## MASTERS BY RESEARCH

# The long- standing complexities of land ownership in England and Wales: A legal analysis of the provisions of the conclusiveness of the register, alteration and indemnity in the Land Registration Act 2002

Ring, Victoria

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## ABSTRACT

*This thesis evaluates the performance and policy aims of the Land Registration Act 2002. This thesis will take the position that certain areas of the LRA 2002 are operating in the way that was intended. This is in light of both the lack of consistency in case law that has been decided since its enactment and the fact that in recent times (2018) the Law Commission have made a proposal for changes to the LRA Act 2002.[1] The Law Commission have in 2018 proposed a Draft Bill which addresses the issues said to have been created by the LRA 2002. For the purpose of the thesis the focus of the Law Commission proposals will be limited to the conclusiveness of the register, alteration of the register and the provisions for indemnity. This thesis focuses upon the conclusiveness of the register, rectification /alteration[2] of the land register and that of the indemnity process. This thesis is concerned with the issues surrounding the term 'mistake' within the alteration and indemnity provisions of the LRA 2002. The thesis seeks to make a brief comparison with the relevant sections of the Land Registration Act 2002 and that of the Australian Torrens system. The thesis concludes that the issues within the provisions of the Land Registration Act 2002 of which the thesis is concerned and the lack of clarification of the term mistake has caused and continues to cause unjust results in the case law. The thesis therefore suggests the Land Registration Act 2002 is in need of further partial, if not complete review or revision, due to the arbitrary results produced since its enactment.*


[1] Law Commission *Updating the Land Registration Act 2002* (Law Com No 380, 2018) The Law Commission have also produced a draft Bill containing the amendments to the LRA 2002.

[2] Rectification is a specific form of alteration of the register found in Schedule 4 Section 1 of the LRA 2002.

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I would like to thank Robin, my husband for all of his support over the past two years. I would also like to thank my parents who have always known I can succeed and helped me to do so. I would like to thank Dr Gwilym Owen at Bangor University Law School for encouraging me to take on a difficult and complex topic and making me believe that I am capable of writing such a thesis. I would like to thank Dr Marie Parker for answering my questions and for the encouragement which was really needed at times. I could not have done this without all of the support from the people mentioned above but most of all this is for my children Amelie, Louis and Emmeline who are, as always, my purpose for wanting to do more and succeed. Thank you

Yr wyf drwy hyn yn datgan mai canlyniad fy ymchwil fy hun yw'r thesis hwn, ac eithrio lle nodir yn wahanol. Caiff ffynonellau eraill eu cydnabod gan droednodiadau yn rhoi cyfeiriadau eglur. Nid yw sylwedd y gwaith hwn wedi cael ei dderbyn o'r blaen ar gyfer unrhyw radd, ac nid yw'n cael ei gyflwyno ar yr un pryd mewn ymgeisiaeth am unrhyw radd oni bai ei fod, fel y cytunwyd gan y Brifysgol, am gymwysterau deuol cymeradwy.

I hereby declare that this thesis is the results of my own investigations, except where otherwise stated. All other sources are acknowledged by bibliographic references. This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree unless, as agreed by the University, for approved dual awards.

# CHAPTER ONE
# INTRODUCTION

*This introduction begins by giving a brief overview of the purpose of the thesis and the specific areas of the Land Registration Act 2002 (the LRA 2002) which the thesis seeks to critically analyse. The chapter will explain the structure of the thesis, and discuss the scope of this study before considering the methodology that will be used. There will be a brief literature review, following which there will be an overview of the sections of the LRA 2002 which are relevant to this thesis. The chapter will conclude with a discussion of A-B-C disputes in land (an explanation is required before considering the relevant case law in chapter 2).*

## 1.1 Purpose of the thesis

The purpose of the thesis is to critically analyse the issues and complexities created by the LRA 2002 since its enactment. This will be in the context of mistake rectification and indemnity in registered land transactions in England and Wales. The Land Registration Act 2002 sought to 'reduce or eliminate complexity and uncertainty in conveyancing',[3] and the Act is also required to protect the rights of those who have an interest in land. This thesis takes the position that the LRA 2002 has not been wholly successful in this dual objective.

To advance the above hypothesis, the thesis will analyse the following three questions:

(1) By reference to the dual aims of the LRA 2002, have the outcomes in case law reflected the tensions brought about by the competing aims of the LRA 2002, and if so, has the LRA 2002 been successful in achieving its stated aims? This is the central research question into which the other research questions feed, and will be analysed in chapter 2.

[3] Law Commission, *Updating the Land Registration Act 2002* (Consultation Paper No 227, 2016)

(2) Are the proposals for reform by the Law Commission adequate to address the issues which will be explored in addressing the first research question?[4] In this respect, the author will be considering the proposals contained within the Law Commission's (2018 Report) that are specific to conclusiveness of title, alteration and indemnity. This research question will be explored in chapter 3.

(3) What can we learn from other jurisdictions? This chapter will focus on a brief comparison with Australia and the concept of indefeasibility in the Torrens system.

## 1.2 Structure of the thesis

*The thesis is divided into four chapters. Each of the chapters is then divided into several sub- sections which break down the issues in the chapters. Each of the chapters answers a research question as will be explained at the beginning of each chapter.*

**Chapter one:** This is the introduction to the thesis. The introduction contains the hypothesis and the research questions, the relevant information concerning the context of the thesis, the methodology, a brief literature review and information on the issues dealt with by the LRA 2002.

**Chapter two:** The chapter analyses the relevant case law concerning 'mistake' in the LRA 2002, and then moves on to consider relevant case law in the context of alteration of the register and the difficulties that are presented when a mistake cannot be clarified are discussed. There then follows an analysis of the case law relating to the indemnity provisions in the LRA 2002 and considers the link between them and the alteration provisions. This chapter answers the first research question.

**Chapter three:** Chapter three will analyse the various Law Commission Reports including the proposal of a revised Draft Bill and discuss whether the proposals go far enough. This chapter answers the second research question.

[4] Law Commission *Updating the Land Registration Act 2002* (Law Com No 380, 2018)

**Chapter four**: This chapter will consider relevant Australian case law to ascertain if there is anything we can learn from Torrens title in helping resolve some of the problems relating to the conclusiveness of the register, mistake, rectification and indemnity in registered land transactions in England and Wales. This chapter answers the third research question.

**Conclusion:** This chapter concludes the thesis.

## 1.3 Overview

There are three foundational principles underpinning land registration[5] and the LRA 2002, namely the mirror, insurance, and the curtain principles.[6]

*The mirror principle is that the register should act like a mirror in allowing the purchaser of land to see all rights and interests which may affect a title in land.*

*The insurance principle is to ensure that the register provides a title guaranteed by the state and an error which results in a loss may result in an indemnity.*

*The curtain principle is that the register is the sole source of information for purchasers and that they need not be concerned with what lies behind such 'curtain'.*[7]

It is the insurance principle which is of the most relevance for the purposes of this thesis. Bevan has argued that the foundational principles do not act in a consistent manner in the LRA 2002. The author agrees with Bevan who states that these foundational principles are simply 'policy aspirations rather than delivered outcomes'.[8] Bevan considers that the LRA 2002 makes a series of compromises in respect of the principles and that in some way the LRA 2002 goes so far as to undermine the principles

[5] T. B. F. Ruoff, *An Englishman Looks at the Torrens System* (Sydney: Law Book Co. of Australasia, 1957) The three principles are that of the mirror principle, the insurance principle and the curtain principle.
[6] *Ibid*
[7] Chris Bevan *Land Law* (Oxford University Press 2018)
[8] Chris Bevan *Land Law* (Oxford University Press 2018)39

of land registration. It is this statement by Bevan which the writer draws upon and wishes to explore further in the context of the conclusiveness of the register in the discrete areas of mistake, rectification, and indemnity. However, although the author is critical of the LRA 2002 in the context of the matters which will be analysed by way of this thesis, it is important at the outset to give the LRA 2002 some credit before moving on.

Along with the new legislation for land registration in 1925 came new provisions for the rectification of the register. The provision for rectification was not by any means established in 1925 and can be seen as early as 1887,[9] when there was a suggestion by Lord Halsbury for a provision in law that conferred judicial power to alter the land register. Provisions for alteration of the register are discussed regularly, and they form a part of many of the Law Commission Reports on land legislation, some of which will be discussed within chapter 3. Following the LRA 1925 came the enactment of the LRA 2002, which was created after a lengthy consultation process between the Land Registry and the Law Commission.[10] The LRA 2002 was hailed to be a 'conveyancing revolution', by the Law Commission who refer to this in the title for their Report which will be analysed in chapter three.[11]

The LRA 2002 has now been in force for well over 16 years during which time it has been claimed by Goymour to have been the 'creator of much activity and to a point a certain amount of controversy'.[12] To give it some credit, the 2002 Act did bring together a large number of land registration rules and it simplified a long-standing piece of legislation. It has been suggested that the Act has had to work as a flexible piece of legislation to allow it to be able to respond to wide ranging issues in law and the wide range in case facts that arise in land disputes. However, it is difficult for the author to imagine that any form of land legislation could act successfully as a whole, especially when all previous land legislation has been considered to be deficient in some manner.

[9] Land Transfer Act 1897 S.7(2)
[10] Law Commission. *Land Registration for the Twenty-first Century: A Conveyancing Revolution* (Law Com No 271, 2001)
[11] *Ibid*
[12] Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart publishing 2018) Preface

This thesis seeks to demonstrate that the LRA 2002 is failing in its aim to protect rights and interests in land as it should. This is primarily in the context of s58 of the LRA 2002 and the conclusiveness of the register. The thesis will explore critically the dual policy aims of the LRA 2002, which are: to protect rights and interests of those who hold registered title and to facilitate the process of conveyancing. This highlights the tension between *static* and *dynamic* security. This was conveniently summarized by Lady Hale in *Scott v Southern Pacific Mortgage Ltd*[13] who stated that 'the system of land registration is merely conveyancing machinery' and that there is 'a danger in letting the land registration tail wag the land ownership dog'.[14] Lady Hale in *Scott* is considering the tension between the differing policy aims of the LRA 2002, and how they can be seen to compete with each other. This view is re-enforced by Watterson and Goymour who consider that 'the Act's central concern is to provide a framework for parties who *deal* with land, and to facilitate *dynamic*[15] transactional dealing.'[16] This thesis will show that although claimed to be a 'conveyancing revolution' prior to its enactment,[17] the LRA 2002 has not fulfilled its potential and has created complexity with its dual policy aims, as the case law in chapter two will reveal.

The LRA 2002 revised the previous law of land registration[18] and with it came a new system which is described as 'not a system of registration of title but a system of title by registration'.[19] This new system of land registration meant that title of the land is vested in the person(s) once the process of registration is complete, and the title is vested then in the person(s) entered on to the land register. Pownall and Hill considered the new system, and state that the 'registration is supposed to be final, and title is

[13] [2015] AC 385, [96]
[14] *Ibid*
[15] Gwilym Owen and Dermot Cahill, 'Overreaching – getting the right balance' [2017] Conv 1 (This contains a clear example of what is meant by *dynamic* and *static security)* In brief *static security* protects existing owners at the expense of further purchasers of land while *dynamic security* protects the rights of purchasers. In regard to the A-B-C scenario in this thesis *dynamic security* protects 'C' while *static security* protects 'A'.
[16] Stephen Watterson and Amy Goymour, 'A Tale of Three Promises: (1) The Title Promise' in Amy Goymour, Stephen Watterson and Martin Dixon eds, *New Perspectives on Land Registration. Contemporary Problems and Solutions* (Hart publishing 2018)
[17] The Land Registration Act 2002 was hailed to be a 'conveyancing revolution' within the title for the Law Commission Report No 271 which was titled '*Land Registration for the Twenty- First Century, a conveyancing revolution'*
[18] The previous legislation that was in force in England and Wales prior to the enactment of the LRA 2002 was the Land Registration Act 1925
[19] Elizabeth Cooke *'The New Law of Land Registration'* (Hart publishing 2003)

supposed to be guaranteed'.[20] Pownall and Hill are referring to the conclusiveness of registered title, by stating that once registration has occurred the registered owner is then considered to be protected by the state guarantee to title. Section 58 of the Act provides that once a title in land is registered, this registration of title is considered to be 'conclusive' or 'indefeasible'[21] and free from the possibility of challenge.

The case law which will be considered in chapter two shows the link between the conclusiveness of the register in s58 and the powers of the registered title holder to make dispositions. It is sections 23, 24 and 26 of the LRA 2002 which confer the powers of disposition upon the registered title holder. These sections will be considered later in this chapter. The combined effect of the four sections is said to provide a form of 'reassurance' for the purchaser. These four sections of the LRA 2002 provide that purchasers in land can rely upon the sale process, thereby promoting the *dynamic* security in land, which is a primary aim of the Act and which seeks to protect purchasers.

Cooke states that the conclusiveness of the register can be at best be described as a form of 'qualified indefeasibility'.[22] The writer agrees on the footing that the existence of specific provisions within the LRA 2002 for the alteration of the register highlight that *any* registered title is open to challenge giving rise to possibility of alteration. This the author would contend renders *no title* to be conclusive. At present, legislation allows for challenges to a registered title to be made at any point in time, meaning that a person could hold registered title for any number of years before facing a challenge. Alteration of the register can occur even if the current disposition (or registered charge in some cases) of such land has been seen to have been conducted lawfully by the previous registered owner. It appears that no matter how thorough the checks made prior to

[20] John Pownall and Richard Hill, 'The Land Registry's Perspective: The Practical Challenges of Land Registration' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New Perspectives on Land Registration. Contemporary Problems and Solutions* (Hart publishing 2018)

[21] Terminology can vary between 'infallible' 'indefeasible' and 'conclusive' but they all are considered to hold the same meaning to a point- that the registration of title is suggested to be 'free from challenge'. Elizabeth Cooke from whom this thesis draws much information from uses the term 'indefeasible' to consider the guarantee in both England and Wales and Australia and for that reason the writer seeks to rely on such term for the purpose of clarity. Elizabeth Cooke, *The New Law of Land Registration* (Hart publishing 2003)

[22] Elizabeth Cooke, *The New Law of Land Registration* (Hart publishing 2003) 11

purchase, nor how valid a transaction appears, there is always a chance that a title may be challenged.

Land registration legislation has been considered by the Law Commission both prior to and following the enactment of the LRA 2002. Part of this thesis will focus upon those Law Commission Reports, the most important being the two most recent in 2016 and 2018 as they include proposals for altering certain areas of the LRA 2002. This will be done in chapter three, following an analysis of the relevant case law in chapter two. These proposals for alteration to the Act are now contained in a Draft Bill which revises certain areas of the Act. The Law Commission Reports consider the issues concerning the LRA 2002 from the perspective of the Law Commission, academics and practitioners alike which creates a multi- faceted approach to the issues. The Law Commission Reports consider a wide range of issues within the LRA 2002, but as this thesis is limited to specific areas, there will be a narrow focus on the conclusiveness of the register, alteration, and indemnity.

This thesis explores the term 'mistake' within the LRA 2002. The term 'mistake' can be found within the alteration and subsequently rectification provisions of the LRA 2002.[23] 'Mistake' is also found within the indemnity provisions of the Act.[24] At present it is the alteration and indemnity provisions that are seen as problematic,[25] as is evident from the Law Commission Reports discussed in chapter three and from case law that will be discussed in chapter two. The term 'mistake' in the alteration provisions of the LRA 2002 has been applied to cases in what is described as the narrow or wide view or application. The narrow view is where the alteration provisions, including the term 'mistake' are given a meaning that appears to give the provisions of the Act a true and literal meaning. The narrow application is at times referred to as the 'orthodox' position and follows the policy aim of protecting purchasers and therefore facilitating the *dynamic* security in land. The wide application of 'mistake' is where the provisions are given a wider context allowing for a certain amount of judicial interpretation.

[23] The alteration of the register provisions are contained within Schedule 4 of the LRA 2002 and it is s65 of the LRA 2002 which gives Schedule 4 it's power

[24] The indemnity provisions are found in Schedule 8 of the Land Registration Act 2002

[25] Law Commission *Updating the Land Registration Act 2002* (Law Com No 380, 2018) Part 1 Para 13.13

The LRA 2002 saw a move from what is described as protection of *static* security to that of *dynamic* security. *Static* security is described as protecting the rights of existing owners at the expense of purchasers whereas *dynamic* security which protects purchasers is referred to as 'legal rules which protect the reasonable expectations of those who purchase in good faith'[26]. *Dynamic* security therefore 'reduces the risk that the purchaser's title will be subject to unknown prior claims and title defects'.[27] This thesis is concerned with disputes in land known as A-B and A-B-C disputes or also known as two -party and three- party cases, which are explained below. In an A-B-C scenario, *static* security can be seen to protect 'A' (the original purchaser / owner of the land) whereas *dynamic* security protects the title of 'C' (the last registered owner of the land or charge holder). Dixon considers the shift from the protection of *static* security to that of *dynamic* security to be preferable,[28] on the footing that protecting *dynamic* security is of economic importance.[29] The issue in any land legislation is the tension in to how to balance out both *static* and *dynamic* security.[30] McFarlane et al refer to the struggle in trying to balance both *static* and *dynamic* security and how it is considered to impact upon the stability of land registration systems.[31]

Chapter four of the thesis will focus upon a comparison of the legislative provisions for land in Australia, and discussions of the Australian Torrens system. This is being undertaken to see if it possible for us to learn anything from another jurisdiction. The Torrens system governs registered land transactions in the Australian States and Territories, and has some similarities to land legislation of England and Wales. A consideration of the legislation in Australia will allow the author to make comparisons with case law in England and Wales. This in turn, will allow the author to see if any Australian provisions could alter the result in England and Wales should any of those provisions be adopted.

