Report*, above n 13, 17 [2.25].

62 Goymour, above n 17, 625.

63 *Ibid* 617. The discussion of the case law that follows in Parts IV and V analyses alternative approaches to interpreting the *LRA 2002*, including the 'wide' approach and an unexpected interpretation of s 58.

64 As one may expect, a donee is not protected from limitations reflected by an entry in the register or imposed by or under the Act: *LRA 2002* s 26(2).

Sections 29(1)–(2) deal with the effect of registered dispositions on priority.⁶⁵ Section 29(1) is as follows:

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.

Section 29(2)(a) goes on to provide protection to the priority of certain interests including an overriding interest under schedule 3.⁶⁶ The particular overriding interest which is relevant here is the interest of a person in actual occupation.⁶⁷ Under schedule 3, the interest is not overriding if the interest-holder failed to disclose the interest upon an inquiry being made,⁶⁸ or if the interest belongs to a person whose occupation was not obvious on inspection and the donee had no actual knowledge of the interest at that time.⁶⁹

(d) Application of the Provisions to the A-B-C Problem

The straightforward literal application of these provisions to the A-B-C problem would appear to be as follows:

1. Prior to registration, B would have no rights to the land as the instrument was void. However, upon registration, ‘statutory magic’⁷⁰ is effected by section 58 and B obtains the legal estate;
2. B, as registered proprietor, has owner’s powers to transfer or mortgage the registered estate to C pursuant to sections 23–4;
3. C, as donee, is protected since section 26(1) deems owner’s powers to be free from any limitation affecting the validity of a disposition. In any event, C is also ‘deemed to be vested’ of the legal estate by virtue of section 58;
4. provided the disposition to C was made for valuable consideration, then, under section 29, upon registration, C will have priority over unregistered interests existing immediately prior to the disposition and

⁶⁵ Section 29 deals with the effect of registered dispositions on the priority of estates and s 30 deals with the effect with regard to charges. The provisions are broadly similar, and for convenience, the terms of s 29 will be discussed here.

⁶⁶ Section 29(2)(a) also provides protection to an interest that is the subject of a notice in the register or is a registered charge, and an interest that appears from the register to be excepted from the effect of registration.

⁶⁷ Another important overriding interest is the interest of a lessee under a lease not exceeding seven years: *LRA 2002* sch 1 para 1.

⁶⁸ *LRA 2002* sch 3 para 2(b).

⁶⁹ *LRA 2002* sch 3 para 2(c).

⁷⁰ ‘Statutory magic’ is best understood in the Torrens system as the notion that registration ‘cures’ defects in registered instruments. This kind of expression has been used frequently to describe the effect of s 58: see, eg, Scottish Law Commission, *Report on Land Registration*, Report No 222 (2010), 19 [3.11]; *Knights Construction (March) Ltd v Roberto Mac Ltd* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Michael Mark, 9 February 2011) [83], [105], [125]; Goymour, above n 17, 627.

which were not protected at the time of registration. However, C will not have priority with regards to the overriding interest of a person in actual occupation of the land.

These provisions in the main body of the *LRA 2002* tell only half the story – they pull in the direction of affording B and C titles. In order to determine the full rights of A, B and C, schedules 4 and 8, dealing with alteration of the Register and indemnities respectively, require examination.

2 *Schedule 4: Alteration of the Register*

The two substantive paragraphs are paragraph 2, concerning alteration by court order, and paragraph 5 that makes virtually identical provision for alteration by the registrar.⁷¹ The focus here will be on the provisions dealing with court ordered alteration.

Schedule 4 paragraph 2 provides:

- (1) The court may make an order for alteration of the register for the purpose of—
 - (a) correcting a mistake,
 - (b) bringing the register up to date, or
 - (c) giving effect to any estate, right or interest excepted from the effect of registration.

An alteration which involves the ‘correction of a mistake’ and ‘prejudicially affects the title of a registered proprietor’ is defined in paragraph 1 to be a ‘rectification’.

Paragraph 3(2) provides a defence to rectification in favour of a proprietor in possession of his or her land. In this situation, the court is not to order a rectification without the proprietor’s consent unless either: the proprietor by fraud or lack of proper care caused or substantially contributed to the mistake; or it would, for any other reason, be unjust for the alteration not to be made.⁷²

(a) *Application of Schedule 4 to the A-B and A-B-C Scenarios*

The issue here is whether A would be entitled to have the register altered so as to remove B. This depends on whether B’s registration, pursuant to a void instrument, falls within one of the three purposes for alteration specified in paragraph 2(1)(a)–(c).

This issue is itself contentious.⁷³ None of the terms in paragraph 2(1)(a)–(c) is defined in the *LRA 2002* and so it is not clear whether they are to be interpreted widely or narrowly.⁷⁴ The narrow interpretation of the provisions, adopted under

71 The registrar has an additional ‘purpose’ for alteration, namely, to remove a superfluous entry.

72 In addition, para 3(3) provides that if the court has power to make an order for rectification, it must do so, unless there are exceptional circumstances which justify it not doing so. Given the key word is ‘exceptional’, it is anticipated that exercise of the discretion not to rectify will be rare: Dixon, above n 1, 89.

73 For an excellent terse discussion of the narrow and wide views of the purposes for alteration, see Goymour, above n 17.

74 Goymour comments that, in fact, there are conflicting views as to the purpose of sch 4: Goymour, above n 17, 628 n 59.

the orthodox view, has two aspects. First, a narrow interpretation would treat the purposes in sub-paragraphs (1)(b)–(c) as permitting only administrative changes, that is, changes that do not affect a particular party's substantive rights.⁷⁵ It is only the purpose in sub-paragraph (1)(a), 'correcting a mistake', that would allow for a substantive change to the register and potentially permit the removal of B from the register. Secondly, the narrow interpretation construes a 'mistake' restrictively, such that a mistake is 'to be ascertained merely by reference [to] the validity of the preceding disposition'.⁷⁶

In the A-B scenario, B's registration is a mistake as B was registered pursuant to a void instrument. Accordingly, the court can alter the register on the ground of 'correcting a mistake'. Since the correction of this mistake would 'prejudicially affect' B's registered title, an alteration of the register to remove B is classified as a 'rectification'.

However, under paragraph 3(2), B may have a defence to rectification if B is in possession of the land, in which case, B's registered title will be secure. The outcome in this particular circumstance is therefore the same as would be the case under the Torrens system. However, the philosophical and conceptual means by which this outcome is achieved is radically different in the two systems. In England, it is based on a particular preference for protecting a proprietor in possession. In Australia, it is based on the perceived need for public confidence in the system which is said to be dependent on the 'rock-solid effect' of registration.⁷⁷

In relation to C, under the orthodox view, C's registered title is secure since the instrument by which C became registered is an internally valid document. B was the registered proprietor with the legal estate (section 58) and was empowered to dispose of the estate to C (sections 23–4).⁷⁸

3 Schedule 8: Indemnities

Paragraph 1(1) provides that a person is entitled to be indemnified by the registrar for loss suffered by reason of: (a) rectification of the register; or (b) a mistake whose correction would involve rectification of the register.⁷⁹

75 An illustration of an administrative change to the register would be, eg, allowing the registration of an overriding interest, which in any event already encumbers the registered estate.

76 Goymour, above n 17, 629. This is in stark contrast to the Australian position where there is no power to correct the register merely on the basis of an '[in]validity of the preceding disposition': at 629. In this regard, Hayne J in *Vassos v State Bank of South Australia* [1993] 2 VR 316, 332 has strenuously commented that such an argument would '[fly] in the face of indefeasibility'.

77 Peter Butt, 'The Conveyancer' (1992) 66 *Australian Law Journal* 595, 597.

78 However, as will be seen, under the wide approach, 'correcting a mistake' may extend to correcting the consequences of a mistake, in which case C's title, like B's, may be subject to rectification.

79 There are six other circumstances that give rise to an entitlement to indemnity: see *LRA 2002* sch 8 paras (1)(c)–(h). They are not relevant for the purposes of this article.

Where a claimant has suffered loss ‘wholly or partly as a result of his own fraud’,⁸⁰ or ‘wholly as a result of his own lack of proper care’,⁸¹ no indemnity is payable.

(a) Application of Schedule 8 to the A-B and A-B-C Scenarios

One of the most important points to note here is that payment of an indemnity is dependent on either a rectification of the register or the existence of a mistake whose correction would involve rectification of the register. If there is an alteration that does not involve a rectification,⁸² no indemnity is payable.

If B is in possession of the land, then B has a defence to rectification under schedule 4 paragraph 3(1). The register will therefore not be rectified and B will be entitled to keep the land. A would be entitled to an indemnity under schedule 8 paragraph 1(1)(b) since B’s registration is a mistake (the registration of the void instrument) whose correction, were it to be made, would involve rectification of the register.

If B is not in possession of the land then B is not entitled to the schedule 4 defence and the register would be rectified in favour of A. However, B would be entitled to an indemnity under schedule 8 paragraph 1(1)(a).⁸³

In relation to C, under the orthodox view, C’s registered title is secure since the instrument by which C became registered is an internally valid document. However, the question arises, is A entitled to an indemnity? Since C’s title is secure, the register is not to be rectified and so A must rely on schedule 8 paragraph 1(1)(b). But, given that C became registered pursuant to a valid instrument, can it be said that there is a mistake to be corrected? This question is considered further later in this article.

C A Suggested ‘LRA 2002 Methodology’

With this orthodox understanding of the legislation in mind, it is suggested that a possible ‘LRA 2002 methodology’ for resolving an A-B-C problem is as follows:

80 LRA 2002 sch 8 para 5(1)(a).

81 LRA 2002 sch 8 para 5(1)(b). If the loss suffered was partly as a result of lack of proper care by the claimant, any indemnity payable is reduced, having regard to the claimant’s share in the responsibility for the loss: LRA 2002 sch 8 para 5(2).

82 As noted, a rectification involves the ‘correction of a mistake’ that ‘prejudicially affects the title of a registered proprietor’: see LRA 2002 sch 4 para 1, sch 8 para 11(2).

83 No indemnity would be payable to B if B’s loss arose either as a result of his or her own fraud or wholly as a result of his or her own lack of proper care: LRA 2002 sch 8 para 5. A third possible scenario is that A is in actual occupation and claims an overriding interest under sch 3. In this situation it would appear that B will not be entitled to an indemnity. The alteration may be viewed as ‘bringing the register up to date’ or ‘giving effect to any estate, right or interest excepted from the effect of registration’ and therefore not as the ‘correction of a mistake’. Additionally, since the registered proprietor is subject to overriding interests in any event, it may be argued the registered proprietor has not been prejudicially affected.

1. Conclusive title: the registered proprietor has the legal estate with rights to exercise owner's powers to make dispositions. The registered disponee for value has priority over prior unregistered interests;⁸⁴
2. exceptions: a registered disponee is subject to certain exceptions, in particular, the unregistered interest existing at the time of the disposition, of a person in actual occupation (an overriding interest);⁸⁵
3. rectification of register: the register may be altered for the purpose of 'correcting a mistake' and this may prejudicially affect the registered proprietor's estate;⁸⁶
4. defence to rectification: the registered proprietor may have a defence if he or she is in possession of the land;⁸⁷ and
5. indemnity: a person who suffers loss by 'rectification' of the register, or by 'a mistake whose correction would involve a rectification of the register', is entitled to be indemnified.⁸⁸

This suggested *LRA 2002* methodology simply provides a broadbrush approach for considering A-B-C problems. As with the Torrens methodology, within each step there may be further issues that require consideration.⁸⁹ However, with these qualifications in mind, this methodology does at least provide a principled, structured, and holistic approach that should ensure all relevant issues are examined in resolving an A-B-C problem.

IV THE NARROW AND WIDE APPROACHES: THE CASE LAW

The cases considered in this Part deal with a particular form of the A-B-C scenario arising under the English regime where A is the registered proprietor, B becomes the registered proprietor pursuant to a void or voidable instrument, and B then grants a charge over the land in favour of C who becomes registered. Under the orthodox view, A should be able to recover the land from B in order to 'correct a mistake'. However, is A bound by the registered charge or can A argue that the register should be rectified so as to remove the charge from the title?

Unfortunately, the decisions are in conflict with regards to this fundamental question. The answer depends on whether a narrow or wide approach is adopted in interpreting the phrase 'correcting a mistake'.

84 The authority for these propositions is *LRA 2002*: s 58, on legal estate; ss 23–4, on owner's powers; s 29(1), on freedom from prior unregistered interests.

85 *LRA 2002* s 29(2), sch 3.

86 *LRA 2002* sch 4 paras 1–2, 5.

87 *LRA 2002* sch 4 paras 3(2), 6(2).

88 *LRA 2002* sch 8 paras 1(1)(a)–(b), 11(2).

89 For example, in step (2), an unregistered interest-holder in actual occupation will not fall within the exception if, prior to the disposition and upon inquiry, he or she failed to disclose the interest: *LRA 2002* sch 3 para 2(b). Similarly, in step (4), a proprietor in possession will not have a defence to rectification if, by fraud or lack of proper care, he or she caused or substantially contributed to the mistake: *LRA 2002* sch 4 paras 3(2)(a), 6(2)(a).

A The Narrow Approach

1 *Barclays Bank plc v Guy*⁹⁰

Guy was the registered proprietor of land. Ten Acre fraudulently procured Guy to execute a transfer of the land to Ten Acre. The transfer was registered and subsequently Ten Acre granted an ‘all monies’ charge to Barclays Bank (‘Bank’) to secure debts in excess of £110 million. The charge was registered. Ten Acre defaulted and the Bank sought a declaration that it was entitled to sell the land.

Guy defended the action claiming that, though the transfer had been signed by him, it had been fraudulently procured and was therefore void. Guy also argued that the charge was invalid and that he was entitled to have the register rectified. The Bank argued that as at the date of the charge, Ten Acre was the registered proprietor and the legal estate was vested in it under section 58. As registered proprietor Ten Acre was entitled, under sections 23–4, to exercise owner’s powers and charge the estate to the Bank. Accordingly, the registration of the charge was not a ‘mistake’ and so the power to ‘correct a mistake’ under schedule 4 paragraph 2 did not arise.⁹¹

Mowchenson QC, sitting as a deputy High Court Judge, rejected Guy’s claim that the transfer was void, finding instead that it was voidable. His Honour accepted the reasoning of the Bank and declared the Bank was entitled to sell the land free from any rights Guy may claim to have in the land. Mowchenson QC made his decision on the basis that the transfer to Ten Acre was voidable and that Guy had not avoided the transfer at the time Ten Acre charged the land to the Bank.⁹²

In a subsequent case, *Barclays Bank plc v Guy*,⁹³ Guy sought permission to appeal the decision of Mowchenson QC. The Court of Appeal’s decision was delivered by Lloyd LJ who concluded that, if Guy’s allegations concerning the transfer were made out, Guy would be entitled to have the transfer to Ten Acre set aside.⁹⁴ In relation to the registered charge, the Court dismissed Guy’s application, noting that Ten Acre was entitled to charge the estate,⁹⁵ and that

90 [2008] EWHC 893 (Ch) (‘Guy’). This was one of the first cases to consider the nature of the title of a registered proprietor in the A-B-C scenario.

91 The Bank’s argument was essentially for an orthodox application of the legislation.

92 Mowchenson QC expressly stated, ‘I do not need to address the question of whether ... the charge, would have been effective if the transfer was void’: *Guy* [2008] EWHC 893 (Ch) [27]. For a more detailed discussion of the relevance of the void/voidable issue, in Part IV(B)(2) see the discussion of *Knights Construction (March) Ltd v Roberto Mac Ltd* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Michael Mark, 9 February 2011). In essence, if the original transaction was merely voidable, and had not been avoided at the time of the subsequent transaction, then the right to rectify the subsequent transaction would be lost.

93 [2008] EWCA Civ 452.

94 *Ibid* [14]. Since Ten Acre had, through fraud, contributed to the mistaken registration of the transfer, it could not rely on the defence of a proprietor in possession in the *LRA 2002* sch 4 para 3(2)(a).

95 *Barclays Bank plc v Guy* [2008] EWCA Civ 452, [9].

unlike the transfer to Ten Acre, there was ‘nothing intrinsically wrong’⁹⁶ with the charge, which was in proper form and had been properly executed by Ten Acre.⁹⁷

One year later, in *Barclays Bank plc v Guy [No 2]*⁹⁸ Guy applied to the Court of Appeal for permission to reopen his appeal against the decision of Mowdsen QC.⁹⁹ Lord Neuberger, with whom Patten and Black LJ agreed, recognised that ‘the point at issue is of some general interest and importance in the field of land registration law’,¹⁰⁰ however, he rejected Guy’s application in the interests of finality.

Without using the terms ‘narrow’ and ‘wide’, Lord Neuberger appeared to identify the approach of Lloyd LJ as a narrow approach, namely, that the alleged mistake, though not proven, was the registration of the charge in the charges register. But Lord Neuberger indicated there were two other ways of putting Guy’s case¹⁰¹ which effectively amounted to adopting a wide approach. It is submitted that, if either of these wide interpretations of mistake had been adopted, the outcome would be very different for Guy. The charge would be removed on either basis because: (a) to properly correct the mistaken removal of Guy from the register the charge must also be removed; or (b) the charge ‘flowed from’ the mistaken registration of Ten Acre and as it is ‘part and parcel’ of that mistake it must be removed.

Although the decision of the Court of Appeal to refuse to reopen Guy’s appeal was ‘unexceptional’,¹⁰² the consequences for Guy were catastrophic. True, Guy was entitled to have his name restored to the register as proprietor of land worth £35 million. However, that was rather a pyrrhic victory given the fact the land remained liable under the Bank’s charge which secured £110 million. It was also implicit from the decision, and from subsequent actions by Guy, that an indemnity would not be available. In *Guy*, the Court found that the only mistake was the transfer to Ten Acre. This mistake had been corrected by rectification of the register, and on a narrow approach, registration of the charge itself was not a mistake. As it was the charge that had caused Guy to suffer loss, and since that was not a mistake, Guy would not be entitled to an indemnity.¹⁰³

96 Ibid [19].

97 Guy raised a further argument that the Bank had actual knowledge of Ten Acre’s mistaken registration. This argument was not accepted by the Court: *Barclays Bank plc v Guy* [2008] EWCA Civ 452, [20]–[24].

98 [2011] 1 WLR 681.

99 Guy’s argument centred on the principles in *Taylor v Lawrence* [2003] QB 528 which, in summary, state that an appeal can only be reopened if the decision is ‘so plainly wrong in principle and unjust in its consequences as to have the effect of corrupting the judicial process’. See Bernadette Hewitt, ‘A Tangled Web: Land Registration and the Facilitation of Fraud – The England and Wales Perspective’ in Carruthers, Mascher and Skead, above n 24, 177, 192.

100 *Barclays Bank plc v Guy [No 2]* [2011] 1 WLR 681, 685 [21].

101 Ibid 687 [35].

102 Cobden House Chambers, *Chancery and Commercial Case Law Update*, (Publication, 4 July 2012) 6 <http://www.cobden.co.uk/articles/chancery_and_commercial_case_law_update/>.

103 There is a postscript to this story. In *Guy v Mace & Jones* [2012] EWHC 1022 (Ch), Guy brought a professional negligence claim against his own solicitors and also the solicitors acting for Ten Acre. Guy was unsuccessful.

2 *Stewart v Lancashire Mortgage Corporation Ltd*¹⁰⁴

Stewart was the sole registered proprietor of land which she held on trust for herself and her brother, Choat. A forged transfer of the land from Stewart to Choat was registered.¹⁰⁵ Choat borrowed two sums of money from Lancashire Mortgage Corporation Ltd ('Lancashire'), both of which were secured by charges which were lodged at the registry and treated as registered.¹⁰⁶ Subsequently, Choat was killed in a road traffic accident. At this point, Stewart became aware of the forged transfer to Choat and sought to have Choat's name removed from the register and her name restored.

Deputy Adjudicator Holland found that Stewart's name ought to be restored to the register. The main issue to be decided was whether the registrar had power to alter the register by 'correcting a mistake' and remove the charges under schedule 4. In dealing with this issue, Deputy Adjudicator Holland noted that he was faced with two conflicting first instance decisions: the decision of Mowschenson QC in *Guy* and the decision of Deputy Adjudicator Rhys in *Ajibade v Bank of Scotland plc*,¹⁰⁷ where a wide view of the phrase 'correcting a mistake' had been adopted. Ultimately, Deputy Adjudicator Holland decided to adopt the narrow interpretation in *Guy*.¹⁰⁸ Stewart's application to rectify the register by removing the registered charges was, accordingly, dismissed.