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[26] Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Land Law, Text, Cases and Materials* (First published in 2009, Oxford University Press 2018) 64
[27] *Ibid*
[28] Martin Dixon, 'Fraud, rectification and land registration: a choice' [2017] Conv 3
[29] *Ibid*
[30] Gwilym Owen and Dermot Cahill, 'Overreaching- getting the right balance' [2017] Conv 1 (a similar argument is made by the authors in respect of overreaching that there is a continual struggle between protection of dynamic and static security)
[31] Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Land Law, Text, Cases and Materials* (First published in 2009, Oxford University Press 2018)

## 1.4 Methodology

The thesis will use legal research and a black letter approach by means of a desk- based legal research. This thesis will use this methodology in order to provide a clear analysis of what the law is today in England and Wales in regard to land registration, how it was previously and a comparative analysis with another jurisdiction. There appears to be no reason to conduct any empirical research within this thesis at present. This type of study will be used to gain a full picture of the complexities and problems that surround the LRA 2002 and allow for the author to give a critical analysis of such.

## 1.5 Literature review

*This sub-section is a brief literature review based upon the ideas of leading academics and practitioners and reflecting upon some of the issues with which this thesis is concerned. The purpose of the brief literature review is to examine issues of the LRA 2002 from the perspective of academics.*

The LRA 2002 has been heavily criticized and it is suggested that it has 'generated many unanticipated problems during its first fourteen years'.[32] Goymour, Dixon and Cooper all opine that the LRA 2002 has been much criticized since its enactment,[33] and further, that it (the LRA 2002) has caused controversy and complexity within case law.[34] The author considers this statement to be true, to a point and in addition the author believes that the LRA 2002, at times, has within case law caused unjust results.[35] A recurring issue with the LRA 2002, appears to lie with the way in which some

[32] Amy Goymour, Stephen Watterson and Martin Dixon (eds) *New perspectives on land registration: Contemporary Problems and Solutions* (Hart publishing 2018) Preface
[33] Amy Goymour, Martin Dixon and Simon Cooper have all written articles that criticise the performance of the LRA 2002 since its enactment
[34] Amy Goymour, Stephen Watterson and Martin Dixon eds, *New Perspectives on Land Registration. Contemporary Problems and Solutions* (Hart publishing 2018) Preface
[35] The writer believes that *Barclays Bank v Guy* [2008] EWHC 893 (Ch) [2008] EWCA Civ 452, [2008] EWCA is only one example in which an unjust result has occurred. In Guy, a charge registered on to the property previously registered to him and fraudulently transferred. The charge was registered by the 3rd party. Guy lost the title in land. There was some consideration whether Guy could see his land returned with the charge on the property. Both the loss of land or the return of the land can be seen by some as an unjust result.

provisions of the LRA 2002 are applied in cases that come before the courts. An example of such can be seen between what has been described as the interpretation of the narrow view and the wider view or application of the term 'mistake' within the Act. In the context of 'mistake', this is due to a lack of clarity in the term within the provisions of alteration of the register and indemnity, which in turn have an effect on the registered title of an individual.

To further explain, the narrow view is seen as the application of the word 'mistake' within the alteration provisions which comes as close to the literal meaning of the Act as is possible. The wider application is one in which the term is applied on a case-by-case basis and one that is aligned somewhat with general property law and that of unregistered land.[36] At present, there is no apparent consensus on which of these applications should take precedence and within case law, this is where the issues lie. There is some agreement between academics and practitioners that there are areas of the LRA 2002 that remain deficient in some form and therefore require revision.[37]

In considering the issues created by the LRA 2002, Goymour explores what she describes to be the 'myth of title by registration,'[38] and in addition the fundamental lack of clarity in certain provisions of the Act.[39] The author seeks to explore these arguments proposed by Goymour, in regard to the 'myth of title by registration' and lack of clarity in greater detail. Goymour proposes that the multiple policy aims of the LRA 2002 are a partial cause of the lack of consistency in the interpretation of the LRA 2002,[40] and the author agrees with this proposition. The author considers that the policy aim of the LRA 2002 in seeking to protect 'C' (the registered owner of the land) is not being consistently applied within case law, and the author submits, gives support to the view that the legislation does not at times find favour with the judiciary. The idea that the

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[36] Emma Lees, 'Guaranteed title: no title guaranteed' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New Perspectives on Land Registration* (Hart Publishing 2018)

[37] Emma Lees, Amy Goymour, Nock Hopkins, Simon Cooper and Martin Dixon have all written comprehensively on the issues with the Land Registration Act 2002 and passed comment on the deficiencies within the Act. The proposal for a revised version of the Act within the Law Commission Report in 2018 highlights that the Act is in need of revision to some extent.

[38] Amy Goymour, 'Mistaken registrations of land: exploding the myth of "title by registration" [2013] C.L.J. 72 (3)

[39] *Ibid*

[40] n (38)

judiciary is not seen to protect 'C' as it should, is in conflict with the aim of LRA 2002 in providing a conclusive title, which Cooper considers:

> to be the very foundation of land registration, which demands that a purchaser's title be secure against any rectification claims stemming from defects that were not disclosed by the register at the time of purchase[41]

The suggestion by Cooper that the conclusiveness of the register as the very foundation of land registration is clear, and the fact that the LRA 2002 is not applied in such a manner to uphold this aim is therefore of some concern. Goymour agrees that the LRA 2002 lacks clarity within its inconsistent application when she states:

> the lack of clarity lies in the LRA 2002 with the inconsistent application of the Act in what should be seen as the orthodox view,[42] in that C, who should be preferred as per the LRA 2002 is not always preferred.[43]

What will therefore be explored within the thesis is *why* the judiciary appears to be taking a different stance from the clear policy aims of the LRA 2002. Goymour refers to the conclusiveness of the register, as merely a form of qualified indefeasibility at best.[44] The author agrees with Goymour's view, as case law often demonstrates that the party who should qualify for the protection afforded by the legislation, the party who is registered on the land register (C), does not always get the protection they should.[45] The fact that the LRA 2002 contains provisions to alter the register also gives weight to the argument by Goymour, that if the entry of a person on to the register was truly conclusive then there would be no option or viable way for the register to be altered. Goymour states that that the indefeasibility that the LRA 2002 portrays is

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[41] Simon Cooper, 'Resolving title conflicts in registered land' [2015] L. Q. R. 131

[42] The narrow view is sometimes referred to as the orthodox view for purpose of clarity the writer will use 'narrow view' throughout unless quoting from a specific piece of text

[43] n (38) (The chapter is called 'The Orthodox view of the LRA 2002: Preferring C (but not necessarily)'

[44] n (38)

[45] Goymour accounts that the Judiciary have some 'eight manifestations' of the Judicial retreat from the orthodox view. The suggestion being that the Judiciary use these 'exceptions' to divert around the use of the LRA 2002 literally. Goymour considers them to be split into three broad categories:
1) The first three undermine undermine C's registered title.
2) The second three dilute s58 'statutory magic'.
3) Miscellaneous category.
For further explanation see Amy Goymour, 'Mistaken registrations of land: exploding the myth of "title by registration" [2013] C. L. J 72 (3)

simply 'a matter of policy.'[46] This idea by Goymour that the provision for 'a conclusive register' is more of a policy agenda shows that the LRA 2002 is struggling to balance its various aims of protecting rights and interests and to facilitate the conveyancing process.

The suggestion by Goymour that the judiciary at times prefers 'A' in an A-B-C dispute[47] is similarly argued by Lees. Lees states that the courts are placing themselves in a position whereby they are making use of unregistered land principles, this again is linked to the off- register position and the protection of 'A'.[48] Lees considers that the preference of the 'off register' position is the court's way to return land to someone whom they feel 'has lost it through no fault of their own'.[49] The suggestion that Lees makes is that the courts seek to unpick the chain of conveyance as far back as necessary, in order to put the parties back in the position they were prior to the loss of their land and this can be seen in *Knights Construction* which is considered in depth in chapter two. [50]

Dixon has focused upon the issues of the LRA 2002, with the argument that there is a 'lingering and unresolved tension in the system of registered title in England and Wales.'[51] The argument by Dixon is focused on the conclusiveness of the register and tension between *dynamic* and *static* security. Dixon argues that this is this area of the LRA 2002 which has caused controversy along with the alteration scheme and the indemnity scheme.[52] In considering if the issues within the three areas require revision Dixon has stated that the LRA 2002 may not be in need of revision in full,[53] but rather needs only partial revision to correct the outstanding issues. The author agrees with

[46] *Ibid* Goymour suggests it is attractive to pursue the idea that there is security in holding legal title and that the LRA 2002 is by no means suggesting that it is an infallible statute.
[47] See Amy Goymour, 'Mistaken registration of land: exploding the myth of "title by registration" [2013] CLJ 72 (3).
[48] Emma Lees, 'Title by registration: rectification, indemnity and mistake and the Land Registration Act 2002'[2013] M. L. R. 76 (1)
[49] Emma Lees, 'Guaranteed title: no title guaranteed' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New Perspectives on Land Registration* (Hart Publishing 2018) 104
[50] [2011] EWLandRA 2009_1459, [2011] 2 EGLR 123
[51] Martin Dixon 'A not so conclusive title register' [2013] L.Q.R 129 (Jul)
[52] Martin Dixon 'Updating the Land Registration Act 2002: title guarantee, rectification and indefeasibility' [2016] Conv 6
[53] *Ibid* Dixon has written several journals discussing the deficiencies within the LRA 2002 (listed above) the comment within the 2016 article referenced above is surprising as it could be suggested that Dixon suggests that there is no reason to amend the LRA 2002, this appears to contradict previous discussions

Dixon to a point; there are parts of the LRA 2002 that are problematic and which are in need revision, an idea which is supported by the most recent Law Commission Report in 2018, and as the case law in chapter two will reveal. [54]

Cooper argues that allowing the land register to be altered has the potential to affect one of the central aims of the Act, 'any form of alteration of the register can mean unreliability for purchasers and can potentially undermine faith in the land register'.[55] Cooper is referring here to the tension between *dynamic* and *static* security. An additional argument by Cooper is that the alteration of the register has the potential to create unreliability, injustice and to affect the housing market in the UK.[56] Cooper's arguments are valid to a point, that there is a possibility that if purchasers were aware of 'vulnerable title' it may give rise to issues, namely a loss of faith in the process of home purchase, yet it should be noted that these types of claim are a rare occurrence. In considering this further, if alteration of the land register were not available there is also the possibility of injustice; the injustice to those who have suffered a loss without a valid route to get back their land.

Dixon comments specifically upon the issue that registered title, though considered to be conclusive, is able to be challenged at any time, with at present no time restraint placed upon such a challenge.[57] This highlights the vulnerability of title registration in England and Wales and this lends more weight to the suggestion of mere qualified indefeasibility. This issue portrayed by Dixon has been addressed by the Law Commission in the 2018 Report and a 'longstop' has been proposed,[58] which is a specified time period in which a claim can be brought for the alteration of the register. The author considers that in theory a longstop rectifies the issue that Dixon has considered, in that after the specified period an individual's title will be completely indefeasible and free from any challenges. The proposed resolution in itself can be considered to create its own issues, in that by rendering a title completely indefeasible and absolute there is the possibility that injustice may be created, in that in certain

[54] Law Commission *Updating the Land Registration Act 2002* (Law Com No 380, 2018)
[55] Simon Cooper, 'Regulating fallibility in registered land titles' [2013] C. L. J. 72 (2)
[56] *Ibid*
[57] Martin Dixon, 'Updating the Land Registration Act 2002: title guarantee, rectification and indefeasibility' [2016] Conv 6
[58] n (54)

circumstances those who have lost out on their land may not make such a discovery for several years..

Cooke has argued that all legislation needs to be open to interpretation or flexibility to allow for it to work well.[59] It is a valid argument by Cooke that all legislation needs to be somewhat flexible to allow for the vast number of circumstances that it encompasses. It may be argued that the LRA 2002 is a flexible instrument, which allows for interpretation to be given in certain areas of the Act, for example by not defining certain terms in the Act such as 'mistake'. However, the author considers that issues can arise when such 'flexibility' in any legislation is given such a wide application that the actual meaning of the provision is lost. The author believes this can be argued following the inconsistent outcomes that the LRA 2002 produces with regard to the lack of clarity in the term 'mistake'.

The LRA 2002 appears from the outset to be no different at its core than previous land law legislation, in that it aims to provide both clarity and certainty to those who are purchasing land and to be a fair working piece of legislation.[60] There is a strong inference that land law legislation is deemed to be working well if it provides for a set amount of security for those who are purchasing land which in turn provides for a stable housing market, the focus being on *dynamic* security and the protection of the purchaser. There is an economic factor that is often attached to land legislation, as often the stability and wealth of a country is viewed by the way in which its housing market is performing.[61] Owen states that there was encouragement for those who possibility could not afford to previously buy a property to now get on the 'property ladder' and

[59] Elizabeth Cooke, 'A (former) Law Reformer's Perspective: Reforming the LRA 2002 – Catalysts and Question*s'* in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018).

[60] As considered in the introduction the LRA 2002 was hailed to be a 'conveyancing revolution' in the 2001 Law Commission Report

[61] Pamela O' Connor, 'A Broader Development Perspective: Economic and Political Drivers of Worldwide Land Registration Reform' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018). O' Connor focuses this chapter on the premise that governments focus upon land registration systems and legislation to promote a healthy housing market which in turns adds to the economic stability of a country. The idea is that a country that is doing well economically will have a land registration system which is working well.

in turn add to the economy.[62] It appears that there is a strong focus on the economy as opposed to the protection of rights and interests within government policy and this could be credited to the multiple aims of the LRA 2002, which it is suggested give rise to complexity.

Consideration will be given briefly within the thesis to what happens to the party that loses out on the registered title in land and whether there is sufficient protection within the LRA 2002 to compensate that party for their loss. The writer believes that the current scheme for indemnity contained in Schedule 8 of the LRA 2002 is deficient at times, and that the losing party is not always suitably compensated for their loss, if indeed they succeed in claiming such compensation at all. This issue is reflected by the Law Commission who have introduced scope for change in the 2018 Report.[63]

There are four Law Commission Reports which will be discussed within the thesis.[64] The two most recent Reports (2016 and 2018) make proposals for alterations to certain arears of the LRA 2002; and these are contained in a revised proposed Bill. The section on the Law Commission Reports within this thesis contain further discussion on the areas proposed for reform.[65] The consideration by Hopkins in response to the Law Commission Reports appears to be on how legislation (the LRA 2002) can be reworked to create stability and certainty in land law legislation.[66] Title fraud appears to be an important factor to rectify for Hopkins, who suggests that the 'indemnity scheme in the LRA 2002 was not designed with registered title fraud particularly in mind'.[67] Title fraud has probably had the largest impact on the volume of work which has been received by the land registry and as such corresponding legislation should represent a remedy to issues of fraud. If the current legislation is deficient in responding to such

[62] Gwilym Owen 'A new model for overreaching – some historical inspiration' [2015] Conv 3 (see this journal for an overview of the development of home ownership in England and Wales) Cite the page references.
[63] Law Commission *Updating the Land Registration Act 2002* (Law Com No 380, 2018)
[64] Law Commission, *Land Registration for the Twenty- First Century: A Consultative Document* (Law Com No 254 1998)
Law Commission. *Land Registration for the Twenty-first Century: A Conveyancing Revolution* (Law Com No 271, 2001)
Law Commission *Updating the Land Registration Act 2002* (Law Com No 227, 2016)
Law Commission *Updating the Land Registration Act 2002* (Law Com No 380, 2018)
[65] Law Commission *Updating the Land Registration Act 2002* (Law Com No 380, 2018) Para 13.51
[66] Nick Hopkins and Joshua Griffin 'Updating the Land Registration Act 2002' [2018] Conv 3
[67] *Ibid*

issues in land ownership, then it would most certainly require revision as considered in the proposed Bill.

## 1.6 Relevant sections of the Land Registration Act 2002

*This sub- section will give a brief explanation of the relevant sections of the LRA 2002 with which this thesis is concerned . The most relevant sections are s58 as this provides the conclusiveness of the register; s23, s24 and s26 as this trio of provisions combined act to give the registered owner certain powers. The most relevant Schedules of the Act are Schedule 4 and Schedule 8, which in turn provide the provisions for the alteration / rectification of the register and indemnity.*

### *Section 58 of the Land Registration Act 2002*

Section 58 has been described as the 'title promise'[68] of the Land Registration Act 2002. It highlights the fact that it is the positive act of the registration which vests the legal estate in the registered proprietor.[69] The date of an individual's registration of title is the date on which the application is made to the land registry. By registering the land, the party is granted the title to that land and the title by registration is therefore guaranteed. This vesting of title has been considered to be something of a 'metaphorical Midas touch' by Goymour, who is of the opinion that 'everything that is registered on the land register turns in to gold'.[70] Goymour's metaphor considers to some extent that the individual who is entered onto the land register has vested in them legal title to land which is conclusive and should be free from challenge- an indefeasible title, regardless of how that title was gained. Yet case law suggests that is not always to be true in practical terms, as will be examined in chapter two.

[68] Stephen Watterson and Amy Goymour, 'A Tale of Three Promises: (1) The Title Promise' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (Hart 2018) 282
[69] Robert Abbey and Mark Richards, *The Land Registration Act 2002* (Oxford University Press 2002)
[70] Stephen Watterson and Amy Goymour 'A Tale of Three Promises: (1) The Title Promise' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (Hart 2018) 282

***Section 23, 24 and 26 of the Land Registration Act 2002 (Owners' Powers)***

Watterson and Goymour state that sections 23, 24 and 26 of the LRA 2002 are a part of a trio of provisions which form an '*empowerment promise*.'[71] In brief, section 23 confers owners' powers; section 24 provides for who can exercise owners' powers and section 26 provides for the protection of dispones who take from someone exercising owners' powers.[72] An understanding of these provisions is relevant for the analysis of the cases in chapter two.