Deputy Adjudicator Holland's reasoning was that as Choat was the registered proprietor, he could lawfully charge the property. The registration of the charges could not be viewed as a mistake since it was a 'fundamental objective of the act that the register should be a complete and accurate reflection of the state of the title to land at any given time'.¹⁰⁹ Importantly, Deputy Adjudicator Holland concluded by saying, '[s]ection 58 reflects a balance struck by Parliament which preferred certainty of title over the property rights of those who had been the victims of fraud. They are to have their remedy by way of indemnity under Schedule 8'.¹¹⁰

104 (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry David Holland, 19 August 2010) ('*Stewart*').

105 The Court made no finding as to who was responsible for the forgery.

106 The first charge was entered on the Day List at the registry on 6 June 2008 and the second was entered on 10 June 2008. At the time of the action the charges had not actually been registered, though, as found in the case, the charges were to be viewed as registered: *Stewart* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry David Holland, 19 August 2010) [48]–[49] (Deputy Adjudicator David Holland).

107 (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Rhys, 8 April 2008). This case is discussed in Part IV(B)(1).

108 Deputy Adjudicator Holland supported his conclusion by reference to the decisions in *Norwich & Peterborough BS v Steed* [1933] Ch 116 and *Pinto v Lim* [2005] EWHC 630 (Ch), both of which had adopted a narrow interpretation of the rectification provision under the *LRA 1925*. Deputy Adjudicator Holland considered these cases on the *LRA 1925* were still relevant since the intention behind the *LRA 2002* was that the number of situations where the register could be altered should not to be increased under the *LRA 2002*: *Stewart* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry David Holland, 19 August 2010), [65] (Deputy Adjudicator Holland).

109 *Stewart* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry David Holland, 19 August 2010), [73] (Deputy Adjudicator Holland).

110 *Ibid.*

Interestingly, though Deputy Adjudicator Holland, in following *Guy*, had adopted a narrow interpretation of ‘correcting a mistake’ for the purposes of rectification, he appeared to adopt a wider view of ‘mistake’ for the purposes of indemnity under schedule 8. Paragraph 1(1)(b) allows a person to be indemnified for loss suffered by reason of ‘a mistake whose correction would involve rectification of the register’. Deputy Adjudicator Holland considered the reference to ‘a’ mistake could ‘cover loss caused by the original mistake ... even if the subsequent registration of a charge is not a mistake within the statutory definition’.¹¹¹

The issue of an indemnity for Stewart was not formally determined in this case. However, the clear implication was that as Stewart’s loss (the presence of the charge) was caused by the original mistake in the registration of Choat, this would suffice for the purposes of paragraph 1(1)(b) and Stewart would be entitled to an indemnity.

3 *The Torrens Approach to Guy and Stewart*

(a) *Guy*

In *Guy*, Ten Acre was involved in the fraud by which it became registered. Prior to *Guy* challenging Ten Acre’s registered title, Ten Acre granted a charge to the Bank, which registered the charge. The Bank was not guilty of fraud in registering the charge and there was no indication on the facts that would give rise to an in personam exception.¹¹² Accordingly, under Torrens, the Bank’s charge would be indefeasible. As in the case itself, *Guy* would be able to challenge the title of Ten Acre on the basis of the fraud exception and be restored to the register as fee simple owner.

However, a point of significant departure between *Guy* and the Torrens system concerns *Guy*’s entitlement to compensation. Under Torrens, *Guy* was a person who had been deprived of an interest in land (his unencumbered fee simple) through the registration of another person as proprietor (the Bank’s charge). In the first resort jurisdictions, *Guy* would be entitled to compensation directly from the assurance fund. In the last resort jurisdictions, *Guy* would be required first to seek compensation from the ‘person liable’, in this case, Ten Acre. Since Ten Acre was insolvent, *Guy* would be entitled to recover compensation from the assurance fund.¹¹³

¹¹¹ Ibid [78]. Deputy Adjudicator Holland made this comment in light of the terms of sch 8 para 1(3).

¹¹² In this case, as the Bank’s registered charge was not a forgery, there would be no scope for the operation of qualified indefeasibility as exists in Queensland, NSW and Victoria: See the discussion in Part II(B)(1).

¹¹³ There may be an argument to say that as *Guy* had signed the transfer document, he had contributed to his loss and would not be entitled to compensation under the Torrens system. This situation is reminiscent of the facts in *Breskvar v Wall* (1971) 126 CLR 376 where the Breskvards signed a transfer form in blank that was later fraudulently registered. Although the Breskvards ultimately failed in their claim for compensation due to the expiry of the limitation period, they would otherwise have been entitled to compensation despite signing the transfer form: see *Breskvar v White* [1978] Qd R 187, 193–4 (Connolly J).

(b) Stewart

In *Stewart*, Choat became registered pursuant to a forged transfer. Prior to Stewart challenging Choat's registered title, Choat granted charges to Lancashire, which were presented at the registry and treated as registered. Lancashire was not guilty of fraud in presenting its charges for registration and there was no indication on the facts that would give rise to an in personam exception.¹¹⁴ Under Torrens, Lancashire would have an indefeasible title to the charges.¹¹⁵ Although Choat became registered pursuant to a forged transfer, there was no finding as to whether Choat was involved in the forgery. In Torrens, this would be a crucial issue to determine. If Choat was involved with the forgery, Choat's title would be defeasible on the ground of fraud. If not, and if there was no valid in personam claim, Choat would have an indefeasible title.

Under the Torrens system, Stewart was a person who had been deprived of an interest in land (her unencumbered fee simple) and would be entitled to compensation, either from the assurance fund in the first resort jurisdictions, or from the 'person liable' in the last resort jurisdictions.¹¹⁶ In *Stewart*, it would appear from the comments made by Deputy Adjudicator Holland that, unlike the position in *Guy*, he would consider Stewart to be entitled to an indemnity.

(c) The Torrens and English Systems Compared

The adoption of a narrow view of 'correcting a mistake' in schedule 4 gives the same outcome as would be the case under the Torrens system in *Guy*, and provided Choat was involved with the forgery in *Stewart*, the same outcome in *Stewart*. If Choat were innocent, then under the Torrens system, Choat's title could not be challenged.¹¹⁷ However, under the English system, the register would be rectified to remove Choat's registration on the basis that registration of a void instrument (the forged transfer) is a mistake.¹¹⁸

Another point of potential difference between the two systems would arise if either *Guy* or *Stewart* had been in 'actual occupation' of the land at the time the

114 In this case, as Lancashire's charges were not forgeries, there would be no scope for the operation of qualified indefeasibility as exists in Queensland, NSW and Victoria: see the discussion in Part II(B)(1).

115 Under Torrens, the registration of Lancashire's charges would date from the time the charges were lodged for registration: *Land Titles Act 1925* (ACT) ss 48(4)–(5); *Real Property Act 1900* (NSW) s 36(5); *Land Title Act 2000* (NT) ss 180–1, 186; *Land Title Act 1994* (Qld) ss 177–8, 183; *Real Property Act 1886* (SA) ss 56, 58; *Land Titles Act 1980* (Tas) ss 48(2)–(3); *Transfer of Land Act 1958* (Vic) s 34(1); *Transfer of Land Act 1893* (WA) s 53.

116 In the last resort jurisdictions, if Choat was involved with the forgery, then he would be the 'person liable'. As Choat was dead, Stewart would be entitled to claim compensation directly from the assurance fund: see *Land Titles Act 1925* (ACT) s 143(b); *Real Property Act 1886* (SA) s 205; *Land Titles Act 1980* (Tas) ss 152(7)–(8); *Transfer of Land Act 1893* (WA) s 201(3). See also Part II(C).

117 The simple fact of registration pursuant to a forged instrument is not, of itself, a ground for challenging a registered title: see, eg, *Frazer v Walker* [1967] 1 AC 569; *Vassos v State Bank of South Australia* [1993] 2 VR 316.

118 This may be the reason why the Court in *Stewart* did not find it necessary to make a finding as to Choat's involvement with the forgery. Either way the result would be the same as the registration of the forged transfer was a 'mistake'.

subsequent charges were created.¹¹⁹ Both Guy and Stewart had an unregistered interest in their respective lands at the time of the subsequent charges,¹²⁰ and accordingly, the subsequent interest-holders (the Bank and Lancashire) would have been subject to the prior overriding interests of Guy and Stewart. In the Torrens system, there is no express exception in favour of an unregistered interest-holder in actual occupation of the land.¹²¹

B The Wide Approach

1 *Ajibade v Bank of Scotland plc*¹²²

Ajibade was the registered proprietor of land. Ajibade had purportedly granted a power of attorney to her sister, Nwaiga, but it was found as a fact that this power of attorney was forged. Nwaiga, in her purported capacity as attorney of Ajibade, executed a transfer of the land to Abiola, Nwaiga's husband.¹²³ Abiola became registered and executed a charge in favour of Endeavour Personal Finance Ltd ('Endeavour') to secure moneys lent by Endeavour to Abiola. The charge was registered.

On these facts, Deputy Adjudicator Rhys had no difficulty determining that Ajibade ought to be reinstated to the register as owner. The main question for the Adjudicator was whether the register should be rectified so as to remove Endeavour's charge.

Deputy Adjudicator Rhys accepted Endeavour's propositions that section 58 of the *LRA 2002* deemed Abiola to have the legal estate at the time the charge was granted and that sections 23–4 granted Abiola owner's powers entitling him to charge the estate. However, Deputy Adjudicator Rhys rejected Endeavour's claim that the 'protection of disponees' provided by section 26 would apply to protect the charge irrespective of the fact that the registration of Abiola was a mistake.¹²⁴

119 Section 29(2) of the *LRA 2002* protects 'overriding interests' which are defined in sch 3 para 2 to include the interest of a person in actual occupation.

120 This unregistered interest arose because the registered proprietor at that time, either Ten Acre or Choat respectively, had obtained their title through a forged instrument, and under the *LRA 2002*, Guy and Stewart had a right to have the register rectified.

121 See, eg, *RM Hosking Properties Pty Ltd v Barnes* [1971] SASR 100. Under Torrens, in order to challenge the registered proprietor's title, the unregistered interest holder would have to establish either fraud by the registered proprietor (as in *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491), or an in personam claim against the registered proprietor (as in *Bahr v Nicolay [No 2]* (1988) 164 CLR 604).

122 (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Rhys, 8 April 2008) ('*Ajibade*').

123 The Adjudicator made no finding as to whether Abiola was involved in the forgery and simply stated, 'Mr Abiola, did not respond or object to the application': *Ajibade* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Rhys, 8 April 2008), [1] (Deputy Adjudicator Rhys).

124 Section 26(1) provides that a person's right to exercise owner's powers is to be taken to be free from any limitation affecting the validity of a disposition. Deputy Adjudicator Rhys took the view that the limitations contemplated referred to 'express or implied limitations which fetter an owner's powers': *ibid* [5]. The provision supplemented ss 23–4 but had no bearing on the power to correct a mistake in the register.

In relation to the correction power in schedule 4, Endeavour argued, consistently with the narrow approach, that the ‘operative mistake’ was the registration of Abiola.¹²⁵ The registration of Endeavour’s charge was not an operative mistake since the legal estate had vested in Abiola and Abiola had owner’s powers to charge the estate to Endeavour.

Counsel for Ajibade adopted a wide approach, arguing that ‘fraud unravels all’.¹²⁶ On this approach, the original mistake, the registration of Abiola, ‘continues to operate’ and is ‘not cured ... until the ... charge is removed’.¹²⁷ Essentially, the charge is the ‘fruit of a poisoned tree’.¹²⁸

Deputy Adjudicator Rhys, in dealing with the ‘stark choice’¹²⁹ offered by these two opposing arguments, turned to consider the effect of the arguments on the indemnity provisions in schedule 8 of the *LRA 2002*. If the register was rectified to remove Endeavour’s charge, Endeavour would be entitled to be indemnified on a straightforward application of paragraph 1(1)(a). However, if the register was not rectified by removing the charge, the entitlement of Ajibade to an indemnity would not be so straightforward. Ajibade would need to rely on paragraph 1(1)(b), that is, that Ajibade was a person who had suffered loss by reason of ‘a mistake whose correction would involve rectification of the register’. However, if Endeavour’s argument was adopted, the registration of Endeavour’s charge was not a mistake. Ajibade would not, therefore, be able to identify ‘a mistake whose correction would involve rectification of the register’ and would not be entitled to an indemnity.

Ultimately, Deputy Adjudicator Rhys adopted a wide interpretation of ‘correcting a mistake’ and concluded that the register should be rectified by removing Endeavour’s charge. Deputy Adjudicator Rhys considered that the focus ought not to be on the word ‘mistake’ but rather on how far the registrar can go in ‘correcting’ that mistake.¹³⁰ Deputy Adjudicator Rhys concluded that:

It seems ... 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.¹³¹

Deputy Adjudicator Rhys acknowledged that a rectification power that extended to correcting the consequences of the original mistake could apply to

125 Ibid [12].

126 Ibid [9].

127 Ibid.

128 Ibid.

129 Ibid [10].

130 Ibid [12].

131 Ibid [12]. In contrast, Deputy Adjudicator Holland in *Stewart* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry David Holland, 19 August 2010) [74], rejected the wide approach of Deputy Adjudicator Rhys as he did not consider that the expression ‘correcting a mistake’ in sch 4 could be read ‘so widely’ as to extend to correcting the consequences of the mistake. Deputy Adjudicator Holland also rejected Deputy Adjudicator Rhys’s interpretation of sch 8 para 1(1)(b) at [78], and the limited way in which Deputy Adjudicator Rhys interpreted the protection for disponees under s 26: at [75]. Deputy Adjudicator Holland, at [75], considered the words ‘any limitation affecting the validity of a disposition’ in s 26(1) were ‘wide enough to encompass dispositions by forged transfers as well as those made ultra vires’.

‘purchasers at several removes from the original fraudster’ and could lead to ‘an undermining of the “sanctity” of a registered title’.¹³² However, for various reasons, Deputy Adjudicator Rhys did not consider this would be a problem in practice.¹³³

The decision in *Ajibade* is strikingly at odds with the decisions in *Guy* and *Stewart*, both of which adopted a narrow interpretation of ‘correcting a mistake’, and therefore found the subsequent registered charges were valid.¹³⁴ These decisions are in direct conflict. It is submitted that conflicts of this kind, dealing as they do with fundamental notions in land law, are unsustainable.

Interestingly however, despite the conflict, the Deputy Adjudicators in both *Stewart* and *Ajibade* were mindful of the interconnectedness of two of the steps in the *LRA 2002* methodology, namely, rectification and indemnity. This holistic consideration by each of the Deputy Adjudicators, despite their different approaches to ‘correcting a mistake’, ultimately fostered the possibility of a just outcome for the party deprived of its interest in the land.¹³⁵

2 *Knights Construction (March) Ltd v Roberto Mac Ltd*¹³⁶

The facts in *Knights Construction* are somewhat different from those in the cases discussed above. However, the case is important for the extensive review of the existing case law undertaken by Deputy Adjudicator Mark.

The Salvation Army applied for, and obtained, first registration of the Salvation Army Chapel and its grounds. However, the Salvation Army had accidentally included in its application the ‘disputed land’ which was owned by Knights Construction (March) Ltd (‘Knights’). Before this problem came to light, the Salvation Army sold the land to Roberto Mac Ltd (‘Roberto’) which became registered and sought to enclose the disputed land and use it as a car park.

132 *Ajibade* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Rhys, 8 April 2008) [13] (Deputy Adjudicator Rhys).

133 Deputy Adjudicator Rhys’s reasons were that: (1) under sch 4 para 6, protection is provided to proprietors in possession, and accordingly, it would be likely that a purchaser at ‘several removes’ would be in possession and therefore entitled to protection; (2) under the broader rectification power in the *LRA 1925* s 82, confidence in the land registration system had not been undermined; and (3) that in any event the power to rectify would be used sparingly: *ibid*.

134 In this regard, *Guy* and *Stewart* give outcomes that are equivalent to applying a deferred indefeasibility approach: *Guy* [2008] EWHC 893 (Ch); *Stewart* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry David Holland, 19 August 2010).

135 The question of indemnity for the losing party was not formally determined in either of these cases. In *Stewart* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry David Holland, 19 August 2010), Deputy Adjudicator Holland considered the charge was valid and it was implicit in his discussion of the indemnity provisions that he considered Stewart would be entitled to an indemnity in relation to the registered charge: at [71], [78]. In *Ajibade* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Rhys, 8 April 2008), Deputy Adjudicator Rhys found that the register should be corrected to remove Endeavour’s charge: at [10]. The implication was that Endeavour would be entitled to an indemnity. On the other hand, in *Guy*, Mowshenson QC did not examine the *LRA 2002* in a holistic manner and the indemnity implications for Guy were not discussed.

136 (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Michael Mark, 9 February 2011) (‘*Knights Construction*’).

Knights became aware of the sale to Roberto and sought to have the disputed land removed from Roberto's title. Roberto argued on a narrow construction of 'correcting a mistake', that the Salvation Army was the registered proprietor at the time Roberto purchased the land, the transfer to Roberto was therefore valid and accordingly there was no mistake with regards to the registration of Roberto.

Deputy Adjudicator Mark noted that the scope of the correction provisions had 'recently been the subject of considerable debate'¹³⁷ and that there were 'conflicting decisions'.¹³⁸ In addition, Deputy Adjudicator Mark identified a 'potential problem' in the relationship between the rectification provisions and the indemnity provisions 'in that on one construction', an innocent 'party might end up without the land or an indemnity' and this may conflict with 'Article 1 of Protocol 1 of the *Human Rights Convention*'.¹³⁹

With these comments in mind, Deputy Adjudicator Mark then proceeded to review the rectification provisions under the *LRA 1925*,¹⁴⁰ the Reports of the Law Commission and HM Land Registry,¹⁴¹ and the case law dealing with the *LRA 1925*.¹⁴² It is very difficult to do justice to Deputy Adjudicator Mark's extensive analysis. However, a few important points may be made. Deputy Adjudicator Mark supported the wide approach to interpreting 'correcting a mistake' adopted by Deputy Adjudicator Rhys in *Ajibade* and was very critical of the decision of Deputy Adjudicator Holland in *Stewart*. In Deputy Adjudicator Mark's view, Deputy Adjudicator Holland failed to appreciate that the decision of Mowschenson QC in *Guy* was based on the fact that the original transaction, the transfer to Ten Acre, was voidable and not void.¹⁴³ In *Stewart*, the original transaction, the transfer to Choat, was forged and therefore void. Accordingly, *Guy* could not be used as an authority to support Deputy Adjudicator Holland's

137 Ibid [58].

138 Ibid.

139 Ibid [61]; *European Convention on Human Rights* (entered into force 3 September 1953).

140 *Knights Construction* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Michael Mark, 9 February 2011) [64]–[68] (Deputy Adjudicator Mark).

141 Ibid [70]–[81]; see also Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Consultative Document*, Report No 254, (1998); Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, Report No 271, (2001).

142 *Knights Construction* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Michael Mark, 9 February 2011) [82]–[88] (Deputy Adjudicator Mark).

143 Deputy Adjudicator Mark, in discussing the rectification provisions under the *LRA 1925*, identified a clear distinction in the case law between the registration of void and voidable transactions. If the original transaction was void, and a subsequent transaction was entered into and registered, then, under the *LRA 1925*, the subsequent registration could be rectified. However, if the original transaction was merely voidable, and had not been avoided at the time of a subsequent transaction in favour of an innocent purchaser for value, then the right to rectification would be lost: *ibid*.

conclusion in *Stewart* that the second transaction, the charge to Lancashire, could not be rectified.¹⁴⁴

Deputy Adjudicator Mark concluded that *Knights* was entitled to the remedy of rectification by adapting the two wide interpretations suggested by Lord Neuberger in *Barclays Bank plc v Guy [No 2]*.¹⁴⁵

(a) the original registration of the Salvation Army was a mistake, and, in order to correct that mistake, ... the register should be corrected by removing this part of the land ... from the title, or (b) that the registration of Roberto Mac as proprietor of the land flowed from the mistake of including the land in the original title, and therefore should be treated as part and parcel of that mistake.¹⁴⁶

In any event, in *Knights Construction*, since the mistake still existed on the title, that is, the mistaken inclusion of excess land, Deputy Adjudicator Mark considered that the application of the narrow interpretation would lead to the same conclusion.¹⁴⁷

3 The Torrens Approach to *Ajibade* and *Knights Construction*

(a) *Ajibade*

In *Ajibade*, Abiola became registered pursuant to a fraudulent transfer that had been executed under a forged power of attorney. Prior to *Ajibade* challenging Abiola's registered title, Abiola granted a charge in favour of Endeavour, which registered the charge. Endeavour was not guilty of fraud in registering its charge and there was no indication on the facts that would give rise to an in personam exception.¹⁴⁸ Accordingly, under Torrens, Endeavour's charge would be indefeasible, and since *Ajibade* was a person who had been deprived of an interest in land (her unencumbered fee simple), she would be entitled to compensation, either from the assurance fund in the first resort jurisdictions, or from the person liable for the deprivation in the last resort jurisdictions.