***Section 23 of the Land Registration Act 2002***

One aim of the LRA 2002 is that the conveyancing process should be quick, easy and secure.[73] Section 23(1)(a) of the LRA 2002 gives the power to the registered owner of the land to be able to make any legal disposition of that land by way of a legal right, the important aspect being the provision that any disposition made by the registered owner is 'legal'.

Section 23 provides:

> (1) Owner's powers in relation to a registered estate consist of-
> (a) power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than mortgage by demise or sub- demise and
> (b) power to charge the estate at law with payment of money.
> (2) Owner's powers in relation to a registered charge consist of-
> (a) power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a legal sub-mortgage, and
> (b) power to charge at law with the payment of money indebtedness secured by the registered charge.

The provision states that it is the registered legal owner who holds certain powers in relation to the legal estate. Those who are registered by virtue of s58 of the LRA 2002,

[71] Stephen Watterson and Amy Goymour, *'*A Tale of Three Promises: (1) The Title Promise*'* in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (Hart 2018) 282
[72] *Ibid*
[73] Robert Abbey and Mark Richards, *The Land Registration Act 2002* (Oxford University Press 2002)

have the power to make any sale / disposition legally. The provision has been considered to be a narrow one as it is only concerned with the dispositional powers of the owner of the land as it does not contain any other information about further rights and powers of an owner.

***Section 24 of the Land Registration Act 2002***

Section 24 of the Act deals with who is defined as an owner and states:

> A person is entitled to exercise owner's powers in relation to a registered estate or charge if he is-
> a) the registered proprietor, or
> b) entitled to be registered as the proprietor

Section 24 provides that the 'registered proprietor' is entitled to exercise owner's powers, but it is interesting that there is also a provision for those who are *entitled* to be registered to hold the same powers. It is s24 (b) which states that anyone who is *entitled* to be registered as the proprietor has the ability to enjoy the rights of the registered owner.[74] This idea that those who are *entitled* to be registered as proprietor have the same standard of legal powers as those who are 'are registered' has now been restricted[75] with the suggestion being that under s 24 (b) those *entitled* to be registered as the proprietor hold powers that are more limited than that of the registered proprietor. The combined effect of ss 58; 23 and 24 of the LRA 2002 is to provide reassurance to the purchaser of land that the transferor has made that disposition legally.[76] It enables the purchaser to rely on the register in full.

***Section 26 of the Land Registration Act 2002***

Section 26 of the LRA 2002 is for the protection of disponees and states:

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[74] An example of this can be seen in *Bank of Scotland plc v King* [2007] EWHC 2747 (Ch), [2008] 1 EGLR 65 which explains how an individual can be registered during the registration gap and enjoy the rights of a registered owner before the registration is actually complete. This view has been criticised.
[75] Stephen Watterson and Amy Goymour, 'A Tale of Three Promises: (2) The Empowerment Promise' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (Hart 2018) 381
[76] Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Land Law, Text, Cases and Materials* (First published in 2009, fourth edition, Oxford University Press 2018) 64

(1) Subject to subsection (2), a person's right to exercise owner's powers in relation to a registered estate or charge is to be taken to be free from any limitation affecting the validity of the disposition.
(2) Subsection (1) does not apply to a limitation-
(a) reflected by an entry in the register, or
(b) imposed by, or under, this Act.
(3) This section has the effect only for the purpose of preventing the title of a dispone being questioned (and so does not affect the lawfulness of a disposition).

Section 26 acts as the 'operative part of the empowerment promise.'[77] This provision states that an individual may be subject to a form of limitation when exercising powers of an owner and that an individual's right should be free from such limitation. The issue arises if it is considered that s26 is suggesting that a disponee's title is unchallengeable,[78] whereas clearly all titles to land in England and Wales are open to challenges.

***Schedule 4 of the Land Registration Act 2002- Alteration of the register***

Schedule 4 of the LRA 2002 contains the provisions for the 'alteration of the register' and, in turn the 'rectification of the register'. In contrast to the LRA 1925 which specifically uses the terminology 'rectification of the register' for all types of alteration.[79] Both provisions (LRA 1925 and LRA 2002) appear to be similar in content. The LRA 2002 however has subtle differences, one of which is the fact that in certain circumstances the LRA 2002 only provides that the alteration of the register can amount to rectification. Rectification of the register is described in the provision of Schedule 4 as:

In this Schedule, references to rectification, in relation to the alteration of the register, are to alteration which –

[77] Stephen Watterson and Amy Goymour 'A Tale of Three Promises: (2) The Empowerment Promise' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (Hart 2018) 386
[78] *Ibid*
[79] It is s82 of the Land Registration Act 1925 which provides for the rectification of the register

(a) involves the correction of a mistake, and

(b) prejudicially affects the title of the registered proprietor

Rectification is therefore a specific form of alteration. Alteration of the register in the LRA 2002 is said to fall into two distinct categories; one is administrative alterations and the other is rectifications.[80] Administrative alterations are regarded as those that do not prejudice the title of the registered title holder. Rectifications are alterations which both *correct mistakes* and *prejudicially affect the title* of the registered title holder.[81] There is a clear link between the provision for rectification and that of 'mistake'.

Schedule 4 is of importance, as payment of an indemnity via the provisions of Schedule 8 rely in part on the rectification of the register. Other forms of alteration via Schedule 4 do not allow for the payment of an indemnity and this is where potential complexity and arbitrary results may apply.[82] The term of correcting the mistake[83] is not defined within Schedule 4 of the LRA 2002, nor elsewhere within the LRA 2002. This lack of a definition leaves the term 'mistake' open for various interpretations within case law. Both the court and the registrar hold powers of alteration / rectification of the register. The power of alteration of the register that the registrar possesses are the same as given to the court, although the registrar does possess an additional power- where the register can be altered to remove a superfluous entry on the register.

Sections 3(2) and 6(2) within Schedule 4 are the provisions for the protection of a proprietor in possession and there was a similar provision in the LRA 1925.[84] The protection of a proprietor in possession, in brief, is that the register cannot be altered against a proprietor in possession without his consent. This is a form of defence in land disputes. However, this defence is subject to certain limitations as provided in s3(2) LRA 2002:

> a) where he has by fraud or lack of proper care caused or substantially contributed to the mistake; or

[80] Chris Bevan *Land Law* (Oxford University Press 2018)
[81] *Ibid*
[82] See the section on indemnity for an in-depth analysis on this issue
[83] Schedule 4, Paragraph 1 of the Land Registration Act 2002
[84] Land Registration Act 1925 S.82 (3)

b) it would be for any reason unjust for the alteration not to be made[85]

The protection of a proprietor in possession is only a partial defence to any alteration. This is seen in rectification of the register against 'C' who should have via s58 an *indefeasible* or *conclusive* title. When a proprietor is in possession of the land, case law suggests that the provision of s3(2)(b) 'would be unjust for the alteration not to be made' is one which has been widely relied on by the court. Lees states that this provision within the LRA 2002 is what has caused unpredictability in case law.[86]

***Schedule 8 of the Land Registration Act 2002- Indemnity provisions***

Schedule 8 contains the indemnity provisions for the Act. Indemnity is in effect a form of compensation paid to those who suffer a loss because of rectification of the register or a 'mistake', and it is paid by the land registry. The indemnity provisions are considered to be a form of state guarantee to compensate individuals for the loss of the legal title in land. The provisions of the LRA 2002 are like the provisions in the LRA 1925 amended by the LRA 1997 s2,[87] highlighting that compensation for loss of land has been an issue for legislators for a long period of time. Schedule 8 provides for eight circumstances for when a loss can be indemnified, and often the provisions are narrowly construed.[88] In considering the provisions for indemnity and that of alteration in the LRA 2002, Bevan states that any legislation that is to be successful must make provisions for both the alteration of the register and the payment of compensation where a loss is suffered.[89] In Schedule 8, the person who is claiming the indemnity must show that they have *'suffered a loss'* through *rectification* or a *'mistake,*' and if it can be shown that a loss has occurred under one of the eight circumstances below then it is possible to claim an indemnity. The eight circumstances are:

[85] Schedule 4 (3) (2) a & b and (6) (2) a & b
[86] Emma Lees, 'Guaranteed Title: no Title, Guaranteed' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018)
[87] Section 83 of the LRA 1925 is where the provisions for the rectification of the land register were held prior to amendment by the LRA 1997.
[88] Emma Lees, 'Guaranteed Title: no Title, Guaranteed' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018)
[89] Chris Beavan, *Land Law* (Oxford University Press 2018)

a) Rectification of the register,
b) A mistake whose correction would involve correction of the register,
c) A mistake in an official search,
d) A mistake in an official copy,
e) A mistake in a document kept by the registrar which is not an original and is referred to in the register,
f) The loss or destruction of a document lodged at the registry for inspection or safe custody,
g) A mistake in the cautions register, or
h) Failure by the registrar to perform his or her duty under section50.[90]

Schedule 8 a and b are the most relevant of the indemnity provisions to this thesis and have been explained by Smith as

> suppose the wrong person 'B' has been registered as proprietor of 'A's' land; prima facie 'A' loses the land. Should 'A's' rectification claim succeed, then 'A' will recover the land, but 'B' will be compensated for the losses consequent on rectification being ordered. Conversely, if 'A' fails to obtain rectification – perhaps because 'B' is a proprietor in possession – then 'A' will be compensated for the losses consequent on a mistake[91]

It is noteworthy from the example by Smith, that rectification of the register does not need to be the only thing to occur in order for the indemnity to be paid.[92]

Schedule 8 contains an exclusion to the right of an indemnity, which is to be found in para 5 of Schedule 8 which states:

> 5 (1) No Indemnity is payable under this schedule on account of any loss suffered by a claimant-
>
> a) wholly or partly as a result of his own fraud, or
> b) wholly as a result of his own lack of proper care.[93]

The indemnity process is subject to limitations. What at first glance then appears to be an appropriate remedy for those who have suffered a loss, can be seen to be a flawed

[90] S50 of the LRA 2002 is reference to registered charges and is of importance to this thesis. It is noted for clarity on the circumstances in which an indemnity can be claimed.
[91] Roger Smith 'Assessing Rectification and Indemnity' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018) 130
[92] *Ibid*
[93] LRA 2002 Schedule 8 Para 5 (1)

provision in that there is, in theory a 'get out clause' to the payment of the indemnity. For example, an indemnity will not be paid where the alteration of the register has amounted to purely an administrative alteration as there has to be an *actual loss* shown, as decided within *Re Chowood's Registered Land*.[94]

Schedule 8 is said at times to create unfairness in the value of the indemnity that is paid out to the party which suffers a loss. Schedule 8 para 6 makes provision for what these values will be. The issue is that if the loss is suffered due to the rectification of the register (Schedule 8 (1)(a)) then the amount payable is the value of the land prior to the rectification of the register. In contrast, if the loss is suffered due to no rectification of the register (a mistake) (Schedule 8 (1) (b)) then the value that will be paid is the value of the land at the point in which the land was lost via the mistake.[95] The latter situation could be the that the mistake in question occurred many years ago and as a result the compensation may be unsatisfactory, given the monetary value in land could be less than the value at the time of the conclusion of the proceedings. It is important to note at this point that the Limitation Act 1980 applies to the indemnity provisions; it is treated as a contract debt and therefore the limitation period is that of 6 years.[96]

## 1.7 The creation of an A-B-C dispute in land ownership

This section considers the formation of transactions between A-B and then transactions between B-C, thus creating the A-B-C chain. A-B disputes are generally referred to as two party cases and A-B-C disputes are referred to as three party disputes.

A basic formation of an A-B-C dispute can be formatted into this simple model:

[94] [1933] Ch 574 ( a well- recognised principle where no indemnity was paid due to the reasoning that there was no loss, here rectification was ordered so that an overriding interest could be recognised).
[95] LRA 2002 Schedule 8 Para 6
[96] The Limitation Act 1980 states that the limitation period is that of 6 years after the cause of action arose. The cause of action arises at the time when the claimant knows or but for his own default might have known of the existence of the claim. Schedule 8 Para 8.

a) ‘A’ begins at the start of the chain as the legal owner of the land. A will be registered at the land registry as such.
b) ‘B’ by whatever means has ‘A’s’ property registered to them (B), and in this sense all aspects need to be considered such as mistake and fraud.
c) By virtue of s23 and the owner’s powers of the LRA 2002 ‘B’ as the owner of the land entered on the land register can make a registered disposition to ‘C’.
d) ‘C’ is now on the land register and by virtue of s58 becomes the legal owner of the land.

***A- B Transactions in land and two- party cases.***

In order to understand an A-B-C dispute it is necessary to firstly understand how an A-B transaction in land and dispute occurs and then potentially further on to a chain of A-B-C and even further at times. It has been suggested that A-B cases ‘are the most straightforward and least problematic to understand.’[97] Not all disputes move from A-B and then C; some will remain between two parties, such as those disputes where land has been double registered.[98] The chain can involve both individuals and mortgage companies (banks) or similar who effect a registered charge over the property or land.

Fraud is one of the more reoccurring reasons why ‘A’s’ land is transferred without A’s knowledge or consent. Goymour considers fraud to be widespread and caused by numerous factors. Goymour has stated that fraudulent forged transactions and registrations have caused a wealth of case law all of which exercise the same decision -making process, in that the disposition between A- B is one which is generally classed as void, as ‘B’ legally has no legal right to the land in question.[99] This issue of void and voidable appears to cause uncertainty with the lack of definition and precedent in this area.

[97] Stephen Watterson and Amy Goymour *‘*A Tale of Three Promises: (1) The Title Promise’ in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018)
[98] *Parshall v Hackney* [2013] EWCA Civ 240, [2013] Ch 568 *(Parshall* is a two- party case of double registration of the same piece of land)
[99] Amy Goymour, ‘Mistaken Registrations of land: exploding the myth of “title by registration” [2013] C. L. J 72 (3)

*Void and voidable*

Smith considers that 'it is straightforward to assert that registration of a void transfer (or other disposition) is a mistake. More problematic is the registration of a voidable disposition'.[100] The issue is the determination of what is classed as void or voidable with the distinction often being somewhat unclear. There is also further complexity such as when that voidable disposition is passed to a new registered owner. The distinction between void and voidable is one which creates a wealth of issues. According to Goymour a void disposition is seen as:

> purported dispositions made by deeds which are not properly attested, directors of companies in the process of being wound up, disponors who fail to comprehend what documents they are signing. In each case, the crucial significance of the 'A' – 'B' disposition being void is that there is no legal basis for B's registration[101]

Goymour states that a void transaction is one without legal basis. At first glance this appears to be quite a simple premise, yet, as Goymour points out at times someone with no legal basis to be registered finds themselves undetected and subsequently registered on the land register.[102] Goymour has pointed out that this accounts for a small number of transactions but they appear to form a wealth of case law on the issues under discussion.

A-B transactions which are seemingly the most simplistic are not always classed as void, and some are seen to be merely voidable and this is where complexity arises. Goymour suggests that voidable transactions occur where 'A' is induced to transfer an interest by fraud or misrepresentation.[103] The distinction between voidable and void is that the voidable disposition or transaction remains legal until it is made void; it is merely voidable until that point in time. The distinction between a void and a voidable transaction is important for the type of alteration of the register called rectification and

[100] Roger Smith, 'Assessing Rectification and Indemnity' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018)
[101] Amy Goymour, 'Mistaken Registrations of land: exploding the myth of "title by registration" [2013] C. L. J 72 (3)
[102] *Ibid*
[103] n (101)

in turn the indemnity provisions. The suggestion by Watterson and Goymour is that the 'registry acts correctly in registering voidable dispositions and incorrectly when registering void ones' suggesting for the latter an indemnity should be paid for the land registrar's mistake.[104] The view here places a significant amount of responsibility on the land registry, who have limited resources in seeking out whether a title is void or voidable. Void and voidable transactions are therefore concerned with the transaction between 'A' and 'B' and the process of how the transaction came to be. If the LRA 2002 were to be followed, a void disposition to 'B' could be altered easily, yet if the transaction was merely voidable then the suggestion made by Goymour is that 'A' would receive an indemnity rather than have their land given back to them.[105]

There appears to be the argument that for the rectification of the register to occur via Schedule 4 it needs to be shown that B's transaction was one which was void as it was 'mistaken' at the time of its registration. Smith notes that *Ruoff and Roper* consider 'that 'mistake' does not include the registration of a voidable transfer'.[106] The issue therefore lies in the definition of the transaction between 'A' and 'B' and which is contained in the facts of the case. To add to the complexity of the matter, it is noted that case law has suggested that transactions between A-B can be seen to be void and in turn mistaken and yet may still not qualify for interpretation as 'mistake' for the purposes of the provisions of the LRA 2002. Goymour has considered that voidable transactions in contrast are considered to be those induced by fraudulent misrepresentation and not forgery and can still be classed as a 'mistake' albeit for a different reasoning.[107] What is apparent is that the case facts and the way in which the transaction was made between 'A' and 'B' is of importance for deciding what can be classed as void or voidable. What is also apparent is that there is no consistent application of which transaction can be classed as void or voidable, which can in turn lead to a lack of consistency in case law results.

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[104] Stephen Watterson and Amy Goymour, 'A Tale of Three Promises: (1) The Title Promise' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018)

[105] Amy Goymour, 'Mistaken Registrations of land: exploding the myth of "title by registration" [2013] C. L. J 72 (3)

[106] Roger Smith, 'Assessing Rectification and Indemnity' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018)

[107] n (105)

Fraud is seen as one of the widest forms of 'mistaken' transaction. However, the distinction between void and voidable transactions is said to depend on the form of the fraud:-forgery for a void transaction or fraudulent misrepresentation for a voidable transaction. Case law will show that this does not appear to be a strictly enforced application and often the factual matrix of a case will determine if it is void or voidable. Cooke considers that fraud in land transactions appears to be something that is only increasing in volume.[108] An recent example of fraudulent transactions can be seen in *Antoine v Barclays Bank UK Plc,*[109] *Antoine* has been credited as bringing a form of coherence to the issues that surround the land registration issue of 'mistake', including a fraudulent void transaction.[110] One of the important decisions that *Antoine* clarified in regard to 'mistake,' is that 'a mistake is generated by registration of a void transaction'.[111] It has been suggested by Lees that the decision in *Antoine* gives clarity to the decision in *NRAM Ltd v Evans*[112] which dealt with the nature of A-B transactions in land and the difference between void and voidable for the purpose of 'mistake'.[113] The point that both *Antoine* and *NRAM* clarify is that for the disposition to be classed both as void and a mistake it has to have been so *at the time of the registration*, but if something entered on the register was not a mistake at the time of entry then it cannot be classed as a mistake at a later point.

Goymour states that case law has now concluded that the transactions between 'A' and 'B' can in certain circumstances be classed as void. This can be when a 'disposition from A-B which, despite appearing valid on the surface, is actually found out to be one that was illegal and therefore in turn void.'[114] A void transaction generally occurs following a fraudulent transaction although as discussed this is not a strict rule and there are several other variations of what qualifies as fraudulent. This void fraudulent transaction can potentially qualify as a mistaken entry on the register if it can be

[108] Elizabeth Cooke, *'*A (Former) Law Reformer's Perspective: Reforming the LRA 2002 – Catalysts and Questions*'* in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (Hart 2018)
[109] [2018] EWCA Civ 2846
[110] Simon Cooper, 'Register entry pursuant to a court order subsequently set aside' '*Antoine v Barclays Bank UK Plc* [2018] EWCA Civ 2846; [2018] 4 W. L. R 67 [2019] Conv 1
[111] *Ibid*
[112] [2017] EWCA Civ 1013
[113] For a more in depth consideration of this please see Kester Lees, 'NRAM v Evans : there are mistakes and mistakes' [2018] Conv 91
[114] Amy Goymour, 'Mistaken registrations of land: exploring the myth of "title by registration" [2013] C. L. J. 72 (3)

considered to be a void transaction at the point of registration only and not at a later point in time. It is potentially easier to view the transaction between A-B as a mistaken one and void for the purpose of 'A' seeking rectification of title. It is however more difficult to rectify once title has passed on further in a chain to that of 'C', 'D' or even further. If the transaction between 'A' and 'B' is not disputed perhaps through lack of knowledge, then B retains the land by virtue of s58.

***Transactions from B to C, the formation of A-B-C chain of ownership. Three party cases***

As above the first transaction in land or property is the change of the registration of title from 'A' to 'B'. Generally, 'A' is not aware of the transaction. It may be in certain circumstances some time before 'A' becomes informed of the transaction and can therefore seek a remedy. During this time frame there is the possibility that the legal title held by 'B' may be passed on to another who is referred to as 'C' in this thesis, and in theory this can go further to 'D', and to 'E' etc. The transfer of the land or property from 'B' to 'C' is usually by way of a disposition (sale of the freehold in the land) or alternatively by way of a registered charge as in *Barclays Bank v Guy* [115] in which 'C' was a registered charge (mortgage) effected by 'B'. Goymour stresses that there are of course, many different variations of the of the above factual matrix, and of the course the A-B-C dispute. [116] The author is of the view that this is why case law has struggled to find a precedent to follow.[117]

Following the transaction between 'B' and 'C', 'C' becomes the legal title holder if they are a person or person(s) having purchased the property, or, if it is a registered charge the entry of the charge will be seen on the charges register which affects the title of those registered. Both the individual registered, and the charge is valid due to the effect of s58 of the LRA 2002. The disposition from 'B' of the freehold or the effect of a legal charge are generally valid as a result of 'owner's powers' found in sections.23, 24 and 26 of the LRA 2002.[118] A-B-C disputes in land ownership is perhaps the most

[115] [2008] EWCA Civ 452
[116] n (114)
[117] It is now some 16 years after the enactment of the LRA 2002 and there is still no clear precedent on how certain areas of the Act should be construed.
[118] S 23, 24 and 26 of the LRA 2002 are discussed in greater depth within an earlier section of the thesis.

common type of scenario to be considered in this thesis. It should be noted that there can be more than three people in the chain but for ease of reference this thesis is focusing on a simpler scenario of A-B-C unless case law states otherwise.

Following this transfer of ownership of the land from ‘A’ to ‘B’ regardless of the method by which the transfer was concluded ‘B’ becomes the legally registered owner of the land. If there was only ‘A’ and ‘B’ in the scenario then the entry of ‘B’ can be potentially challenged as one that is void or voidable, until challenged ‘B’ is deemed to be the legal title holder. This entry of ‘B’ on to the land register enables ‘B’ to have owner’s powers conferred on them by way of sections 23, 24 and 26 of the LRA 2002, which includes the ability to pass ownership of the land to another as permitted by way of s23 (1)(a) of the LRA 2002. ‘B’ is therefore permitted to pass the legal title to ‘C’ who then becomes a third-party owner. This transfer is a legal one and as a result ‘C’ becomes the legal owner of the land or property. The above scenario remains true where ‘B’ executes a registered charge against the property, and often ‘B’ takes the money leaving ‘A’ and ‘C’ to come to court to fight for what they both believe to be theirs.

# CHAPTER TWO

*This chapter is concerned with the state guarantee of title pursuant to s58 of the LRA 2002 and the conclusiveness of the register. Further, the chapter considers the scheme for alteration of the register found in Schedule 4 of the Act, and specifically for when alteration of the register amounts to rectification. The chapter is also concerned with what is meant by the term 'mistake' found within Schedule 4 of the LRA 2002 and how 'mistake' has been interpreted within case law following the enactment of the LRA 2002.This chapter also analyses the indemnity provisions contained in Schedule 8 of the LRA 2002. This chapter therefore analyses the first research question.*

## Introduction

As previously discussed, a dispute arises from the creation of an A-B or and A-B-C chain in transactions in land. The dispute arises when 'A' is seeking to have the land lost returned to him from 'C' (often a second innocent party). In a different format there may be an issue with a registered charge effected by 'B' without the knowledge of 'A' and 'A' is seeking the removal of such a charge as well as a return of the land (in this case 'C' is the 'owner' of the registered charge and generally a mortgage company/ bank), and 'C' is again an innocent party. There are several other formats of this scenario.

The chapter begins by analysing the conclusiveness of the register before moving on to consider the provisions for alteration of the register are of the utmost importance when considering these types of dispute in land. Mistake' is a most important term within the provisions concerning alteration which needs to be understood clearly and concisely. Understanding what type of 'mistake' has occurred is important to know how to resolve such disputes in the most effective way. The link between 'mistake' in the provisions for the alteration of the register and indemnity make the term one that has an impact on both provisions and how they are interpreted. The chapter will discuss how a 'mistake'

is thought to be corrected using the narrow and the wider applications of the LRA 2002 in case law, and how these two applications can affect the outcome of a case.[119]

This chapter then moves on to examine the provisions for indemnity in the LRA 2002 (schedule 8 of the LRA 2002). It will consider whether the provisions for indemnity within the LRA 2002 are suitable in deciding whether there will be compensation available for those who have suffered a loss via the alteration provisions. There will be a consideration of the *Malory* 2 argument from the perspective of overriding interests and how they affect interests in land. The need to assess the position of *Malory* is due to the arbitrary results produced by *Malory* seen in the refusal of the option of an indemnity to those who have suffered a loss. The link between the alteration and the indemnity provisions will be considered along with an examination of the link between the two provisions and the term 'mistake'.

## 2.1 The extent of title guarantee in the LRA 2002, how conclusive is a title in land?

'The state guarantee of a registered title sounds highly comforting, especially to the purchaser of land or property. However, it is necessary to remember that you can have your title taken from under your nose.'[120] The aim of this sub -section is to consider if the suggestion by Lees that the state guarantee is nothing more than a policy aspiration is true,[121] or whether the state guarantee pursuant to s58 of the LRA 2002 offers a robust form of protection to the title holder of the land. The way in which an individual's title in land can be returned or lost is via the alteration and subsequently the rectification provisions in Schedule 4 of the Act, and this depends on whether the individual is either A or C in the chain. For this reason alone, it can be suggested firmly that no title is absolute or immune from challenge, therefore the description of a form of qualified indefeasibility as considered previously is perhaps more of an accurate description of the strength of registered title.

[119] The narrow application and the wide application have been previously discussed within the thesis. The narrow application is called the orthodox view on occasion and is seen to be an application which gives the Act its most true and literal meaning. In contrast the wider application or view is seen to be more flexible in case law and somewhat aligns with concepts of general property law. The narrow application seeks to protect 'C' while the wide application seeks to protect 'A'.
[120] How reliable is registered title [2018] P. L. B. 38(8) 57-58
[121] Emma Lees, 'Guaranteed Title: No Title, Guaranteed*'* in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions Preface* (Hart 2018)

The aim of s58 of the LRA 2002 was to give a title guarantee to the person registered on the land register and furthermore, to give security to purchasers in land. Essentially the protection of 'C' in the chain and the protection of *dynamic* security. It appears a simple policy decision as it would allow people to be able to rely on the register fully. Cooke states that:

> A complete and infallible register would make conveyancing simple by eliminating the work of investigating a title from documentary and physical evidence; it would eliminate risk for all parties because it would be impossible to be caught by an undiscoverable interest, and because the holder of a registered interest is completely invulnerable to any off -register events[122]

Cooke's explanation of what an infallible register would be is an example of an ideal scenario and one which would, in theory, give people complete confidence in the register and transactions in land. Cooke further explains how all title registers are open to off register interests and challenges especially that of human error and fraud.[123] The off register interests to which Cooke is referring are partially that of overriding interests which Cooke describes as being held to override the interests of the registered title holder and have proved problematic ever since.[124] Although Cooke appears to be critical of title registration, she argues that although the system in England and Wales is flawed it is the 'only one that can come anywhere near the myth of the ideal register'.[125] The author considers this to be a somewhat realistic approach and the author considers much of the tension in the LRA 2002 lies with its dual policy aims and what results it produces in case law.

In considering the limit to the conclusiveness of the register, Lees states that 'we still await a court willing to draw together the tentacles of land registration, giving us a

[122] Elizabeth Cooke, *The New Law of Land Registration* (Hart, 2003) 10
[123] *Ibid*
[124] Seen in *Malory Enterprises v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151 and *Swift 1st Ltd v Chief Land Register* [2014] EWHC 4866 (Ch) *Swift 1st Ltd v Chief Land Registrar* [2015] EWCA Civ 330, [2015] Ch 602
[125] Elizabeth Cooke, *The New Law of Land Registration* (Hart, 2003) 11

complete picture as to what the statutory magic of state guarantee achieves.'[126] The statutory magic to which Lees refers is the guarantee of title that s58 of the LRA 2002 provides. Goymour too has referred to this, as 'just as King Midas turned worthless objects into gold, the Registrar turns void interests into fully fledged legal proprietary rights.'[127] Both Lees and Goymour are referring to the effect of the provisions of the LRA 2002 for conclusiveness, and the fact the legislation seeks to protect 'C' regardless of how 'C' appears to have obtained the title. Gardner develops this with the suggestion that the LRA 2002 is a flawed piece of legislation by suggesting that the lack of information held by the register in regard to overriding interests and off- register interests puts the purchaser in a vulnerable position.[128]

Hopkins states in discussing the proposals in the most recent Law Commission Report in 2018 that relate to the issue of conclusiveness and guarantee to title,

> the foundation of land registration is the guarantee of title provided in the LRA 2002 s 58. But this guarantee is not absolute – it is subject to the power of the registrar or the court to alter the register[129]

It is clear that although the policy aim of the LRA 2002 is to give a form of security to those who purchase land, an individual cannot remain absolutely secure that their title will be free from any challenges indefinitely. This is a point that Cooke re- enforces in stating that:

> where the wrong person is registered as proprietor of a legal estate (because of error or forgery), he nevertheless holds the legal estate until the register is amended. This is the fundamental principle of title registration.[130]

Cooke points out that to some extent title is secure, as the person registered is deemed to hold the title securely by virtue of the Act, with no regard to how that title was

[126] Emma Lees, 'Registration make – believe and forgery- Swift 1st Ltd v Chief Land Register' [2015] L. Q. R 131 (Oct). See also Amy Goymour, 'Mistaken registrations of land: exploring the myth of "title by registration" [2013] C. L. J. 72 (3)
[127] Amy Goymour, 'Mistaken registrations of land: exploding the myth of "title by registration" [2013] C. L. J 72 (3)
[128] Simon Gardner, 'The Land Registration Act 2002 – The Show on the Road' [2014] M. L. R. 77 (5)
[129] Nick Hopkins and Joshua Griffin, 'Updating the Land Registration Act 2002' [2018] Conv 3
[130] Elizabeth Cooke, *The New Law of Land Registration* (Hart, 2003)54

obtained. Cooke makes the point that both void and voidable titles can be registered on the register, and regardless of how that title was obtained, it remains registered until challenged and removed.[131] What is apparent is that those who are registered have a set amount of security in the registered title by virtue of s58, though what is unfortunate is that those who are registered may not be aware if that title was obtained in a way which potentially made it void or voidable. Those who are registered can be somewhat reassured that their title is protected by way of s58 of the LRA and that the legislation does promote the protection of those who are the registered title holder as a basic starting point.

One question that could be considered with regard to the conclusiveness of the register is, to what *extent* can any pre- existing legal or equitable property rights be asserted against 'C' by another party. There are two distinct scenarios in which 'C' will be bound by the pre- existing rights of another unregistered party and that is when (a) the register is rectified against C and (b) when there is an overriding interest.[132] Rectification of the register will be considered below in the sub section on the alteration of the register; however, the issue of the overriding interest requires further exploration at this point.

***Overriding interest argument – The Malory legacy***

It was held in *Malory Enterprises Ltd v Cheshire Homes UK Ltd*[133] that legal title in land was guaranteed by the LRA 1925 s69 (Malory was decided under the LRA 1925, just four days before the LRA 2002 received Royal Assent, yet it is still considered today by academics and practitioners in reference to the LRA 2002). Two arguments were advanced in Malory, referred to as *Malory 1* and *Malory 2*. The first of the arguments was that beneficial ownership and legal ownership could be split, thus if 'A' lost the land via a fraudulent act they would only lose the legal title and the beneficial title will remain with 'A'. The second argument was that the defrauded person 'A' would hold an overriding interest over future disponees.[134] Both have been considered within the 2018 Law Commission Report. *Malory 1* has said to have been overridden

[131] Elizabeth Cooke, *The New Law of Land Registration* (Hart, 2003)
[132] Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Land Law, Text, Cases and Materials* (First published in 2009, Oxford University Press 2018)
[133] [2002] EWCA Civ 151: [2002] Ch. 216 (CA (Civ Div))
[134] This argument was based upon the right to rectify under section 70(1)(g) of the LRA 1925

by *Swift 1st Ltd v Chief Land Registrar.*[135] The *Malory 2* argument remains to be considered by the judiciary. The 2018 Report has made the recommendation that the *Malory* argument that the LRA 2002 confers both legal and equitable title should cease to be considered in further cases, and the report goes further and suggests that both of the Malory arguments should be abandoned.[136]

In the *Malory 1* argument it was held that the land in question had been held as an equitable interest by *Malory Enterprises Ltd* 'A', although the purchaser (Cheshire Homes UK Ltd 'C') was the legal owner (via their entry on the register). The transfer had been made by 'X' which was a sham company and fraudulently transferred title. It was held that the beneficial ownership remained with Malory Enterprises Ltd. This is referred to as the *Malory 1* argument and is one that has attracted controversy ever since due to there being no mention of a split in beneficial / legal ownership within the LRA 2002.[137] The suggestion is that *Malory* was decided upon the rules of general property law. When considering the factual matrix of *Malory* there was a further issue, which was that 'C' in the scenario (Cheshire Homes UK Ltd) was not classed as being in occupation of the land; and the land was deemed to have remained in the occupation of *Malory* ('A'). This therefore was considered to be an overriding interest on 'C's title and became known as the *Malory 2* argument. The *Malory* 2 argument meant for 'C' that no indemnity would be payable as there would be no loss due to the reasoning that *Malory* had an overriding interest which would have bound 'C' from the outset. As will be seen below, the *Malory* 1 line of reasoning was rejected by the Court of Appeal in the case of *Swift 1st*, but the line of reasoning in *Malory* 2 remains.

The arguments created within *Malory* faced criticism which fell into two distinct categories.[138] The first, is that the whole point of registration and having security in the register is eroded with the decision of a *Malory* 1 argument, as it would mean that title in land is split into two entities, one being the legal title vested in those registered and one being an equitable title based on a trust. This suggests that the legal title may be

[135] [2014] EWHC 4866 ch and [2015] EWCA Civ 330, [2015] Ch 602
[136] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018)
[137] John Pownall and Richard Hill, 'The Land Registry's perspective' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018) Preface
[138] Emma Lees, 'Registration make- believe and forgery- Swift 1st Ltd v Chief Land Register [2015] L. Q. R. 131 (Oct)

one that is of little or no value to the person registered if there can be another who has retained a form of beneficial ownership in the land. Cooke states that:

> First, the principle of qualified indefeasibility is fatally undermined. The 2002 Act embodied a careful scheme, the structure of which is outlined above. X is to have the land back, subject to special protection for the registered proprietor in possession. This is an important policy framework, and it should not be subverted without amendment to the legislation[139]

Cooke regards the decisions taken in *Malory* as strange[140] and suggests that perhaps the use of general property law and the diversion from the purpose of the LRA 2002 should not have been considered as it works completely against the intention of the LRA 2002. The author considers Cooke to be right in this analysis as s58 of the LRA mentions nothing of equitable interests. The Act makes it clear that registered estates are legal estates. The author finds that it is difficult to see how a trust would have arisen in the circumstances of *Malory* and it is suggested this put the case of *Malory* at odds with that of *Westdeutsche Landesbank Girozentrale v Islington LBC.*[141] The amount of criticism that *Malory* received in case law and from the Law Commission has not been enough to undermine part of the second argument of *Malory.*[142] In respect of the point relating to retention of the beneficial interest ( the *Malory*1 argument) that now ceases to exist,[143] yet, *Malory* remains to be considered for future cases on the overriding interest point ( the *Malory* 2 argument), hence the discussion within the 2018 Law Commission Report.