In contrast however, under the wide interpretation of 'correcting a mistake' adopted by the Court in *Ajibade*, it was not just the original mistake, but also the

144 Deputy Adjudicator Mark commented that Deputy Adjudicator Holland was 'plainly wrong' in relying on the decision in *Guy* in relation to a forged transfer: *ibid* [119]. Deputy Adjudicator Mark also considered Deputy Adjudicator Holland was wrong in three other respects. First, in concluding that *Norwich & Peterborough BS v Steed* [1933] Ch 116 and *Pinto v Lim* [2005] EWHC 630 (Ch) supported a narrow interpretation of the LRA 1925: *ibid* [121]–[122]. Secondly, in failing to recognise that 'correcting a mistake' in sch 4 of the LRA 2002 was intended to cover all cases of mistake as were covered in the LRA 1925: *ibid* [122]. Thirdly, in adopting an artificial construction of the indemnity provisions of sch 8: *ibid* [126]–[128].

145 [2011] 1 WLR 681, 685 [21].

146 *Knights Construction* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Michael Mark, 9 February 2011) [132]. In addition, Deputy Adjudicator Mark found rectification would also be available if Blackburne J was correct in *Pinto v Lim* [2005] EWHC 630 (Ch) in treating the registration of the second transfer as itself a mistake.

147 *Knights Construction* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Michael Mark, 9 February 2011) [132].

148 In this case, as Endeavour's registered charge was not a forgery, there would be no scope for the operation of qualified indefeasibility as exists in Queensland, NSW and Victoria: see the discussion in Part II(B)(1).

consequences of the original mistake, that could be corrected by rectification. Rectification was therefore ordered and Endeavour's charge was removed from the register.

Although Abiola became registered pursuant to a fraudulent transfer, there was no finding as to whether Abiola was involved in the fraud. In Torrens, this would be a crucial issue to determine. If Abiola was involved with the fraud, Abiola's title would be defeasible on the ground of fraud. If not, and if there was no valid in personam claim, Abiola would have an indefeasible title. However, Ajibade would be entitled to compensation for the deprivation of her fee simple estate.

(b) Knights Construction

In *Knights Construction*, land was mistakenly included in the registered title of the Salvation Army. Under the Torrens system, there is an express exception with regards to land that has, through wrong description, been included in a registered proprietor's title.¹⁴⁹ Accordingly, at the time when the land was still held by the Salvation Army, the Salvation Army would not have an indefeasible title to the wrongly included land. However, there is a limitation to the wrong description exception such that when the wrongly described land is subsequently sold to a purchaser, the exception no longer operates. Accordingly, when the land was sold to Roberto, Roberto would obtain an indefeasible title to the whole of the land and Knights would be left to seek compensation pursuant to the compensation provisions.

(c) The Torrens and English Systems Compared

In rectification proceedings in the English system, the court does not appear to be too concerned with identifying whether the registration of the original mistaken transaction involved the fraud of the person becoming registered.¹⁵⁰ However, this is not to say that the fraud of a registered proprietor in the English system is irrelevant. The issue of fraud is relevant in indemnity proceedings,¹⁵¹ and also in rectification proceedings where a proprietor is in possession of the land.¹⁵² In the Torrens system, it is of critical importance to determine whether the person becoming registered was guilty of fraud. In short: without fraud, indefeasible title; with fraud, defeasible title.

149 *Land Titles Act 1925* (ACT) s 58(1)(c); *Real Property Act 1900* (NSW) s 42(1)(c); *Land Title Act 2000* (NT) s 189(1)(f); *Land Title Act 1994* (Qld) s 185(1)(g); *Real Property Act 1886* (SA) s 69(c); *Land Titles Act 1980* (Tas) s 40(3)(f); *Transfer of Land Act 1958* (Vic) s 42(1)(b); *Transfer of Land Act 1893* (WA) s 68(1).

150 Presumably this is because registration of a void document, under either the narrow or wide approaches, is a 'mistake' and can be rectified regardless of fraud. However, this is subject to the protection provided in *LRA 2002* sch 4 paras 3(2), 6(2) in favour of a proprietor in possession.

151 *LRA 2002* sch 8 para 5(1).

152 In this case, a proprietor in possession who has, by fraud, contributed to the mistake will not be entitled to rely on the sch 4 defence to rectify his or her title.

V THE ENIGMATIC SECTION 58: IS BENEFICIAL TITLE CONFERRED?

The suggested ‘*LRA 2002* methodology’ includes five steps which, in summary, require a consideration of: (1) conclusive title of the registered proprietor; (2) exceptions; (3) rectification; (4) defence to rectification; and (5) indemnity.

The focus in the cases discussed above was directed to the third step: the question of whether the court or the registrar was able to rectify the register for the purpose of ‘correcting a mistake’. This discussion revealed inconsistent decisions and different views as to whether to adopt a narrow or wide interpretation of ‘correcting a mistake’.

However, in a somewhat surprising twist, recent English case law has turned attention from the third step to the first step and to an examination of the meaning of the ‘conclusive’ title provision in section 58 of the *LRA 2002*. Section 58 presents something of an enigma. There have been profoundly divergent views as to how the section should be interpreted and this, in turn, has grave implications for the outcome in the A-B-C scenario.

In 2013, Newey J in *Fitzwilliam v Richall Holdings Services Ltd*¹⁵³ considered himself bound by a Court of Appeal decision in *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd*¹⁵⁴ that had adopted a particular interpretation of the *LRA 1925* equivalent to section 58 of the *LRA 2002*. However, on 1 April 2015, in *Swift*, the Court of Appeal, in a further twist, concluded that *Malory* was ‘wrong’.¹⁵⁵ This Part traces and critiques the evolving interpretation of section 58.

A *Malory*

In *Malory*, Malory BVI was the registered proprietor of land. Another company, called Malory Enterprises Ltd, with no connection to Malory BVI, was set up, and by deception, obtained a new land certificate in the name of Malory Enterprises Ltd (‘Malory UK’). Malory UK then sold and executed a transfer of the land to Cheshire which became the registered proprietor in January 1999.

Malory BVI was successful in its claim for rectification of the register and also in its claim that Cheshire’s entry upon the land on and after 17 July 1999 amounted to trespass. Of particular interest here is the Court of Appeal’s discussion of sections 69(1) and 20(1) of the *LRA 1925* which are similar to sections 58 and 29 of the *LRA 2002* respectively.

Lady Justice Arden delivered the main judgment. Her Honour found that, although Malory UK had no title to convey to Cheshire,¹⁵⁶ once Cheshire became

153 [2013] EWHC 86 (Ch) (‘*Fitzwilliam*’).

154 [2002] Ch 216 (‘*Malory*’).

155 [2015] 3 WLR 239, [45].

156 It is submitted that this cannot be correct. Malory UK had obtained a land certificate issued in its name. As registered proprietor, the *LRA 1925* s 69(1) provided that Malory UK ‘shall be deemed to have vested in [it] without any conveyance’ the legal estate.

registered, Cheshire was, pursuant to section 69(1) ‘deemed to have vested in it “the legal estate in fee simple in possession”’.¹⁵⁷ Her Honour continued: ‘However, section 69 deals only with the legal estate. Unlike section 5, which deals with first registration, that registered estate is not vested in Cheshire “together with all rights, privileges and appurtenances ...”’.¹⁵⁸ The effect of this finding was that Cheshire had throughout held the land on trust for Malory BVI.¹⁵⁹

In addition, Arden LJ discussed the application of section 20(1) of the *LRA 1925*. In broad terms, this section provided that a disposition for valuable consideration would, when registered, confer on the transferee the estate disposed of, subject to overriding interests, but free from all other estates and interests whatsoever.¹⁶⁰ Leaving aside the issue of overriding interests, as Cheshire had provided consideration for its interest and was registered, this section would appear to grant priority to Cheshire over the interest of Malory BVI. However, in her Honour’s view, since the transfer to Cheshire could not, in itself, be effective in law,¹⁶¹ it could not constitute a ‘disposition’ for the purposes of section 20 of the *LRA 1925* and therefore could not confer on Cheshire the estate free from all other rights and interests.

Her Honour concluded that, ‘Malory BVI has sufficient standing to sue for trespass even without seeking rectification of the register because it is the true owner and has a better right to possession.’¹⁶² Her Honour also found that as Malory BVI was in actual occupation, it was entitled to be treated as having an overriding interest by virtue of its right to seek rectification of the register.¹⁶³ Her Honour chose to express no view on the submissions concerning indemnity.¹⁶⁴

1 *Malory Critique*

The decision in *Malory* gave rise to a flurry of academic criticism and comment.¹⁶⁵ One of the most contentious aspects of the decision was the

¹⁵⁷ *Malory* [2002] Ch 216, 232 [64].

¹⁵⁸ *Ibid* 232 [65].

¹⁵⁹ Lord Justice Clarke agreed with her Honour and commented that the status of Cheshire as registered proprietor was ‘subject to the rights of Malory BVI as beneficial owner because section 69 of the [*LRA 1925*] only has the effect of vesting in Cheshire “the legal estate in fee simple in possession”’: *ibid* 237 [85].

¹⁶⁰ The provision appears similar in effect to the paramouncy provisions in the Australian jurisdictions.

¹⁶¹ Given that Malory UK was the registered proprietor, it is not clear on what basis her Honour claimed that the transfer to Cheshire was not effective in law. The transfer was, at law, inherently valid as it had been validly executed by the parties.

¹⁶² *Malory* [2002] Ch 216, 232 [65].

¹⁶³ *Ibid* 233 [69]. Her Honour concluded that the right to seek rectification arose at the same time as the registration of Cheshire. This right, coupled with ‘actual occupation’ by Malory BVI, gave rise to an overriding interest: at 232–3 [67]–[70]. However, it is submitted that the right for Malory BVI to seek rectification of the register must have first arisen at the time that Malory UK was registered. Malory UK had, by deception, obtained a new land certificate for the land (GM723895) and was registered as proprietor prior to the sale to Cheshire: at 222 [5], [8].

¹⁶⁴ *Ibid* 237 [83].