Following *Malory* came *Fitzwilliam v Richall Holdings Services Ltd*[144] and *Swift 1st Ltd v Chief Land Register.*[145]Both cases considered the issue of the state guarantee to title, indemnity and that of the issues created in *Malory*. Both were considered under the provisions of the LRA 2002. Cooke considers that *Fitzwilliam* was decided on a

[139] Elizabeth Cooke, 'The register's guarantee of title. *Fitzwilliam v Richall Holdings Services Ltd* [2013] EWHC 86 (Ch); [2013] 1 P. & C. R 19' Conv 344
[140] *Ibid*
[141] [1996] A. C. 669, [1996] 2 ALL E. R 961
[142] Emma Lees, 'Registration make- believe and forgery- Swift 1st Ltd v Chief Land Register [2015] L. Q. R. 131 (Oct)
[143] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018)
[144] [2013] EWHC 86 (Ch); [2013] 1 P. & C. R. 19 (Ch D)
[145] [2015] EWCA civ 330: [2015] 3 W. L. R. 239 (CA (Civ Div)

completely different basis to that of the LRA 1925, and suggests that the basis for the alteration of the register in *Fitzwilliam* was not one that was clear.[146] What was clear was that the case appeared to be decided on the basis of what had occurred within *Malory*, although it was pointed out during *Fitzwilliam* that there could be no split between legal and equitable interest as defined by *Westdeutsche.* Cooke makes reference to the reasoning and hoped that she would see support for *Fitzwilliam*'s rejection of the Malory 1 argument, so that there would be a 'chance for the legislation to operate as parliament intended.'[147] Following *Fitzwilliam* came the Court of Appeal case of *Swift 1st*[148] and on which Lees comments that 'the Court of Appeal has finally been given the opportunity to consider the guarantees provided by registration of title.'[149]In the *Swift 1st* appeal the *Malory* 1 argument was considered to have been decided per incuriam and this was considered to be welcomed by many.[150] What is still apparent following *Fitzwilliam* and *Swift* is that the argument in *Malory* 2 is still somewhat available to the Judiciary. As a result, and until a precedent is set or Parliament enacts new legislation, the overriding interest argument continues to pose a threat to those who hold legal title and to those who seek an indemnity, which in turn affects the Act's policy aim in seeking to protect interest holders.

A key issue with regard to cases following on from *Malory* was whether an indemnity could be claimed by the party which suffered a loss –which notably was the loss of 'C' in both *Malory* and *Swift 1st*. In *Malory* no indemnity was available to the party that suffered the loss, 'C' ,on the basis of the overriding interest argument (Malory 2). This issue has been resolved somewhat by virtue of the case of *Swift 1st*, although this still highlights the issue that 'C' is not wholly secure in their position as the registered title holder or charge. In the Court of Appeal case for *Swift 1st* it was held that Swift ,'C', who claimed an indemnity could do so on the basis that Mrs Rani ,'A', had the register *rectified* to remove their charge, (this position was also agreed by 'C'), and that this was coupled by the overriding right of Mrs Rani who was in possession of the land in question. The *rectification* of the register was the key issue. If treated as though the

[146] Elizabeth Cooke, 'The register's guarantee of title. Fitzwilliam v Richall Holdings Services Ltd [2013] EWHC 86 (Ch); [2013] 1 P. & C. R 19' Conv
[147] *Ibid*
[148] [2015] EWCA Civ 330
[149] Emma Lees, 'Registration make- believe and forgery- Swift 1st Ltd v Chief Land Register [2015] L. Q. R. 131 (Oct)
[150] *Ibid*

overriding interest was the only basis for the register to be altered, then an indemnity would not have been able to be claimed as seen in *Malory*. The reasoning in *Swift 1st* showed that it is a possibility that when a title or charge is derived from a forged disposition, upon rectification, an indemnity will be paid to those who lose out. Although in these types of cases it could perhaps be seen as somewhat *fair* to all parties. 'A' sees the land returned and 'C' can claim an indemnity. This type of case works completely against the aim of the LRA 2002 in protecting the registered title holder and highlights the difficulty the Act has in protecting rights and interests.

*Return to state guarantee*

Smith considers that the decision-making process in *Swift 1st* is somewhat at odds with that of *Gold Harp Properties v McLeod,*[151]even though both cases saw the rectification of the title of 'C'.[152] In *Swift*, as discussed above, it was agreed that the charge should be removed. In *Gold* Harp the factual basis was different from the outset, 'A' held an interest (a lease) over the freehold of 'X'.[153] This interest belonging to 'A' was removed from the register and 'X' created another lease to replace that of the first referred to as 'C'. 'A' sought to have their lease re-instated via both the priority provisions and that of the alteration provisions of the LRA 2002. The later registered interest holder 'C' sought to rely on the protection of the LRA 2002 via s58 and the guarantee to title as a matter of policy. Underhill LJ considered the issue of indefeasibility in *Gold Harp* and considered that the 'the system of land registration, thus provides only for qualified indefeasibility of registered title'.[154] The author agrees with Underhill LJ and considers that the judiciary recognises that registered title is always open to challenge and that the conclusiveness of the register is perhaps more of a policy aspiration.

It was held in *Gold Harp* that the lease of 'A' could be re- instated thus going against the policy considerations and title promise of s58 of the LRA 2002. The suggestion by

[151] [2014] EWCA Civ 1084; [2015] 1 W. L. R. 1249
[152] Roger Smith, 'Assessing Rectification and Indemnity' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions*(Hart 2018) Chapter 9
[153] Academic writing on *Gold Harp Properties* refers to 'X' in the scenario broken down within this thesis 'X' would be considered to be 'B' even though they were the original owners of the land. *Gold Harp Properties* regards issues of leases as opposed to registered charges or dispositions.
[154] *Gold Harp Properties v McLeod* [2014] EWCA Civ 1084; [2015] 1 W. L. R. 1249 [23]

Lees is that it was the intention of the court in *Gold Harp* to put the parties into the position they would have been had there been no mistake.[155] Goymour considers the decision in *Gold Harp* has sapped strength from the title promise and furthermore stultifying the ambitions of the LRA 2002.[156] The author considers Goymour's argument to be of some relevance, as case law which is decided on principles other than that of the LRA 2002 works against the fundamental objectives of the LRA 2002 and each one only gives weight to the argument that the Act is not working efficiently. It should be noted that Lees considers that it is implied within *Gold Harp* that the 'freeholders dubious behaviour' gave rise to the decision making of the Court. This was based on the facts that the freeholder 'X' and the subsequent leaseholder 'C' were known to each other.[157]

In *Gold Harp* there was a great deal of interest shown in putting the parties in the position that they would have been prior to the occurrence of the 'mistake'.[158] It is interesting that this type of argument could in theory have the result of affecting any titles in the chain, should it be followed as precedent. In simpler terms, the suggestion made that had the title moved from 'C' to 'D' or further, then they too would have suffered the loss of their registered title. A further issue created by *Gold Harp* was the issue as to whether rectification of title could be retrospective; it was held that it could be, although this will not be discussed further here.[159] This decision was good for those who had the lease re- instated yet this decision has been criticized for rectification against a proprietor in possession of the land 'C', and also for the fact that it works

[155] Emma Lees, 'Guaranteed Title: No Title, Guaranteed*'* in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018) Lees is referring to *Gold Harp Properties v McLeod* [2014] EWCA Civ 1084; [2015] 1 W. L. R. 1249 [94] Underhill J

[156] Amy Goymour, 'Resolving the Tension between the Land Registration Act 2002' "priority" and "alteration" provisions' [2015] Conv. 3

[157] Emma Lees, 'Guaranteed Title: No Title, Guaranteed*'* in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018) Lees is referring to *Gold Harp Properties v McLeod* [2014] EWCA Civ 1084; [2015] 1 W. L. R. 1249 [10] Underhill J

[158] Roger Smith, 'Assessing Rectification and Indemnity' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018) Chapter 9

[159] The question of retrospective rectification had been considered under the LRA 1925 in *Freer v Unwins Ltd* [1976] Ch 288 (Ch) and in *Clark v Chief Land Registrar* [1993] Ch 294 (Ch) and they held that rectification could not be retrospective. The provision was S 82 (2) of the LRA 1925. In *Gold harp* it was held that rectification could be retrospective.

against the premise of the LRA 2002.[160] In weighing up the position of the parties it is difficult to consider *morally* whether 'A' or 'C' should have benefited from being made the title holder, yet legally, the decision appears to be in contrast to the guarantee of title in s58 of the LRA 2002. This decision making can only be to the detriment of the policy aim of the LRA 2002.

Smith states that there are now five leading cases which give an overview into the issue of the state guarantee of title.[161] The five cases are: *Gold Harp v McLeod,*[162] in which the register was altered to place the original leaseholder back on the register after their removal and replacement. *Swift 1st v Chief Land Registrar,*[163] which concerned the issue of the *Malory* legacy and whether title could be split into two being that of legal and beneficial title thus creating a trust. *Walker v Burton,*[164] in which rectification against a proprietor in possession was refused and where the 'true owner' of the land was not seeking title to the property. *Parshall v Hackney* [165] which considered double registration of land and *Knights Construction v Roberto Mac*[166] which considered a 'mistaken' registration of land to someone who was never an interested party, which resulted in rectification against the registered owner. This case, along with some of the other cases referred to above, are considered in more detail in the next part of this sub-section dealing with alteration in the specific context of the how the term 'mistake' has been interpreted by the courts.

The suggestion is that in some of the cases discussed above there appears to be a preference for the judiciary to prefer an off register position, and this therefore does not accord with what the LRA 2002 set out to achieve with its dual policy aims.[167] There is a suggested inconsistency in the approach of the off register position, which may be

[160] Charles Harpum, 'Can Rectification be Retrospective?' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018) Chapter 7
[161] Roger Smith, 'Assessing Rectification and Indemnity' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018) Chapter 9
[162] [2014] EWCA Civ 1084, [2015] 1 WLR 1249
[163] [2015] EWCA Civ 330, [2015] Ch 602
[164] [2013] EWCA Civ 1228, [2014] 1 P & CR 9
[165] [2013] EWCA Civ 240, [2013] Ch 568
[166] [2011] EWLandRA 2009_1459, [2011] EGLR 123
[167] Emma Lees, Guaranteed Title: No Title Guaranteed in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018) Chapter 7

seen in the cases of *Gold Harp* and *Parshall* which were decided by reference to what is referred to as the off register position, which has been considered to bare a similarity to unregistered conveyancing.[168] What is clear, is that in each of the five cases above all of the case facts are different and it may be suggested that the LRA 2002 has to respond to a wide variety of case facts, which means that it has to retain an amount of flexibility in the application.

*Parshall v Hackney* [169] is a case where two parties were registered to the same plot of land concurrently which appeared to cause issues for Mummery LJ who felt the need to consider the state guarantee for a proprietor in possession and how the legislation has the ability to cater for those who lose their land via a mistake.[170] In *Parshall* there was a conflict with the issue of a double registration, given the starting point for both parties should be that the registered owner would be given priority via s58, and in this case they were both registered. The case was decided partly on the off-register position and weight was given to the party in possession of the land in question, and as a result they were given the priority. Notably where 'C' is in possession of the land, as in *Parshall* or *Malory* (discussed earlier), rectification can only be ordered if 'C' consents to the alteration, he has contributed to the mistake by way of fraud or lack of care or it would be unjust for the alteration not to be made.[171]

Lees contrasts the decisions in *Gold Harp* and *Parshall* to that of *Walker v Burton.*[172] She states that the two cases are somewhat at odds by their legal arguments and judicial reasoning, in fact, Dixon considers the decision in *Walker* to be akin to marmite – you will either love it or hate it.[173] *Walker* consisted of a case brought against the title owners of land 'A', who had purchased a property and registered with it a large amount of unregistered land referred to as the 'Ireby Fell'. 'A' set about fencing off some of the land that had previously been used as common ground in the village. The action was brought against 'A' by the local community ,'B' , who objected to the registration of the land, yet, perhaps in strange circumstances did not seek to be the title holders

[168] *Ibid*
[169] [2013] EWCA Civ 240, [2013] Ch 568
[170] *Parshall v Hackney* [2013] EWCA Civ 240, [2013] Ch 568 [95]
[171] Schedule 4 of the LRA 2002 Paragraph 3 (2) (a and b) and 6 (2) (a and b)
[172] *Walker v Burton* [2013] EWCA Civ 1228, [2014] 1 P & CR 9
[173] Martin Dixon, 'The past, the present, and the future of land registration' [2013] Conv 6

themselves. In *Walker* the rectification was refused on the basis that 'A,' the title holder, was in the possession of the land and more so it was held that there was no reason for it to be held that it would be not to be unjust not to rectify.[174] In contrast to both *Gold Harp* and *Parshall* which appear to have been decided on the basis of who ought to have been registered should have been registered.[175] Furthermore, this appears to have been based on the argument that there was no one to rectify the land back to, and therefore by not rectifying the register there was no injustice said to have been caused, and it was not unjust not to rectify.

In Walker the land was retained by 'A' even though it could potentially be argued that there was no basis for them to be. 'A' had registered themselves as the first owners of what was previously unregistered land and had not faced opposition from the 'owners' but rather the local villagers who used some of the land as common ground. It would have been interesting to see the outcome of this case should the original owner of the land have been located by the villagers who sought the rectification of the register or if indeed the villagers had sought to have the land registered to themselves.

It can be seen that there is no absolute guarantee for those registered on the land register that they will keep their land should a challenge be made. The suggestion by the author is therefore that title guarantee is simply a form of *qualified indefeasibility* or a mere *policy aspiration*. Regarding the conclusiveness of the register, the author considers that a case may be made out to say that the register is therefore somewhat conclusive. Until challenged, the registered title is 'conclusive' in that it clearly shows at that point in time who the registered owner is and not who it could be potentially and for that reason it should be all that is needed to satisfy the purchaser in land when making any relevant searches. These issues coupled with the fact that a challenge to a registered title can be made at any point suggests that the state guarantee to title is a difficult and complex area of the LRA 2002 and one that does not appear to promote the security and stability that was envisioned. It highlights also the difficulty the Act has in balancing the dual aims of protecting rights and interests and facilitating a smooth

[174] n (172) [39]
[175] Emma Lees, 'Guaranteed Title: No Title Guaranteed' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018) Chapter 7,102

conveyancing process. One suggestion by Lees is that in order to resolve the issue of state guarantee a decision must be made to decide the relationship between the rules of conveyancing for unregistered land and the land registration system.[176] Lees is perhaps suggesting that the conflict in land registration is further complicated by the rules of unregistered land and registered land, which should in theory be two distinct systems, yet the overlap between the two is clearly apparent at times.[177]

A clear theme from the case law is that the tension between *static* security and *dynamic* security is affecting the outcomes of cases. The register which is considered to be conclusive due to s58 is open to challenge from those who seek to have an alteration or a rectification made at any point in time. Furthermore, it can be seen from the case law that has been discussed so far that the LRA 2002 is not always protecting the registered owner as it should do by virtue of s58 and at times the registered title has been returned to 'A' who should not be protected if the LRA 2002 is to be narrowly followed, and this theme is explored further in the sub-section below.

In order to conclude this sub-section, we can say that the LRA 2002 seeks to promote a conclusive register. One of the policy aims of the Act is that people can rely fully on the register and once registered they can be satisfied that their title to land is secure. This promotes stability in dynamic transactions in land. In an A-B-C scenario this would be seen as the protection of C. Case law shows that this policy aim is one which is not always consistently applied and shows that in fact, the judiciary at times seek to protect 'A' and have the land returned to them. What is apparent from the case law and the views of academics, is that this is a widely disputed area of the Act and one which causes concern for the Law Commission and academics alike. The author concludes that although the Act seeks to promote a conclusive title in land, this is not always the case.

[176] *Ibid*
[177] n (175)

## 2.2 Alteration of the land register: Mistaken and fraudulent transactions in the LRA 2002

One of the policy aims of the LRA 2002 was to make land ownership and conveyancing a straightforward process and one which has adds stability and security to those who purchase land. The emphasis within the LRA 2002 is focused upon the ability that you can now purchase land with ease, and the land that you purchase is then registered in your name on the land register and in turn this registration is a form of security. This is in theory the suggested 'conclusiveness of the register' by way of s58 of the LRA 2002. However, as described in the previous sub- section, this is often not the case. Pownall and Hill state that since its enactment the LRA 2002 has created difficulty and complexity rather than stability and security,[178] a view that the author considers to be true. It is submitted that the land register is seen to be somewhat of a balancing act and the issues to be balanced out are those of the rights of the registered owner of the land and that of any competing claims to the legal title, i.e., the balance between *static* and *dynamic* security in land. Much of the complexity and difficulty has been attributed to the lack of clarity surrounding the understanding of 'mistake' within Schedule 4 of the LRA 2002. This sub-section considers the issues that the term 'mistake' has created within the LRA 2002.

A significant part of this thesis is concerned with what happens when a 'mistake' occurs and in addition, knowing what constitutes as a 'mistake' for the purpose of the provisions of alteration of the register and indemnity. Case law shows that 'mistake' takes on many forms and can be both a genuine mistaken entry, an omission, or a fraudulent entry on the register, to name a few of the broad circumstances it has encompassed. In considering the A-B-C disputes with which this thesis is concerned, a 'mistake' on the register can in effect cause an innocent party to lose their land through no fault on their part. This person is 'A' in the chain of transactions. A 'mistake' on the register can also have an effect on the third-party purchaser of land and property who is essentially 'C' in the A-B- C scenario. It is suggested that there will always be someone in any of these land ownership scenarios who will lose out be it 'A' or 'C',

[178] John Pownall and Richard Hill, 'The Land Registry's Perspective' in Amy Goymour, Stephen Watterson and Martin Dixon (eds),*New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018) 19

although ‘C’ is sometimes offered protection by virtue of s58 of the LRA 2002. In essence, the balance appears to be for the judiciary in making a decision based on the LRA 2002 as to which of the innocent parties has the best of the competing claims for the land.

Schedule 4 gives both the Land Registry and the courts the power to alter the register[179] and in effect to correct a ‘mistake’ that has occurred. There are two types of alteration, one is rectification, and one is administrative alterations, and this thesis is concerned mainly with the former. The power to alter the land register is a power that has always historically been conferred by statutory provision. [180] This is seen to be the establishment of a legislative scheme for alteration which is described by Cooper as being controversial ever since.[181] The provision for the alteration of the register has attracted much controversy and has been discussed at length within the 2018 Law Commission Report.[182] A fundamental requirement of the LRA 2002 is that both alteration and subsequently rectification of the register, are triggered by a ‘mistake’ or for alteration alone by other means as described in the Schedule 4 LRA 2002.[183] If a ‘mistake’ is held to have occurred then the ‘mistake’ can be altered by means of applying to the Land Registry or in certain circumstances the court. This alteration can be the removal of the ‘mistake’ and in some instances the re- registration of another (rectification). What is held to constitute a ‘mistake’ lacks consistency and decisions can be somewhat arbitrary. It is the rectification of the register, which links to the provisions for an indemnity in Schedule 8. As we have seen in chapter 1, rectification is classed as a sub species of the alteration provisions in Schedule 4, and they are found in Schedule 4 (1) a and b and involve the correction of a mistake which prejudicially affects the title of the registered proprietor. It is therefore a two-stage test. All of this is helpfully set out diagrammatically by Bevan.[184]

If it is discovered by an individual (or indeed a company or more than one individual, this can take on several forms) that a title in land has been registered erroneously on

[179] Schedule 4 (2) the power of the court Schedule 4 (5) the power of the registrar
[180] Hansard HL Deb. vol. 313 cols 27-28 (3 March 1887), proposing the Land Transfer Bill 1887, cl. 16 (1. The first statutory embodiment occurred in the Land Transfer Act 1897, s. 7(2)
[181] Simon Cooper, ‘Regulating fallibility in registered land titles’ [2013] C. L.J 72 (2)
[182] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018) at Chapter 13
[183] Schedule 4 of the LRA 2002
[184] Chris Bevan, *Land Law*(Oxford University Press 2018) 99

the register or that they believe it has been so, then an application for the alteration of the register can be made. In order to apply for the alteration of the register an application is made via form AP1 form which is sent to the Land Registry to be dealt with by one of their solicitors.[185] When the AP1 form is received it will be assessed on the basis of the evidence that it provided with the form and this is done so on the balance of probabilities. The evidence provided must fulfil the criteria given within Schedule 4 of the LRA 2002 Para 2 and 5.[186] The issue for the Land Registry to decide is whether the evidence demonstrates that an alteration is required and whether that alteration amounts to rectification of the register.

A major consideration by the Land Registry is; who is in possession of the land in question at the time of the application, with Schedule 4 offering the partial statutory defence of a proprietor in possession.[187] For the type of alteration that amounts to rectification of the register, as we have seen in the above sub-section, special protection is given to a proprietor who is in possession of the land under the LRA 2002.[188] A proprietor in possession can give consent for the alteration of the register. However, without consent alteration / rectification of the register can only be made if (1) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or (2) it would for any other reason be unjust for the alteration not to be made.[189] A further hurdle to be faced is contained within Schedule 4 (3) (3), which states that 'if in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify it not doing so'. The test is set at 'exceptional' which could be argued is something of a high test to satisfy. By using the example of *Walker* in which the Judge held that it was not unjust for the alteration not to have been made, the Judge would have had to justify this to the exceptional circumstance for not doing so. It could be argued that in *Walker* the facts of the case were slightly unusual as there was no original owner seeking rectification of the register and therefore that could be classed as the 'exceptional circumstances'. It would be

[185] At present there are approximately 116 qualified lawyers who are employed at the Land Registry (John Pownall and Richard Hill, 'The Land Registry's Perspective: The Practical Challenges of Land Registration' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018)
[186] Schedule 4 Paragraph 2 is the criteria for all court made alterations to the register, paragraph 5 is for all alterations that can be made bey the registrar.
[187] Schedule 4 (3) 2 and (6) 2
[188] LRA 2002 Schedule 4 Para 3 (2) and 6 (2)
[189] LRA 2002 Schedule 4 Para 3 (2) a & b and 6 (2) a & b

interesting, as mentioned before to see what the results may have been should the prior owners of the land seeking the rectification. It is therefore submitted by the author that it is likely that only a very small number of proprietors who are in possession of the land and who face rectification would consent to such. As a result, Lees contends that the second provision above (2) it would for any other reason be unjust for the alteration not to be made, is one most widely relied upon in the courts to justify rectification.[190]

Goymour considers that the protection for a proprietor is generally afforded to 'registered proprietors in possession.'[191] Goymour suggests that this particular defence of being in possession of the land is not as strong as previously considered[192] and may be exemplified by reference to *Baxter v Mannion*[193] in which a squatter, 'B', had become registered in place of 'A' by way of adverse possession. 'A' sought to have the land rectified and 'B' objected, being in possession of the land. It was held that the possession of the land was worthless as it was held under the rules of adverse possession that this was not for the required period. In *Baxter*, Henderson J concluded that 'I am satisfied that in all the circumstances it would be unjust for the register not to be rectified.'[194] Henderson J therefore defeated the defence of a proprietor in possession by relying upon the provision of Schedule 4 (3)(2)(b) it would for any other reason be unjust for the alteration not to be made

In contrast, *Malory Enterprises Ltd v Cheshire Homes Ltd UK,*[195] which was decided by reference to the LRA 1925 and considered briefly earlier, has been criticised for its reasoning as there was a strong emphasis on the protection of the person who was in occupation of the land and who was not registered. In *Malory* a sham company 'B' was set up in the same name as Malory Enterprises Ltd, 'A', 'B' sold the land in question to 'C' Cheshire Homes Ltd UK who carried out work on the land, yet it was held that 'A' (Malory Enterprises Ltd) remained in occupation throughout.[196] *Malory* was

[190] Emma Lees, 'Guaranteed Title: no Title, Guaranteed' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018)
[191] Amy Goymour, 'Mistaken registrations of land: exploring the myth of "title by registration" [2013] C. L. J. 72 (3)7
[192] *Ibid*
[193] [2010] EWHC 573 Ch [2010] 1 W. L. R 1965
[194] *Ibid at* [63]
[195] [2002] Ch 216
[196] Ibid at [10]

decided on the basis of an establishment of a trust which reasoning has now been rejected,[197] although a main thrust of the reasoning was around who was in possession of the land and whether it was 'A' or 'C', this has been considered above.

*Walker v Burton*[198] involved a proprietor in possession of the land against whom rectification was sought. In *Walker* 'B' were the local villagers who sought to have title in land which was registered to 'A' altered to remove 'A's title by way of the Schedule 4 provisions. 'A' had possession of the land and as a result the only way in which title could be altered, as discussed earlier, would be if the proprietor consented to such action and failing that by either of the two caveats: he has by fraud or lack of proper care contributed to the situation or finally it would be unjust for the alteration not to be made.[199] 'A' in *Walker* did not consent to such an alteration and a further issue in the case was the fact that the original owners of the land did not seek the rectification as they were unknown. In *Walker* it was held that s58 had great strength and much reliance was placed upon the provision. It was held that as 'A' the registered proprietor was in possession of the land and that they did not consent to any form of alteration/ rectification nor had they contributed to the proposed 'mistaken' entry. The only route for the judiciary to explore was therefore the question of 'whether it would be unjust not to rectify the register'.[200] It was held that there could be no reasoning along these lines and therefore no rectification of the register was ordered, on the footing that the villagers did not claim title to the disputed land. 'A' in this case kept the land that they were in possession of. It is worth considering again if the final decision may have been different should it have been the original owners who made the application for the rectification of the register.

It can be seen that the LRA 2002 seeks to provide protection to those who are in possession of the land. This too, is fact specific and can perhaps be referred to as a qualified form of protection. As seen in *Malory* protection was afforded to those who were in possession of the land that had in effect been lost via a mistaken transfer.

[197] Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Land Law, Text, Cases and Materials* (First published in 2009, Oxford University Press 2018) 720.This was referred to as the Malory 1 argument and has been discussed earlier in the thesis.
[198] [2010] EWCA Civ 1228, [2013] 43 E.G. 126 (C. S. ) (CA (Civ Div)
[199] The Land Registration Act Schedule 4, Section 3 (2) (a) and (b), Section 6 (2) (a) and (b)
[200] Schedule 4, Para 3 (2) a & b and Para 5 (2) a & b

However, in both *Baxter* and *Gold Harp* protection was not afforded to those in possession and rectification of the register was granted against them. What can be observed is that each of the three cases were factually very different. In *Malory* the land in question had been partially fenced off by 'A', who sought to build property on the land. This partial fencing off of the land was deemed enough to qualify as a proprietor possession in the eyes of the Court. In both *Gold Harp* and *Baxter*, the title holders 'B' were in possession of the land, yet this possession was not sufficient enough for the register not to be rectified against them. Notably in *Gold Harp* the conduct of 'C' had been considered by the Court and in Baxter the title of 'B' was obtained following their occupancy as a squatter on the land of 'A', these facts may have had an impact on the way in which the judiciary determined the case.

As has been considered, there are many different types of category of 'mistake' for the purpose of the LRA 2002. The issue with the term 'mistake' is the lack of statutory definition which leaves the term open for judicial interpretation. This is vitally important from the point of view of the rectification provisions under schedule 4 LRA 2002 because, as we have seen, before the rectification provisions can kick in there must be the correction of a mistake. This will form the discussion to the final part of this sun-section. For now, we will consider the different categories of mistake. Some forms of 'mistake' that are clear, such as a mistaken entry by a member of staff at the land register or a solicitor who has entered incorrect names onto official paperwork, are regarded as simple administrative alterations. Other variations of 'mistake' though are far more complex and diverse. Ruoff and Roper give a definition of what 'mistake' could be,

> Mistake is not itself specifically defined in the 2002 Act, but it is suggested that there will be a mistake whenever the registrar (i) makes an entry in the register that he would not have made; (ii) makes and entry in the register that would not have been made in the form in which it was made; (iii) fails to make an entry in the register which he would otherwise have made; or (iv) deletes and entry which he would not have deleted; had he known the true state of affairs at the time of the entry or deletion[201]

[201] Ruoff and Roper registered conveyancing, loose leaf, para 46.009

The explanation by Ruoff and Roper clearly set out the situations in which a 'mistake' may occur for the purposes of then altering the land register. This reasoning has been cited with approval within case law.[202] Cooper has considered that a statutory definition of the term may provide better guidance to give a clearer meaning to the term in case law.[203] Cooper's proposal for a statutory definition of 'mistake' to be within the alteration provisions of LRA 2002 has been doubted by the Law Commission in the 2018 Report who state that a statutory definition of 'mistake' may add more difficulties to the law, by narrowing the scope of what mistake can mean.[204] The author agrees with Cooper, that a statutory definition may add some form of clarity to the term 'mistake'. However, the author considers a 'statutory definition' may cause more issues than the lack of one does currently as it may curtail any amount of flexibility that the Act contains.

Lees has made the comment that defining 'mistake' will not resolve the problems that lie with Schedule 4 of the LRA 2002.[205] Lees considers that the issues with Schedule 4 of the LRA 2002 are more complex than that of fixing the definition of a term. Lees states that no consensus has arisen as yet to how 'mistake' is to be interpreted due to the reasoning that not one of the definitions provided 'accord with the logic of the LRA 2002'.[206] Lees states that commentary on this area of the LRA 2002 and subsequent case law has only added to the issues with 'mistake' as opposed to providing a form of coherence.[207] The issue with the lack of an understanding as to what is a 'mistake' for the purpose of the alteration of the register can have potentially 'unfortunate consequences,' in that if there is no 'mistake' then there can be no rectification or alteration of the register, and furthermore, no indemnity may then be payable.[208] Deciding whether or not a 'mistake' has occurred has wide reaching consequences for

[202] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018) at 13.15 The definition by Ruoff and Roper has most recently been cited within *NRAM v Evans* [2017] EWCA Civ 1013
[203] *Ibid* at 13.17
[204] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018) at 13.17, 13.18
[205] Emma Lees, 'Title by Registration: Rectification, Indemnity and Mistake and the Land Registration Act 2002 [2013] MLR (76) 1
[206] *Ibid*
[207] Emma Lees, 'Guaranteed Title: No Title, Guaranteed' in Amy Goymour, Stephen Watterson and Martin Dixon (eds),*New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018) Chapter 7
[208] Emma Lees, 'Title by Registration: Rectification, Indemnity and Mistake and the Land Registration Act 2002 [2013] MLR (76) 1

the parties involved, and for the consistency in the law Lees has stated that it is 'crucial that a resolution to this issue be found'.[209]

Lees considers that the leading authority on the definition of 'mistake' within the alteration provisions is *Knights Construction v Roberto Mac.*[210] This authority has been considered to be up for grabs.[211] *Knights* consisted of a 'mistaken' registration to the Salvation Army 'B' when the land in question was never meant to have been registered to them. The land should have been registered to Knights Construction 'A'. Should the transaction have stayed between 'A' and 'B' then the resolution may have been swifter and less complex. However, the land in question was sold to Roberto Mac 'C' by the Salvation Army, and Roberto Mac was duly registered as the legal owner at the land registry. The issue in question was could the registration of Roberto Mac be classed as one that was 'mistaken', and could the register be altered via the provision for rectification to register Knights Construction as the legal owner of the land?

In considering *Knights Construction v Roberto Mac*[212] as an A-B-C dispute 'A' would be Knights Construction, 'B' is the Salvation Army and 'C' is Roberto Mac. Both 'A' and 'C' are innocent parties in the scenario, as A's registration was removed and that of 'B' registered in place of them. The disposition from B-C is valid due to the combined effect of s58 of the LRA 2002 and the trio of owner's powers found in s23, 24 and 26. The issue for the courts is  to which of the innocent parties (A or C) should the land be registered. The issue should be simple as the LRA 2002 seeks to protect 'C'. However, this is not always the case and things are not always so straightforward. It was held that the title of 'C' (Roberto Mac) could be removed from the register and 'A' (Knights Construction) could be entered on the register as the true owner of the land. Rectification of the register had been granted.

In *Knights* 'A' were in occupation of the land in question which made the issue one that was slightly easier to decide. The Adjudicator suggested that this was in accordance

[209] *Ibid*
[210] [2011] EWLandRA 2009_1459, [2011] 2 EGLR 123
[211] Emma Lees, 'Guaranteed Title: No Title, Guaranteed' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018) Chapter 7
[212] [2011] EWLandRA 2009_1459, [2011] 2 EGLR 123

with the decision in *Malory 2,*[213] with added protection given to those in actual occupation of the land.[214] In considering the mistake, the adjudicator referred to the case of *Ajibade v Bank of Scotland*[215] and suggests that the cases are of a similar nature, and in which it was held that 'mistake' could include correcting further entries on the register that were direct results of the original 'mistake'.[216] The Adjudicator states:

> I am therefore satisfied that the remedy of rectification is available in the present case to Knights Construction. It would be so available whether, adapting the two possible interpretations suggested by Lord Neuberger, (a) the original registration of the Salvation Army was a mistake, and, in order to correct that mistake, which here persists, the register should be corrected by removing this part of the land, which should never have been registered at all, 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[217]

In holding that all subsequent registrations following an initial 'mistake' can be also classed as mistaken may have clarified the issue of interpretation of 'mistake' and how such could be resolved. If this model for resolution is to be followed in terms of all A-B-C scenarios, that would mean that if the A-B transaction could be classed as 'mistaken', then following on from that, so could the transaction from B-C and so on. Clarification of 'mistake' is considered to have occurred in *Knights Construction,*[218] yet, it appears that 'mistake' is still being debated and considered in other cases.[219] A further leading authority on 'mistake' is *NRAM Ltd v Evans*[220] which was cited with approval in *Antoine v Barclays Bank Plc.*[221]

[213] [2002] EWCA Civ 151, [2002] Ch 216
[214] [2011] EWLandRA 2009_1459, [2011] 2 EGLR 123 at [53]
[215] (REF/2006/0163 AND 0174)
[216] *Knights Construction v Roberto Mac* [2011] EWLandRA 2009_1459, [2011] 2 EGLR 123 at [58]
[217] *Knights Construction v Roberto Mac* [2011] EWLandRA 2009_1459, [2011] 2 EGLR 123 at [131]
[218] Emma Lees, 'Guaranteed Title: No Title Guaranteed' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018) Chapter 7
[219] Mistake has been debated within *NRAM Ltd v Evans* [2017] EWCA Civ 1013, [2018] 1 WLR 639 and *Antoine v Barclays Bank Plc* [2018] EWHC 395 (Ch), [2018] 4 WLR 67
[220] [2017] EWCA Civ 1013, [2018] 1 WLR 639 at [51]
[221] [2018] EWHC 395 (Ch), [2018] 4 WLR 67