¹⁶⁵ See, eg, Elizabeth Cooke, ‘Land Registration: Void and Voidable Titles – A Discussion of the Scottish Law Commission’s Paper’ [2004] *Conveyancer and Property Lawyer* 482, 485–6.

proposition that under section 69 of the *LRA 1925*, registration of a void transfer vested only the legal estate in the registered proprietor and beneficial title remained with the former owner. Charles Harpum has described this interpretation of section 69 as one that ‘undermines ... the essential structure of land registration without any compensating gains’.¹⁶⁶

One of the difficulties with the *Malory* interpretation of section 69 is that it implies that prior to the transfer, the former owner was vested with two estates: the legal estate and the beneficial estate. However, conceptually, this is not a correct description of the former owner’s position. As Lord Browne-Wilkinson stated in *Westdeutsche Landesbank Girozentrale v Islington LBC*, ‘[t]he 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’.¹⁶⁷

A ‘separation of the legal and equitable estates’ will arise where, according to equitable jurisdiction, there is an express, constructive or resulting trust. However, in the *Malory* situation, there was certainly no express trust and, given the registered proprietor was a good faith purchaser of the legal estate, no circumstances that would give rise to a constructive or resulting trust.¹⁶⁸

It is true that the language of section 69 of the *LRA 1925* deemed the vesting of only the legal estate. But this should not be interpreted as meaning that where a void instrument is registered, without more, beneficial title remains with the former owner. As noted in *Westdeutsche*, ‘legal title carries with it all rights’ and so specific reference to the beneficial title is not required.¹⁶⁹ In any event, the legislation ‘cannot make a generalised assertion about the beneficial ownership of the registered land’¹⁷⁰ since a registered proprietor may be subject to a trust that has been expressly created or which arises by the operation of recognised equitable principles.

Another contentious aspect of *Malory* was the decision that a registered forged transfer was not to be treated as a ‘disposition’ for the purposes of section 20 of the *LRA 1925*. The broad object of section 20 was to ensure that the

166 Charles Harpum, ‘Registered Land – A Law unto Itself?’ in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis, 2003) 187, 199.

167 [1996] AC 669, 706 (‘*Westdeutsche*’).

168 See generally Cooke, ‘The Register’s Guarantee of Title’, above n 16, 349; David Fox, ‘Forgery and Alteration of the Register under the *Land Registration Act 2002*’ in Elizabeth Cooke (ed), *Modern Studies in Property Law* (Hart Publishing) vol 3, 25, 36–7. However, Alexander Hill-Smith has argued to the contrary in relation to the interpretation of the *LRA 2002* s 58. In Hill-Smith’s view, it is the wording of the section itself, which says nothing about the vesting of the beneficial title, which operates to separate the legal from the equitable title. He therefore concludes that *Malory* is ‘entirely correct’: Alexander Hill-Smith, ‘Forgery and Land Registration: The Decision in *Malory Investments v Cheshire Homes*’ [2009] *Conveyancer and Property Lawyer* 127, 135.

169 [1996] AC 669, 706.

170 Cooke, ‘The Register’s Guarantee of Title’, above n 16, 346. Although it is submitted that this criticism of *Malory* is correct, there are other persuasive academic arguments to the effect that this aspect of *Malory* is ‘defensible in terms both of intrinsic doctrine and of compatibility with the surrounding legislation’: Simon Gardner, ‘Alteration of the Register: An Alternative View’ [2013] *Conveyancer and Property Lawyer* 530, 537. See also Hill-Smith, above n 169, 135.

registered disposition for value had priority,¹⁷¹ and the decision in *Malory* appears to thwart this objective. In this regard, it is worth highlighting the concluding words of the section, ‘the disposition shall operate in like manner as if the registered transferor or grantor were ... entitled to the registered land in fee simple in possession for his own benefit’. If a ‘disposition’ is held not to include a void transfer, one wonders what work these concluding words were to do. The words seem to cover a situation where, in fact, the transferor was not entitled to the fee simple – perhaps the transferor is a forger. In which case, the concluding words effectively deem the transferor/forger to be entitled to the estate and able to make an effective disposition.

There was widespread expectation among academic commentators that the decision in *Malory* ‘should not, and probably would not’¹⁷² be followed in relation to the *LRA 2002*. The *LRA 2002* was considered to introduce a change from ‘registration of title to title by registration’¹⁷³ and the adoption of the *Malory* approach ‘would be to import principles of unregistered conveyancing into registered land and this would wholly contradict the system of registration of title’.¹⁷⁴ However, the assumption that *Malory* would not be followed in the *LRA 2002* proved to be ‘presumptuous and wrong’,¹⁷⁵ and initially at least, the “heresy” from *Malory*¹⁷⁶ continued into the new regime.

B *Fitzwilliam*

Fitzwilliam was the registered proprietor of land which was transferred to Richall pursuant to a forged power of attorney.¹⁷⁷ Fitzwilliam became aware of the transfer and brought an application seeking various declarations concerning alteration of the register under schedule 4 of the *LRA 2002*. Fitzwilliam argued, on the basis of *Malory*, that he had retained beneficial ownership despite the transfer to Richall because section 58 of the *LRA 2002*, like section 69 of the *LRA 1925*, only had the effect of vesting the legal estate in Richall.¹⁷⁸ The Court should, therefore, order alteration of the register for the purpose of ‘correcting a mistake’ under schedule 4 paragraph 2(a).

171 There were some exceptions to the priority rule established in the *LRA 1925* s 20(1): see s 20(1)(a) regarding encumbrances and entries on the register and any charge for capital transfer tax, and s 20(1)(b) which dealt with overriding interests.

172 Martin Dixon, ‘A Not So Conclusive Title Register?’ (2013) 129 *Law Quarterly Review* 320, 321.

173 *Ibid* (emphasis in original).

174 Dixon, *Modern Land Law*, above n 1, 44 n 66. This view also seems to have been accepted by the judiciary and adjudicators: see Emma Lees, ‘*Richall Holdings v Fitzwilliam: Malory v Cheshire Homes and the LRA 2002*’ (2013) 76 *Modern Law Review* 924, 924.

175 Dixon, ‘A Not So Conclusive Title Register?’, above n 172, 321.

176 Cooke, ‘Land Registration: Void and Voidable Titles’, above n 165, 486.

177 Richall was not involved in the forgery.

178 *Fitzwilliam* [2013] EWHC 86, [69]. By relying on the much discredited *Malory* decision, Fitzwilliam could avoid the possibility of Richall defending rectification proceedings by asserting the defence of a proprietor in possession under sch 4 para 3(2).

Justice Newey, in considering Fitzwilliam's argument, acknowledged the 'considerable force'¹⁷⁹ in the criticisms of *Malory*. Ultimately, however, his Honour decided that '[w]hatever merit the criticisms of *Malory* may have ... I am bound by the decision'.¹⁸⁰ His Honour did not accept the arguments by Richall's counsel that *Malory* could be distinguished on the basis that the wording of section 58 of the *LRA 2002* differed significantly from the wording of section 69 of the *LRA 1925*.¹⁸¹

His Honour also rejected Richall's 'fall-back position' that the word 'disposition' in the context of section 29 of the *LRA 2002* should be read as extending to a void transfer.¹⁸² In *Malory*, the Court of Appeal concluded that a transfer that 'could not in law be of any effect in itself, ... [and could not] constitute a "disposition"'¹⁸³ for the purposes of section 20 of the *LRA 1925*. His Honour appeared to concede that the interpretation of 'disposition' in *Malory* may be wrong,¹⁸⁴ but commented 'I am bound by *Malory*'.¹⁸⁵

In these circumstances, Newey J concluded that Fitzwilliam remained beneficial owner notwithstanding Richall's registration,¹⁸⁶ and was entitled to be restored to the register as owner.¹⁸⁷ Despite this conclusion, Newey J went on to state that even had he found that a void transfer could be a 'disposition', the overall result in the case may still have been the same.¹⁸⁸ The reasoning here was that Fitzwilliam may have been able to claim he had an overriding interest,¹⁸⁹ pursuant to transitional provisions.¹⁹⁰ However, Newey J was not required to make a final conclusion on these matters since, 'they do not arise if a void transfer does not constitute a "disposition" for the purposes of section 29 ... and it seems to me I must proceed on that basis'.¹⁹¹

1 *Fitzwilliam Critique*

The decision in *Fitzwilliam* spawned yet further academic commentary regarding the correctness of the *Malory* decision itself and the correctness

179 Ibid [76].

180 Ibid.

181 Ibid [78]–[82].

182 Ibid [83].

183 [2002] Ch 216, 232 [65].

184 Justice Newey appears to approve of Hill-Smith's conclusion that the Court of Appeal in *Malory* was wrong in its construction of what constitutes a 'disposition': *Fitzwilliam* [2013] EWHC 86, [84], quoting Hill-Smith, above n 169, 135.

185 *Fitzwilliam* [2013] EWHC 86, [84].

186 Ibid [85].

187 Justice Newey also found, however, that Fitzwilliam had to reimburse Richall £274 370.98, which represented a portion of Richall's loan money that was used to pay out a pre-existing mortgage over the land: *ibid* [108].

188 Ibid [86].

189 Justice Newey commented, on the basis of *Malory*, that an absolute owner has 'rights ... as beneficial owner' which can survive the registration of another person as proprietor. Such pre-existing rights may therefore qualify for protection as overriding interests: *Fitzwilliam* [2013] EWHC 86, [91], quoting *Malory* [2002] Ch 216, 232 [65] (Arden LJ).

190 *LRA 2002* sch 12 para 8. See *Fitzwilliam* [2013] EWHC 86, [87].

191 *Fitzwilliam* [2013] EWHC 86, [92].

of Justice Newey's view in *Fitzwilliam* that he was bound by *Malory*.¹⁹² Interestingly, there was an obvious point of distinction between the two cases that appears to have been missed by Newey J and also in the commentaries on *Fitzwilliam*. In truth, *Malory* was an A-B-C scenario and *Fitzwilliam* was an A-B scenario. In *Malory*, the fraudster, Malory UK, became registered and then executed a transfer to Cheshire who became registered. The fraud of Malory UK would be the kind of event that would cause it to hold the land on trust for Malory BVI.¹⁹³ In *Fitzwilliam*, however, Richall was not guilty of fraud and so, unlike *Malory*, there was no event that should warrant a finding that Richall held on trust for Fitzwilliam.¹⁹⁴

In order to comment properly on *Fitzwilliam*, it is helpful to reflect on the facts and to consider, briefly, how the case would be resolved by applying the holistic *LRA 2002* methodology.¹⁹⁵

On this approach, section 58 would vest legal title which, on the basis of reasoning from *Westdeutsche* includes the beneficial title, in Richall. However, as Richall's registration was pursuant to a void instrument, this registration would be a mistake and would be subject to rectification under schedule 4, unless Richall was in possession of the land.¹⁹⁶ Either way, whether rectification is ordered or not, the losing party would be entitled to an indemnity under schedule 8. As Cooke has pointed out, '[t]he availability of an indemnity is thus crucial to the guarantee of title which is the purpose of title registration'.¹⁹⁷ The rectification provisions and the indemnity provisions are thus intimately connected. 'If there is rectification, B gets an indemnity; if B keeps the land then A gets one'.¹⁹⁸ It is therefore of fundamental importance that the interconnecting provisions of the *LRA 2002* are all taken into account in resolving A-B and A-B-C disputes. Indeed, had this occurred in *Fitzwilliam*, the outcome may have been quite different. As one commentator, who had initially considered Newey J to be bound by *Malory* on the basis 'that the provisions of the two registration statutes do not differ far enough',¹⁹⁹ later commented:

Argument about the consequences of the *Malory* reasoning for indemnity would have exposed the incorrectness of that reasoning under the 2002 Act, and it would

192 Lees, eg, has argued that by considering the *LRA 1925* s 20 and the *LRA 2002* s 29 'as part of the bigger picture, we begin to see that the registration system is subtly, but crucially, different under the two acts': Lees, above n 175, 929.