In *NRAM Ltd* Kitchin LJ stated that the term 'mistake' encompasses a broad yet uncertain scope to enable it to encompass a wide range of circumstances.'[222] In *NRAM ltd* it is stated that the definition of mistake provided in both *Megarry & Wade: The Law of Real Property* and that of *Ruoff & Roper, Registered Conveyancing* were both correct.[223] Kitchin LJ makes the comparison in *NRAM* Ltd between a void and voidable disposition in clarifying what the consequences are for 'mistake'.[224] Kitchen LJ relied upon the definition of void and voidable found in Emmet & Farrand[225] which states;

> On the one hand, if a registered proprietor loses his land because of something rendering a disposition only *voidable* —like misrepresentation (fraudulent or innocent), undue influence or lack of capacity—there will be no mistake to correct, no rectification (and no indemnity from HM Land Registry …). This seems certainly so if a bona fide transferee/chargee for value has become registered and, arguably, it might strictly be so against any proprietor despite the disposition to him being avoided. On the other hand, if a registered proprietor loses his land through a *void* disposition—because of forgery, non est factum, fundamental mistake, defective execution of the transfer, lack of title—there will be a mistake to correct so that rectification and/or indemnity should be claimable by him …"

The definition here is clear and to the author the statement makes sense, yet often as seen, the facts of a case may not be so clear cut and easy to resolve. *NRAM Ltd* considered a voidable disposition and whether that voidable disposition was in fact a mistake. One important factor that *NRAM Ltd* considered was that if something was not a 'mistake' at the time of the registration it cannot become a 'mistake' afterwards.[226] Lees states that historically 'there has been a large amount of focus on the *extent* of such 'mistakes' in land registration', [227] focusing on the fact that previously there has

[222] *NRAM Ltd v Evans* [2017] EWCA Civ 1013, [2018] 1 WLR 639 at [48]
[223] Ruoff and Roper, *Registered Conveyancing*, (loose leaf ed), Para 46.009 (this has been considered already in the thesis) and Megarry & Wade,*The Law of Real Property* (8th edition,2012) para 7-133: 'what constitutes as a mistake is widely interpreted and is not confined to any particular kind of mistake. It is suggested therefore that there will be a mistake whenever the registrar would have done something different had he known the true facts at the time in which he made or deleted the relevant entry in the register, as by (i) making an entry in the register that he would not have made or would not have made in the form it was made; (ii) deleting an entry which he would not have deleted; or (iii) failing to make an entry in the register which he would have otherwise have made'
[224] n (220) [55]
[225] *Emmet & Farrand on Title* (Loose-leaf ed) vol 1, para 9.028
[226] Kester Lees 'NRAM v Evans: there are mistakes and mistakes…' [2018] Conv 1
[227] *Ibid*

been a focus on how many of subsequent transactions in land could be 'unraveled' as a result of the initial mistake.[228]

*Antoine v Barclays Bank UK Plc*[229] offers some clarity. The Court of Appeal held that a register entry made pursuant to a court order subsequently set aside is not classed as a 'mistake'. The important aspect of the case was the consideration of the term 'mistake',

1) Mistake is only generated by a void transaction and not one that is voidable, even if that transaction has been set aside.

2) The facts of the case and the definition of mistake should be taken as when the entry occurred in the land register.

3) Mistake does not rely on the knowledge of the registrar, as it is not the place of the registrar to make enquires as to whether a mistake has occurred. Hindsight cannot be considered.[230]

*Antoine* considered what is meant by mistake but only in certain factual situations., It adds clarity in one area, but not in others. Unfortunately, this can only add to the piecemeal development of the clarification of the term.

One conclusion which may be ventured is that 'mistake' falls into two distinct categories. For the purpose of clarification, they are a 'fraudulent mistake' and 'mistake' as a standalone entity.[231] Lees considers this and makes the comment that cases of forgery are treated in a different manner to that of other forms of 'mistake'. It has been discussed that a forged disposition is classed as one which is fraudulent and therefore void which in turn can qualify as mistaken. However, it has been considered previously that not all forged or fraudulent disposition fall into this category of void

[228] n (226)
[229] [2018] EWCA Civ 2846; [2018] 4 W. L. R 67
[230] Simon Cooper, 'Register entry pursuant to a court order subsequently set aside' Antoine v Barclays Bank UK Plc [2018] EWCA Civ 2846; [2018] 4 W. L. R 67
[231] Emma Lees, 'Registration make believe and forgery- Swift 1st Ltd v Chief Land Register' [2015] L. Q. R

and some are considered merely voidable. Lees also points out though that not all cases of fraud involve a forged disposition and therefore this requires what Lees considers to be some thought when making a decision.[232] It may be considered following *Knights Construction* that it is settled that all subsequent transactions following a fraudulent mistaken one can be altered. This proposition can only create a form of unfairness for 'C', the last innocent party in the scenario, as their title is susceptible to rectification because of the original mistaken transaction.

*Parshall v Hackney*[233] consisted of a mistaken double entry on the register, where both parties had been registered with the absolute freehold at the same time. 'A' was registered first and 'B' later. The *mistake* was compounded further when in 2000 the land registry computerized its plans and in doing so removed the land from the plan of Parshall who is referred to as 'A,' and in error registered the land solely to Hackney, 'B'. 'A' sought to rectify the register against 'B' and have the land returned to him via rectification. 'B' sought to rely on the fact that they had possession of the land (a parking space) and was thus relying on adverse possession as opposed to that of the registration of legal title. In brief, the Court of Appeal held that 'B' was unable to rely on the ground of adverse possession, based on the argument that it is impossible to be in adverse possession of land in respect of which you hold registered title.[234]

The issue for the Court of Appeal was to decide which of the two registrations of the land (be it one had been removed from the register erroneously) was the correct one.[235] The issue was whether the land should be rectified back to 'A' or whether 'B' should retain legal title. 'B' s registration was perhaps an obvious 'mistake' yet, by virtue of the guarantee of title (this case was decided under the LRA 1925), 'B' was registered as the legal title owner at the time that the case was heard and furthermore there was no fraud or fraudulent activity. The Deputy Adjudicator found that the land should not be

[232] *Ibid*
[233] [2012] EWHC 665(Ch), [2013] EWCA Civ 240
[234] [2013] EWCA Civ 240 at [97]
[235] Mummery J considered that the starting point for this case was that there was equality between the two titles whilst they were both concurrently registered [2013] EWCA Civ 240 at [89]. Goymour and Hickey consider that this was the wrong starting point and the starting point should have been the *relativity* of titles. Amy Goymour and Robin Hickey, 'The Continuing Relevance of Relativity of Title Under the Land Registration Act' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018) Chapter 6

rectified back to 'A' but instead 'B' should remain with the legal owner, and this was based upon the argument of the adverse possession of 'B'. The Deputy Adjudicator pointed out that if the adverse possession argument was not made, he may have been likely to rectify title to 'A'. The High Court was also in agreement with this.[236] The Court of Appeal held that 'mistakes' that occurred and resulted in a concurrent registration of title could be rectified, although, in *Parshall* it was held that 'B's title, despite the fact that they were in possession of the land, the title owner could still face rectification of the register, which they did when rectification of the register was ordered against them.[237]

It is suggested that *Parshall* has had far reaching consequences in the area of law concerning the rectification of the register.[238] In *Parshall* it was held that a concurrent registration in land, that is two different owners of the land at the same time can only be resolved by way of rectification and indemnification.[239] This case has been the subject of critical analysis and the suggestion by Lees is that the case is ripe for a revision by the Supreme Court.[240] Lees states that the decision in *Parshall* has potentially created uncertainty stating that the court in this case has relied more on the actual possession of the land rather than the 'previously well- established understanding of title'.[241] The case was therefore decided upon the principles of the off register position in which it was again considered that that those who ought to be registered should be so, and in doing so rectification occurred.

*Parshall* concerned the Land Registration Act 1925 and not the Land Registration Act 2002. It is however a good example of what is perhaps a clear or simple 'mistake' made by the land registry and how the courts deal with such matters. Lees makes the suggestion that the argument that *Parshall* was a leading case on issues of double

[236] [2012] EWHC 665(Ch)
[237] One point made during the hearing of the case by Mummery J was 'the points force- fully advanced by Mr Roger QC against rectification could not disguise the plain unvarnished fact that his client is seeking to take the benefit of a mistake by the Land Registry, which had occurred through no fault on the appellants side' ([2013] EWCA Civ 240 at [97]). Mummery J focusing on the point that the respondent has used the 'mistake' to their benefit and perhaps to some extent dishonestly.
[238] Kester Lees, 'Parshall v Hackney: A Tale of Two Titles' [2013] Conv 3
[239] *Ibid*
[240] Kester Lees, 'Parshall v Hackney: A Tale of Two Titles' [2013] Conv 3
[241] *Ibid*

registration is incorrect and one that has attracted criticism.[242] Milne considers that the Court of Appeal case of *Rashid v Nasrullah*[243] has overruled *Parshall*. The case was to determine whether an application for alteration of the register could be made. Rashid 'A' was the original proprietor and fell foul of a forged disposition, 'B' then sold on the property to 'C' (who was in fact his son) 'A' applied to alter the register for the correction of a 'mistake'. To allow for the alteration of the register it was decided that there was the imposition of a constructive trust on the fraudster in question. The suggestion by Milne is that although *Rashid* is considered to have overruled *Parshall* on the point of double registrations that are mistaken, it has left uncertainty in the imposition of the constructive trust which is one that will hopefully be clarified soon.

Injustice can also affect 'A' in the terms of understanding what is meant by 'mistake', to which the discussion moves to conclude this subsection. This can be seen in the case of *Barclays Bank v Guy*[244]. In *Guy* 'A' (Guy) transferred title to 'B' (Ten Acre). 'A' argued that this was induced by way of fraud and therefore 'A' (Guy) contended that this was voidable. 'A' also argued that the transfer could be void under the rule of *non-est factum.* 'B' without knowledge of 'A' secured debts against the property by way of a registered charge who shall be referred to as 'C' (Barclays Bank) without the knowledge of 'A'.[245] 'A' sought to have the register rectified to remove both 'B' and 'C'. 'C' argued that the charge was valid, and rectification could not occur. It was held in *Guy* that although the registration of 'B' was a 'mistake' the registration of the charge by 'C' was not held to be a 'mistake' by virtue of s58 of the LRA 2002 and the provisions for owner's powers. The decision in *Guy* was followed by a Court of Appeal decision based on application for permission to appeal.[246] The application was dismissed as it was deemed the transaction between 'B' and 'C' was not a 'mistake' as the bank were unaware of the fraudulent activity.[247]

[242] *Ibid* and see also L Xu, 'What do we Protect in Land Registration?' [2013] L. Q. R. 129
[243] [2018] EWCA Civ 2685: [2019] 1 P. & C. R. DG18: [2018] 11 WLUK 493 (CA (Civ Div))
[244] *Barclays Bank v Guy* [2008] EWHC 1248 (Ch)
[245] The charge was over £110,000,000.00
[246] [2008] EWCA Civ 452
[247] *Ibid* at [23]

Schedule 4 of the LRA and the definition of 'mistake' has been considered in *Guy* and has highlighted the difficulty that comes with interpreting what can be classed as a 'mistake'. In considering 'mistake' in *Guy* Lloyd LJ states:

> it seems to me that it is necessary to grasp the nettle of what is meant by 'mistake' in that respect, while the scope of the phrase 'correcting the mistake' is no doubt something that requires to be explored and discussed and developed in the course of future litigation, which will be decided on the facts and the merits of each case[248]

It is submitted that Lloyd LJ is making a reference to the fact that as each case has different starting points and different factual matrices, therefore it would then be potentially dangerous to establish a statutory interpretation of the term, a view that has been expressed by the author. Lloyd LJ considers that case law in time would determine the future of the definition of 'mistake'.[249] Yet given that it is now several years post *Guy* it is difficult to see how or when clarification will be made. To suggest that future case law will be the decider is perhaps a little unsatisfactory as cases will constantly be held on their case facts alone with no indicator of telling how they will be decided due to the lack of satisfactory precedent. It could be submitted that a lack of precedent will therefore erode the much-needed principle of certainty in land law though the writer's opinion remains the same in that a statutory definition would not be of benefit.

This issue of a definition of 'mistake' in land registration disputes has appeared steadily before the courts and tribunals on many occasions prior to and following the LRA 2002. There has been, as discussed, no firm precedent on how the matter should be resolved although it appears that 'mistake' is beginning to be classified into certain categories such as fraudulent, forgery and simple mistakes. In considering if a 'mistake' has occurred Lees states that the court should ask itself three questions. These problems reflect the courts position when considering further problems of rectification or indemnity:

1) Has there been a mistake
2) What steps should go into correcting the mistake

[248] [2008] EWCA Civ 452 at [23]
[249] [2008] EWCA Civ 452 at [23]

3) Are any of the parties to the dispute entitled to an indemnity whether or not the register has been rectified.[250]

This is quite a simplistic view by Lees but does offer a basis from which the courts could offer a solution. However, it should be noted from this thesis that all 'mistakes' on the register are not clear and furthermore 'mistakes' on the register can result in further dispositions and an onward chain to which the issues become more complex and diverse. So far, this thesis has considered 'mistake' for the purpose of both the alteration and the rectification of the register and will move on to consider the narrow and the wide application of Schedule 4 before moving towards the indemnity process which is a form of protection for those who suffer a loss from the rectification process.

***The narrow view to the correction of a mistake***

The previous sub-section has considered the various categories of 'mistake' within case law for purposes of the Schedule 4 provisions. It appears from the case law that mistake is not yet fully defined and that different factual scenarios in cases provoke different outcomes. This may to add to the flexibility of the legislation, or it may create outcomes that are not consistent with the overall aims of the LRA 2002. The suggestion is that often the application of the LRA 2002 concerning the application of Schedule 4 and the understanding of 'mistake' falls into two categories which are that of the narrow and the wider view. It is the narrow view that will be considered first.

The narrow application of the LRA 2002 sees a total rejection of general property law rules and that of unregistered land.[251] The only way in which 'C' would not be protected by the LRA 2002 would be if it were considered there was a flaw in the disposition that was prior to 'C' becoming registered (a void disposition). It is considered there is still however a lack of clarity in determining what is meant by 'mistake'. Goymour considers the protection of 'C' via the narrow application of the LRA 2002 to be

[250] Emma Lees, 'Title by Registration: Rectification, Indemnity and Mistake in the Land Registration Act 2002 [2013] M.L.R. 76 (1)
[251] Amy Goymour, 'Mistaken registrations of land: exploring the myth of "title by registration" [2013] C. L. J. 72 (3)

following the concept of formalism[252] which is consistent with idea of the narrow application. Considering that the narrow application of the LRA 2002 follows the statute literally and to give it the meaning it intended, then it is interesting to see the criticism of such, as inflexible and rigid.[253] The discussion now moves on to consider how the narrow application of the LRA 2002 provisions can be seen as inflexible and rigid in order to consider if this is a valid criticism of the LRA 2002.

A case in which the formalist view and the narrow application of the LRA 2002 were seen to be used was that of *Stewart v Lancashire Mortgage Corporation Ltd*[254] in which Goymour stated there was some reluctance to find for 'C'. The Adjudicator considered the formalist approach and suggested a balance between what parliament would have preferred from a policy point of view.[255] This is a good example of the Adjudicator attempting to make use of the Act to produce a result that reflects what Parliament intended. 'A' (Stewart) was the registered proprietor of land when a forged transfer occurred between 'A' and 'B' ('B' was an individual called Choat, and also 'A's brother). 'B' then secured debts on the property by way of registered charge from 'C' (Lancashire Mortgage Corporation Ltd). Upon discovery 'A' sought to have the registration altered to remove 'B' and the registered charge 'C'. It was held that the adjudicator felt conflicted between the decision in *Guy* (considered below) and that of *Ajibade v Bank of Scotland plc*[256]. The Deputy Adjudicator held that 'A' should be restored to the register as the title holder however the conflict lay with whether the charge 'C' should also be removed. It was held that the application be dismissed on the basis of removing the registered charge.[257] The reasoning; that the charges could not be a 'mistake', as it was made legally by reason of the trio of provisions that befall the register owner and also as the 'fundamental objective of the Act is that the register should be a complete and accurate reflection of the state of the title to land at any given

[252] The formalist view is considered by Goymour to firstly see the application of the law from a logical point of view, judges are suggested to follow this idea rigidly and mechanically.
[253] Amy Goymour, 'Mistaken registrations of land: exploring the myth of "title by registration" [2013] C. L. J. 72 (3)
[254] [2010] EWLandRA 2009_ 0086, [2010] EWLandRA 2009_0086. (Unreported, England and Wales Land registry Adjudicator, Deputy Adjudicator to HM Land Registry David Holland, 19 August 2010)
[255] *Ibid*
[256] [2010] EWLandRA 2009_0086. (Unreported, England and Wales Land registry Adjudicator, Deputy Adjudicator to HM Land Registry David Holland, 19 August 2010)
[257] *Ibid* at [73]

time'.[258] A small amount of positiveness that can be construed from *Stewart* is the suggestion from the Deputy Adjudicator that the possibility of an indemnity may be open to 'A' although this was never finalized in the case.[259]

*Barclays Bank v Guy*[260] was decided on the basis of the narrow interpretation of the term 'mistake'. 'A's (Guy) argument was that the transaction between A-B was void or at least voidable, 'C' (the Bank that had effected that charge) sought to rely on the argument that they were protected by virtue of s58 of the LRA 2002 and therefore the registration of the charge could not be considered as a 'mistake' for the purpose of Schedule 4 of the Act. 'C' further based the argument on the basis that 'B' had exercised their owner's powers in relation to the transaction and it was therefore valid. Mowschenson QC[261] considered that 'A's argument was not viable, and the transaction could only be considered to be voidable not void and thus the land could be sold or charges effected by 'B'. 'A' appealed the decision. In the appeal Lloyd LJ considered the issues of the proposed 'mistake' and felt that it may be possible that the transfer from 'A' to 'B' *could* be potentially be set aside, however the charge created by 'C' was still held to be valid and therefore stood.[262]

'A' sought to appeal the decision again and it was considered that the issues raised were of importance to land law.[263] However the appeal once again was rejected, and this was considered to be a final decision on the matter. It could be suggested that the decision in *Guy* was fair in that 'A' had signed the transfer paperwork regardless of the fact they had not given permission for the sale to be executed. 'C' following the case had not lost out on the very substantive charge on the land in question. This can be seen as fair to some considering that 'C' had entered into in a transaction with 'B' that they felt to be valid at the time. 'A' has obviously lost out on a piece of land which was of great value and this may be viewed as be arbitrary result if considered from this point. One valid point is that in *Stewart* an indemnity was possibly open to 'A' yet in *Guy* this was not considered a viable option as it was held that there was no mistaken transfer.