193 This distinction may not have been picked up due to the confusing discussion of the facts in *Malory*: see above nn 156, 161, 163.

194 This point of distinction between the two cases has been identified by Dixon, 'A Not So Conclusive Title Register?', above n 172, 323, and also picked up in the later case of *Swift 1st Ltd v Chief Land Registrar* [2014] EWHC B26 (Ch), [43] (Sheldon QC).

195 Commentators in England have described this type of approach as a 'set of rules' approach: see, eg, Elizabeth Cooke, 'Chickens Coming Home to Roost' [2014] *Conveyancer and Property Lawyer* 444, 444.

196 Justice Newey discussed the issue of the date on which a proprietor must be in possession in order to defend an alteration application: *Fitzwilliam* [2013] EWHC 86, [99]–[102].

197 Cooke, 'Chickens Coming Home to Roost', above n 197, 445.

198 Ibid.

199 Cooke, 'The Register's Guarantee of Title', above n 16, 349.

have become clear that the statutory scheme necessitated a different construction of s 58.²⁰⁰

However, the comprehensive, holistic *LRA 2002* methodology was not the approach adopted in *Fitzwilliam*. In *Fitzwilliam*, section 58 was construed as conferring only the bare legal title on Richall, and Fitzwilliam was regarded throughout as beneficial owner. In these circumstances, counsel for Richall conceded that the register could be altered. Justice Newey did not make it clear on what basis the alteration to the register was made. It is possible the order was made ‘simply to speed up a *Saunders v Vautier* type approach which would allow for Fitzwilliam to call for Richall to transfer the legal title to him’.²⁰¹

The difficulty with this approach is that the indemnity provisions in schedule 8 are inapplicable. A person is only entitled to an indemnity if he or she ‘suffers loss’. However, as Richall was considered to be merely a bare trustee, the alteration of the register to reflect that fact caused no loss to Richall. Accordingly, Richall was not entitled to an indemnity.²⁰²

Another problematic aspect of the *Fitzwilliam* interpretation of section 58 is the possibility of treating Fitzwilliam’s ‘pre-existing’ beneficial interest as an overriding interest.²⁰³ If the register were to be altered on the basis of an overriding interest, the alteration would not cause the registered proprietor to ‘suffer loss’, since the registered proprietor is, in any event, bound by overriding interests.²⁰⁴ In addition, this kind of alteration is not for the purpose of ‘correcting a mistake’ but rather for ‘updating the register’. Once again, the registered proprietor, Richall, would not be entitled to an indemnity.

The indemnity consequences of the acceptance, in *Fitzwilliam*, of the *Malory* decision were not considered by Newey J in *Fitzwilliam*. However, it was inevitable that a future case would have to tussle with this issue. In January 2014, such a case did arise, namely *Swift 1st Ltd v Chief Land Registrar*,²⁰⁵ and, to use the language of Cooke, ‘[i]n *Swift* the indemnity chickens came home to roost’.²⁰⁶

C *Swift 1st Limited v Chief Land Registrar* (‘*Swift*’)

Rani was the registered proprietor of land. Swift received a mortgage application purportedly signed by Rani. After checking identity documents and

200 Cooke, ‘Chickens Coming Home to Roost’, above n 197, 447.

201 Lees, above n 175, 932–3, citing *Saunders v Vautier* (1841) 4 Beav 115. Another possibility is that the register was altered for the purpose of ‘bring[ing the register] up to date’ as has been suggested by Cooke, ‘Chickens Coming Home to Roost’, above n 197, 445.

202 Lees has described the consequences of this approach as follows: ‘This means that in the case of all void transfers, indemnity would be unavailable since nothing would be lost on the removal of the registered proprietor from the register. This robs the indemnity provisions of their power as a builder of confidence in the registration system’: Lees, above n 175, 933.

203 Ordinarily in order to claim an overriding interest the interest-holder must be in actual possession. However, pursuant to the transitional provisions, the fact that Fitzwilliam was in receipt of the rents and profits satisfied this aspect of an overriding interest. See above n 190.

204 See Law Commission and HM Land Registry, *Report*, above n 13, 223 [10.16].

205 [2014] EWHC B26 (Ch).

206 Cooke, ‘Chickens Coming Home to Roost’, above n 197, 445.

speaking on the phone to a person purporting to be Rani, Swift agreed to the loan. A legal charge, purportedly executed by Rani, was registered in the charges register and Swift advanced the funds. These funds were never received by Rani. Default having been made on the mortgage, Swift brought proceedings for possession of the land. Rani defended the action on the ground the charge had been forged. Swift accepted that the charge had been forged and discontinued the action. The entry of the charge on the register was removed, and by consent, the Court ordered that the charge was agreed to be void. Swift applied for an indemnity from the Chief Land Registrar (registrar). However, this application was refused.

The registrar argued that, following *Malory* and *Fitzwilliam*, there was no rectification as the removal of the charge from the register was simply for the purpose of ‘bringing the register up to date’.²⁰⁷ Rani, who had remained in actual occupation at all material times, could rely on her right to rectification, or her continuing beneficial ownership, as constituting an overriding interest which prevailed over the registered charge. Accordingly, there was no rectification and without rectification there can be no indemnity.²⁰⁸

1 The High Court Decision in *Swift*

Swift applied to the High Court for a determination as to whether it was entitled to an indemnity. Sheldon QC, sitting as a Deputy Judge of the High Court, considered himself bound by *Fitzwilliam*.²⁰⁹ With some doubt,²¹⁰ and by adopting an unlikely construction of paragraph 1(2)(b) of schedule 8, Sheldon QC allowed the application and found that Swift was entitled to an indemnity.²¹¹

LRA 2002 schedule 8 paragraph 1 provides:

- (2) For the purposes of sub-paragraph (1)(a) – ...
 - (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.

Sheldon QC focussed on the concluding words ‘as if the disposition had not been forged’. He considered that by giving effect to those words, the loss suffered was to be determined on the basis that the disposition had not been forged.²¹² On that basis, the overriding interest of Rani could not be set up to defeat Swift’s claim.²¹³

207 *Swift 1st Ltd v Chief Land Registrar* [2014] EWHC B26 (Ch), [13].

208 *Ibid* 446; see *LRA 2002* sch 8.

209 *Swift 1st Ltd v Chief Land Registrar* [2014] EWHC B26 (Ch), [32].

210 *Ibid* [39].

211 *Ibid* [43]–[44]. Sheldon QC commented, ‘I make this finding with some reluctance but consider that I am bound by *Malory* and *Fitzwilliam*. In the light of those decisions, Swift 1st Ltd’s (Swift) argument is the only way I can see to give meaningful effect to the relevant provisions in Schedule 8’: at [44].

212 *Ibid* [39].

213 *Ibid*.

This resolution of the indemnity problem in *Swift* is ‘highly unsatisfactory’ and ‘wrenches the sense’ of schedule 8 paragraph 1(2)(b).²¹⁴ This paragraph was intended to apply so that ‘where the register is rectified’, a person who had, in good faith, obtained a registered interest would be entitled to an indemnity since ‘loss’ would be deemed by the provision. Instead, the provision was construed the other way around such that since ‘loss’ was deemed, then the registered proprietor could be treated as having been ‘prejudicially affected’ and thus the alteration to the register would be deemed a rectification. Since there is a rectification and loss suffered by the registered proprietor, indemnity follows.²¹⁵

It is submitted that the more acceptable way to resolve the problem in *Swift* is to adopt the holistic *LRA 2002* methodology. Under section 58, Swift held both the legal and equitable title to its charge. However, since the charge was a forgery and therefore void, the registration of Swift was a mistake and the register could be rectified and the charge removed from Rani’s title. The removal of the charge caused loss to Swift as it no longer had the right to exercise the powers of a chargee. Accordingly, since the register was altered by the ‘correction of a mistake’ that prejudicially affected Swift’s title, Swift would be entitled to an indemnity under schedule 8.²¹⁶ This approach is sensible, fair and recognises the interplay between the rectification and indemnity provisions, thus giving full effect to the words of the legislation itself.

The Chief Land Registrar appealed Sheldon QC’s decision to the Court of Appeal. Before the Court of Appeal handed down its decision, a number of academic commentators considered his decision, and in particular, his finding that *Malory* was binding on the Court as confirmed by *Fitzwilliam*. These commentators called for *Malory* and *Fitzwilliam* to be overruled.²¹⁷ In addition, it was suggested that ‘a thorough examination of the position by a higher court is required’²¹⁸ or alternatively, and rather more radically, that ‘a new scheme and a different basis of title registration must be contemplated’.²¹⁹

This higher court examination did finally occur in April 2015 with the decision of the Court of Appeal in *Swift*.²²⁰

2 The Court of Appeal Decision in *Swift*

The Court of Appeal dismissed the appeal and ultimately agreed with Sheldon QC regarding the interpretation and application of schedule 8 paragraph 1(2)(b).²²¹ However, in doing so, Patten LJ, speaking for the Court, commented,

214 Cooke, ‘Chickens Coming Home to Roost’, above n 197, 446; see also *Swift 1st Ltd v Chief Land Registrar* [2014] EWHC B26 (Ch), [35].

215 Cooke, ‘Chickens Coming Home to Roost’, above n 197, 446.

216 This will be the result provided that Swift had not caused the loss through its own fraud or lack of proper care: *LRA 2002* sch 8, paras 5(1)(a)–(b).

217 See, eg, Cooke, ‘Chickens Coming Home to Roost’, above n 197, 448; Lees, above n 175, 924.

218 Emma Lees, ‘Indemnity and the *Land Registration Act 2002*’ (2014) 73 *Cambridge Law Journal* 250, 253.

219 Cooke, ‘Chickens Coming Home to Roost’, above n 197, 449.

220 *Swift* [2015] 3 WLR 239.

221 *Ibid* 258–60 [46]–[51] (Patten LJ).

‘I have not found this an easy question and it is certainly an issue which deserves to be considered in the forthcoming review by the Law Commission of the workings of the *LRA 2002*’.²²²

There is, perhaps, no particular surprise in this aspect of the Court of Appeal’s decision. However, what is particularly momentous about the decision is the Court’s comments regarding *Malory*. The Court examined Lady Justice Arden’s view in *Malory* on the ‘beneficial ownership issue’, that is, that registration of a void instrument vests only the legal estate in the registered proprietor and that beneficial title remains with the former owner. The Court noted it would be bound by *Malory* unless the decision was found to have been decided *per incuriam*.²²³ Ultimately, the Court concluded that *Malory* had been decided *per incuriam* and was, accordingly, wrong.²²⁴

There were two principle reasons for this finding. First, the Court found that Arden LJ did not take account of the earlier Court of Appeal decision in *Argyle Building Society v Hammond* (1984) 49 P & CR 148, which had decided that section 69(1) of the *LRA 1925* had the effect of vesting title by registration even where there had been a forgery in the transfer.²²⁵ Secondly, in *Malory*, the Court’s attention had not been drawn to section 114, which impliedly confirmed the validating effect of section 20 on the registration of forged dispositions for valuable consideration.²²⁶ As noted by Patten LJ in *Swift*, ‘[i]t is not therefore possible to construe section 20 as having no application to a fraudulent transfer for valuable consideration that is registered’.²²⁷

D The Torrens Approach to *Fitzwilliam* and *Swift*²²⁸

1 *Fitzwilliam*

In *Fitzwilliam*, Richall became registered pursuant to a forged power of attorney. Richall was not guilty of fraud in becoming registered and there was no indication on the facts that would give rise to an in personam exception. Accordingly, under Torrens, Richall’s title would be indefeasible. Fitzwilliam would be entitled to compensation as he was deprived of his interest in land through the registration of another person as proprietor. In *Fitzwilliam* itself, Richall was treated as holding the land on trust for Fitzwilliam and therefore lost its registered legal estate. No comment was made in the case regarding an indemnity.²²⁹

222 Ibid 259 [48].

223 Ibid 257 [42].

224 Ibid 258 [45].

225 Ibid 257 [42].

226 Ibid 257–8 [43]–[44].

227 Ibid 258 [44].

228 A discussion of the Torrens approach to *Malory* will not be made here as *Malory* concerned the operation of the *LRA 1925*.

229 At the very least, however, Fitzwilliam was required to pay Richall the amount of money that had been used to pay out the pre-existing mortgage.

2 *Swift*

In *Swift*, Swift became registered pursuant to a forged charge. Swift was not guilty of fraud in becoming registered and there was no indication on the facts that would give rise to an in personam exception. Accordingly, under Torrens, Swift's charge would be indefeasible.²³⁰ Rani would be entitled to compensation as she was deprived of her interest in land through the registration of another person as proprietor. In *Swift* itself, Swift accepted that the charge was a forgery and a consent order was made under which the charge was removed from the register. Swift was, however, entitled to an indemnity by virtue of an arguably unintended interpretation of schedule 8 paragraph 1(2)(b) of the *LRA 2002*.

VI CONCLUSION

All land title registration systems must provide a mechanism for dealing with bijural inaccuracy in A-B and A-B-C scenarios. In Australia, immediate indefeasibility has been adopted and one can say with certainty that, in the absence of fraud, B or C will be entitled to the land and A will be left to seek compensation from the person liable for the loss or from the assurance fund.

Immediate indefeasibility is undoubtedly a harsh doctrine and from time to time the injustice of this approach comes to the attention of the public.²³¹ But, it is this 'rock-solid effect of registration'²³² that gives rise to the system's greatest strength: its certainty.

The certainty of outcomes achieved by adopting immediate indefeasibility was strikingly highlighted in this article when the Torrens approach was applied to the factual scenarios of the English cases. The brevity of the discussion required in applying the Torrens approach was breathtaking. The reason for this clarity and certainty is due to the fact that the problem of bijural inaccuracy has been worked through by the Australian courts, which consistently resolve bijural

230 However, pursuant to the qualified indefeasibility provisions in Queensland, NSW and Victoria, Swift would not (Queensland), or may not (NSW and Victoria), obtain an indefeasible title if Swift had failed to take reasonable steps to verify the identity of the mortgagor, Rani: see above nn 30–5 and accompanying text. For reports to this story see Ashley Mullany, 'Scammers Con Real Estate Agent into Selling House', *The Sunday Times* (online), 11 September 2010 <<http://www.perthnow.com.au/news/western-australia/scammers-con-real-estate-agent-into-selling-house/story-e6frg13u-1225918470678>>; Lucky Rickard, 'Property Scams Continue in Perth', *WA News* (online), 21 September 2010 <<http://www.wa.today.com.au/wa-news/property-scams-continue-in-perth-20100921-15kwl.html>>.

231 A good illustration of this is the 2010 WA case of Roger Mildenhall. Mildenhall, while on holiday, was defrauded of his property when a forged transfer of his land was registered in favour of an innocent purchaser.

232 Butt, above n 77, 597.

inaccuracies in favour of registration law rather than the general law.²³³ Quite simply, registration pursuant to a void instrument, of itself, is absolutely and categorically *not* a ground for challenging a registered proprietor's title.²³⁴ More is required.²³⁵

For an Australian looking at the English system, it does indeed appear to be a 'tangled web'²³⁶ and the inconsistent, divergent, and confusing case law is of no assistance in untangling this web. The root cause of the problem is the lack of clarity in the legislation concerning the meaning of 'correcting a mistake' and the highly contentious meaning that had been ascribed to section 58 of the *LRA 2002* prior to the Court of Appeal's historic decision in *Swift* in 2015.

A Correcting a Mistake

What is meant by 'correcting a mistake'? Is it intended to cover just the original mistake (the narrow interpretation) or does it also cover the consequences of the original mistake (the wide interpretation)?

The narrow interpretation applies the legislation in an 'orthodox' and literal manner, and it fosters dynamic security in the A-B-C scenario by favouring C over A. However, there are downsides. Adopting the narrow interpretation precludes static security for A as against C²³⁷ and runs the risk that A, a perfectly just claimant who has been deprived of his or her interest in the land,²³⁸ is denied the opportunity of obtaining an indemnity.

This concern regarding indemnity was clearly a motivating factor for those adjudicators who adopted the wide interpretation. Under the wide interpretation, both B and C's registrations could be corrected giving rise to rectification of the register and, provided B and C had not contributed to the loss, they would be entitled to an indemnity. Although static security is fostered with the wide approach, the manifest downsides are that it thwarts dynamic security and it erodes the utility of a registered title. If the 'consequences of a mistake' can be corrected,²³⁹ then this can continue to apply to D's registration and E's and so on.

233 This resolution was finally achieved in 1971 by the High Court, firmly endorsing immediate indefeasibility over deferred indefeasibility in the decision of *Breskvar v Wall* (1971) 126 CLR 376. See the earlier discussion in Part II regarding the deferred indefeasibility approach. For a recent High Court decision confirming immediate indefeasibility, see *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 316 ALR 111 and for a commentary on this case, see Penny Carruthers and Natalie Skead, 'Confirming Torrens Orthodoxy: The High Court Decision in *Cassegrain v Gerard Cassegrain & Co Pty Ltd*' (2015) 24 *Australian Property Law Journal* 211.

234 See, eg, *Frazer v Walker* [1967] AC 569; *Breskvar v Wall* (1971) 126 CLR 376.

235 In order to challenge the registered proprietor's title, the claimant must identify either an express exception, eg, fraud by the registered proprietor, or one of the other non-express exceptions.

236 The reference to a 'tangled web' is taken from Hewitt, above n 99, 177.

237 On the narrow interpretation, static security is preserved for A in the A-B scenario, since B's registration pursuant to a void instrument is a 'mistake' and can be corrected. However, since C's registration is pursuant to an internally valid instrument, on the narrow interpretation, it is not a mistake.

238 In the cases considered in this article, C's interest was a charge, and so the interest A was deprived of was an unencumbered fee simple estate.

239 *Ajibade* (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Rhys, 8 April 2008), [13].

There is no easy answer. As Dixon recently commented, '[t]he challenges facing the land registry and the adjudicators ... in interpreting the alteration/rectification provisions of the 2002 Act should not be underestimated'.²⁴⁰

B Section 58 of the Act

Prior to *Swift* in 2015, the sensible and cohesive development of English land law was thwarted by the acceptance in *Fitzwilliam* of the *Malory* decision that had decided 'that the innocent victim of a forged disposition acquired only the legal estate and not the beneficial ownership of the property'.²⁴¹ The decision in *Fitzwilliam* lent support to the view that there was a 'deep-rooted judicial commitment to the fundamental values that inhere in the general law'.²⁴² *Fitzwilliam* effectively side-stepped the scheme of registered title, rectification and indemnity that had been set up under the *LRA 2002* and rendered almost meaningless the value of obtaining a registered title.²⁴³ This state of affairs with the ensuing uncertainty had been described as 'unacceptable, and unsustainable'.²⁴⁴

However, the Court of Appeal's decision in *Swift*, that *Malory* was 'wrong', is indeed momentous and hopefully ushers in a new era in English land law that sees a movement away from general law principles, and instead refocusses on the scheme of registered title set up under the *LRA 2002*. In any event, the English Law Commission will be undertaking a thoroughgoing review of the 2002 Act during 2015.²⁴⁵ Doubtless the Court of Appeal's decision in *Swift* will be significant in the Commission's deliberations.

240 Martin Dixon, 'Title by Registration or Conquest: Interpreting the *Land Registration Act 2002* in England and Wales' (2013) 5 *International Journal of Law in the Built Environment* 194, 205.

241 *Swift* [2015] 3 WLR 239, 242 [1] (Patten LJ).

242 Goymour, above n 17, 618.

243 If, prior to A being restored to the register, B were to transfer to C, and on to D and so on, each of these subsequent proprietors would, presumably, hold the property on trust for A. The sch 4 defence of a proprietor in possession would not be available to the subsequent proprietors in A's action to be restored to the register.

244 Goymour, above n 17, 647.

245 Law Commission, *Twelfth Programme of Law Reform*, Report No 354 (2014). '[T]his project will examine the extent of Land Registry's guarantee of title, rectification and alteration of the register, and the impact of fraud. The project will also re-examine the legal framework for electronic conveyancing': at 9 [2.16].