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[258] n (256)
[259] n (256) at [78]
[260] [2008] EWCA Civ 120, [2008] 2 EGLR 74 *Barclays Bank v Guy No 2* [2010] EWCA civ 1396, [2011] 1 WLR 681
[261] Sitting as a Deputy High Court Judge
[262] *Barclays Bank v Guy* [2008] EWCA Civ 120, [2008] 2 EGLR 74 [20-24]
[263] *Barclays Bank v Guy* [No 2] [2010] EWCA Civ 1396; [2011] 1 WLR 681, 685 [21]

The narrow approach of the LRA 2002 and 'mistake' favours the position of 'C' in the A-B-C scenario and follows the literal meaning of the alteration provisions of the Act. To some extent in the two cases discussed above, it can be said that fairness was achieved in that 'C', who had no knowledge of the fraudulent activity has been protected by the statutory provisions, in addition, the statutory provisions have stayed true to the policy aspirations of the LRA 2002. These two cases consist of registered charges but what about where 'C' is an individual purchaser of the land? In *Patel v Freddy's Ltd*[264] which follows the A-B-C scenario factual pattern, 'A' sought the alteration of the register under the rectification provisions of Schedule 4. Goymour suggests that the court sought to rely somewhat on the 'statutory magic'[265] that has been previously considered to be conferred by s58 of the LRA 2002.[266] Such 'statutory magic' confers title onto those registered. Rectification was refused in this case and 'A' only had the option to try for an indemnity following the loss of the land. This decision in *Patel* highlights the difficulties in choosing to rely on the register and that of the LRA 2002 or seeking to bypass such provisions to have a result which could be morally fair. Either way such difficulties do exist and persist within land law to which there appears to be no future resolution.[267]

The final case to be considered under the narrow application is that of *Antoine v Barclays Bank UK Plc*[268] which has clarified an area of the LRA 2002 in relation to Schedule 4[269] The facts in *Antoine* are complex and are simplified here. *Antoine* follows the same A-B-C scenario precedent as previous cases, yet it is the decision which is of importance. The courts were asked to rectify the register via the provisions of Schedule 4 of the LRA 2002. The register was rectified in favour of 'A' but a charge from the bank 'C' remained also on the register also. 'A' therefore sought to have 'C's charge removed from the register. It was held that there was no such power to delete the registered charge, a decision upheld by the Court of Appeal. The importance of

[264] [2017] EWHC 73(Ch) (Ch D)
[265] Amy Goymour, 'Mistaken registrations of land: exploring the myth of "title by registration" [2013] C. L. J. 72 (3)
[266] 'Title: rectification not available' [2017] P. L.B. 37(10 75
[267] Emma Lees, 'Title by Registration: Rectification, Indemnity and Mistake in the Land Registration Act 2002' [2013] M. L. R 76 (1). Lees comments that the LRA 2002 Schedule 4 and the issue of choosing 'A' or 'C' is one of the most difficult situations that a legal system has to resolve
[268] [2018] EWCA Civ 2846; [2018] 4 W.L. R 67
[269] Simon Cooper, 'Register entry pursuant to a court order subsequently set aside' [2019] Conv 1 70-78

*Antoine* is that it clarifies the definition of 'mistake,' and that this adds only to the stability and coherence in this area of the law.[270] Cooper states that in *Antoine* the court's approach cannot be faulted[271] and that the decision was one consistent with the statutory scheme and the intention of the Law Commission.[272]

***The wider view to the correction of a mistake***

The opposite to the narrow or orthodox application of the term 'mistake' in the alteration provisions of the LRA 2002 is the wider application. The first case to consider for the purpose of understanding the wider application is that of *Ajibade v Bank of Scotland plc*[273] 'A' was the registered proprietor of the land and a forged power of attorney occurred by 'B', who then used the power of attorney to transfer the land to 'C'. 'C' then effected a registered charge over the property 'D' and in addition 'C' took out a further charge 'E' from Endeavour Personal Finance Ltd. The chain in this matter had become quite long and complex to this point with the two transactions and the two registered charges. 'A' sought rectification of the register to remove all 'mistaken' entries arguing that the registration of 'B' was a 'mistake' and therefore all subsequent registrations should be classed as a mistake also.

It was held by the Deputy Adjudicator that 'A' should be placed back on the register. The issue was what could be done with the registered charges of both 'D' and 'E'. The position of the registered charge holders was that the charge' was not a 'mistake' by virtue of s23-24 and 26 (owner's powers) and that of s58. 'C' was the legal owner at the time of the disposition. 'A' argued that once a fraudulent transaction had taken place all subsequent transactions should be treated the same way, suggesting that the charge was 'the fruit of a poisoned tree.'[274] Both arguments have merit depending on the personal view that is favoured by those assessing the case. However, only one accords with the policy aim of the LRA 2002. The Deputy Adjudicator in this case felt that the wider approach was the correct one and on the facts of the case the charges were

[270] *Ibid*
[271] Simon Cooper, 'Register entry pursuant to a court order subsequently set aside' [2019] Conv 1 70-78
[272] *Ibid*
[273] [2008] EWLand RA 2006_0163 (Unreported, England and Wales Land Registry Adjudicator, Deputy Adjudicator to HM Land Registry Rhys, 8 April 2008)
[274] *Ibid* at [128]

removed from the register and 'A' re- registered. The Deputy Adjudicator held that only correcting the initial 'mistake' would only leave undesirable consequences.[275] If *Ajibade* was a binding case the consequences would be far reaching as precedent could have been that no title would be secure however far down the chain they were. This outcome begs the question that if all cases followed such a legal line of reasoning this could potentially lead to unfair and arbitrary consequences. Though, on the other hand the consideration is that those who lose out on the land or property would have available to them a remedy which would see land returned to them.

*Knights Construction*[276] is the current leading authority in understanding the meaning of 'mistake' for the purpose of the LRA 2002. *Knights* is also considered to be a case decided on the wide application of 'mistake'. The facts in *Knight*s have been considered previously and do not need revisiting now but for the point that the case was that of a three-party case or an A-B-C scenario. In *Knights*, there was some consideration of how Human Rights would potentially be affected considering Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR).[277] The land in issue in *Knights* was returned to 'A' with the decision being based on the reasoning that all subsequent mistakes can be seen as a part of the original one.[278] In making his decision Deputy Adjudicator Mark considered that the previous approaches to the issue of rectification are not binding on the decision he had to make and therefore he considered that he would base his findings on the intention of the Law Commission and Statute (the LRA 2002).[279] The reasoning in *Knights* does not clarify the position of the law in regards to seeing if the subsequent registration was seen as mistaken or if it was simply classed as a part of the original 'mistake'[280] The only consensus is that 'mistake' can either be seen as the correction of all subsequent transactions including that of the transaction from A-B, or as seen, the mistake may be viewed as the transaction between A- B but when it goes further to C- D, no 'mistake' is said to occur.

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[275] n (273) at [131]
[276] [2011] EWLandRA 2009 _1459, [2011] 2 EGLR123
[277] European Convention on Human Rights (ECHR) 3rd September 1953 this is incorporated into domestic law by the Human Rights Act 1998 (HRA 1998). [2011] EWLandRA 2009 _1459, [2011] 2 EGLR123. The Deputy Adjudicator considered that any decision of the court would need to be compatible with that of Human Rights legislation at [131]
[278] [2011] EWLandRA 2009 _1459, [2011] 2 EGLR123 at [131]
[279] *Ibid* [130]
[280] Emma Lees, 'Title by Registration: Rectification, Indemnity and Mistake in the Land Registration Act 2002' [2013] M. L. R 76 (1)

It is clear from the case law discussed above that there are two applications of the LRA 2002 seen in the narrow and wide application. It appears from the case law that the Act struggles to balance its dual policy aims and furthermore struggles to follow the policy aim of the Act for all cases, as seen when there is a preference for the wider application. What appears not to be clear is the precedent on which is the preferred view or application. What is apparent is that each of the facts is decided on the factual matrix at the time with the starting point being how the title was passed from 'A' to 'B' and whether this transaction was void or voidable. It should be noted that deciding if a transaction is void or voidable is a difficult distinction to make. An example of the differing outcomes can be seen in both *Stewart* and *Ajibade,* In *Stewart* where there was a fraudulent transaction the charge of 'C' was maintained, yet in the case of *Ajibade* the subsequent charges of 'D' and 'E' were removed from the register. These two examples highlight that there appears to be differing outcomes in case law depending on which of the applications the factual matrix supports and perhaps to some extent the judiciary prefers. This supports the conclusion that the LRA 2002 struggles to meet its competing policy aims and that the Act does not provide consistent outcomes within case law.

## 2.3 Indemnity – a suitable solution?

An indemnity is claimed via the provisions of Schedule 8 of the LRA 2002 in circumstances where someone has suffered a loss,[281] and that loss has been suffered for one of the eight reasons given.[282] This forms the basis of the insurance principle which seeks to compensate those who have suffered a loss, and it is the land registry which offers such compensation. The insurance principle has been considered by Ruoff to be,

> The true insurance principle is this, that the mirror that is the register is deemed to give an absolutely correct reflection of title but if, through human frailty, a flaw appears, anyone

[281] Schedule 8 of the LRA 2002 Section 1 (1)
[282] Schedule 8 of the LRA 2002 Section 1 (1) a-h

> who thereby suffers a loss must be put in the same position, as far as money can do it, as if the reflection were a true one. A lost right is converted into hard cash[283]

Ruoff considers that it may be satisfactory to compensate those who suffer a loss with the scheme for indemnity and monetary compensation.[284] Often this compensation is insufficient due to the reason that in many instances the land is more valuable to a person.[285] The value of the land may be monetary or there may be emotional ties to the land in question and on occasion the money offered in compensation may not feel adequate to those who have suffered a loss, Goymour considers this to be the issue of the 'mud and the money'.[286] Hopkins considers that the indemnity scheme of the LRA 2002 has a constitutional function, which is needed to be able to rely on the register.[287] This constitutional function has been considered previously with regard to the economic value of a land registration system that performs well.

Schedule 8 contains a caveat to when an indemnity shall be paid.[288] Section 5 of Schedule 8 states that no indemnity shall be payable where loss is suffered, if the claimant has been a part of the fraud, or lacked any proper care.[289] Furthermore there are also the issues of time limits for the claim to be brought[290] and that of the valuation of the estate for the purpose of the payment of the indemnity.[291] Schedule 8 and the compensation for loss can be considered to be a practical and useful solution to a complex area yet, the provisions are criticized and proposals for change have been made

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[283] TBF Ruoff, *An Englishman Looks at the Torrens System* (Sydney, Law Book Co of Australasia, 1957) 13

[284] *Ibid*

[285] Amy Goymour, 'Mistaken registrations of land: exploring the myth of "title by registration" [2013] C. L. J. 72(3)

[286] *Ibid*

[287] Nicholas Hopkins, 'Reforming the Indemnity Scheme' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018)

[288] Schedule 8 Section 5

[289] *Ibid* and b. Compensation can also be reduced to take into account an individual's responsibility for such loss S.5 (2) of Schedule 8

[290] Schedule 8 Section 8 (a and b) the time limit set is that of a simple contact debt (see the Limitation Act 1980 ) and that for the purpose of knowledge and when the cause of action arises, this is when the claimant knows, or but for his own default might of known of the claim.

[291] Schedule 8 Section 6 considers the valuation that will be paid for the loss that has been suffered. The Act states that: Where and indemnity is payable in respect of the loss of an estate, interest or charge for the purposes of the indemnity is to be regarded as not exceeding –

a) in the case of an indemnity under paragraph 1(1) (a), it's value immediately before rectification of the register(but as if there were to be no rectification) and
b) in the case of an indemnity under paragraph 1(1)(b), it's value at the time when the mistake which caused the loss was made.

in the 2018 Law Commission Report. It is now suggested that the scheme for indemnity already reviewed for the purpose of the LRA 2002 is somewhat out of date with today's landscape and the issue of increasing fraudulent transactions in land,[292] and therefore requires change in order to adapt.[293] Smith states that Schedule 8 does have a specific provision for forgery which relates back to the decision in *Attorney General v Odell*[294]. The suggestion by Smith is that the response from *Odell* was the insertion of paragraph 1 (2) (b) in Schedule 8.[295] The premise appears to be that even following 'bad title' indemnity may be payable.

'Mistake' features throughout Schedule 8, most specifically in s1 and can be considered to give a more detailed understanding of the terminology.[296] Rectification is also central to the payment of an indemnity as it is to the provisions for the alteration of the register. Lees considers that the link lies between 'mistake' and the indemnity provisions of the Act. She states that *Swift 1st* [297] has created a precedent whereby 'B' derives title under a forged disposition 'B' will be entitled to an indemnity following the rectification of the register. [298] Lees considers this conclusion to have been welcomed by many but recognizes that it still leaves many questions unanswered.[299] It is therefore very much an issue for those claiming an indemnity in which manner the provisions of Schedule 4 (the alteration of the register) will be interpreted. The issue being that there is always in the A-B-C scenario the potential for loss, even more so should an indemnity be declined to the party that loses the land they thought belonged

[292] Fraud has been accounted for over 60% of the claims for indemnity in the 2016 Law Commission Report
[293] Nicholas Hopkins, 'Reforming the Indemnity Scheme' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018)
[294] [1906] 2 Ch 47
[295] Roger Smith, 'Assessing Rectification and Indemnity' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018)
[296] s1 of Schedule 8 mentions 'Mistake' no less than 6 times. There is perhaps a little more clarity in the provisions of s1 of Schedule 8. It does not provide for a definition of what is meant by 'mistake' with regard for the provision for the Alteration of the register.
[297] *Swift 1st Ltd v Chief Land Register* [2014] EWHC 4866 (Ch), [2015] EWCA Civ 330, [2015] Ch 602
[298] Emma Lees, 'Registration make believe and forgery- Swift 1st Ltd v Chief Land Register' [2015] L. Q. R
[299] *Ibid*

to them. Smith comments on the lack of clarification of the term 'mistake' in the provisions and comments on the fact the term is much debated in case law.[300]

In considering how obtaining an indemnity can be viewed as a suitable solution or if the denial of such can create arbitrary circumstances it is essential to visit some of the cases considered above, the first of which is *Barclays Bank v Guy*.[301] The factual scenario in *Guy* revealed that the charge registered against 'A's property had been a result of the land being fraudulently transferred by 'B' (who took out the charge with 'C'). Although argued to have been fraudulently transferred, Guy had signed all of the transfer documents, however he argued he was not aware that the transfer was to take place. The charge was therefore held to be not 'mistaken' and as a result saw the charge remain on the register. *Guy* then sought an indemnity, a form of compensation for losing his land which was worth more than 35 million.[302] It was held that no such indemnity could be paid to *Guy*. This was because the loss was suffered between 'A' and 'B' and not 'A' and 'C' as 'C's charge was registered legally. There are those who may sympathise with Guy's situation and could view the lack of compensation as somewhat unfair. He lost both his land and the availability of compensation to make good his losses. In comparison, should the charge of 'C' have been removed from the register it would have been 'C' (the bank and charge holder) that suffered a substantial loss and therefore would have been left for them to try to claim an indemnity. This indemnity would essentially have to be paid from the Land Registry. It was considered in *Guy* that a possible solution to the issues at hand could be that Guy could see the land returned to him but with the registered charge remaining on the register.[303] Considering that the charge held against the land in question was in excess of £100 million it is difficult to see how this may have been be a fair result for 'A', especially without the payment of indemnity.[304]

[300] Roger Smith, 'Assessing Rectification and Indemnity' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018)
[301] [2008] EWCA Civ 452, [2008] 2 EGLR 74
[302] As considered earlier the charge was in excess of £110, 000,000.00
[303] See the discussion of Lord Neuberger in *Barclays Bank v Guy No 2* [2010] EWCA Civ 1396, [2011] 1 WLR 681[78]
[304] *Barclays Bank v Guy No 2* [2010] EWCA Civ 1396, [2011] 1 WLR 681

Lees has suggested that there has been a form of reliance on the provisions for indemnity to satisfy people who have lost an interest in land through lack of fault of their own.[305] Lees considers this reliance is gained through a broad conception of 'mistake' and manipulation of the statutory provisions.[306] Lees considers that this can be seen in the cases of *Swift 1st*[307] and *Knights Construction*[308] and the suggestion of Less is that this (indemnity) was to 'mollify' the losing party.[309] Deputy Adjudicator Mark comments in *Knights* that there is a problem with the relationship with rectification and indemnity stating that 'in one construction of the provisions, a party might end up without the land or an indemnity as a result solely of the provisions of the 2002 Act, although wholly without fault.'[310] Deputy Mark is considering the fact that in some cases a party in the case, generally 'A', will lose out on everything, both the land and compensation. this can hardly be fair for 'A' if he has not contributed to the mistake and loss. Furthermore, how can legislation be effective if it does not protect those who have made such a substantial loss?

The 2018 Law Commission Report considered that a cap should be placed upon the amount that can be claimed as an indemnity following the rectification of the register.[311] The Land Registry has stated that a cap on the value of claims would reduce the amount that the Land Registry has to pay out in compensation. This valuation cap can be considered unfair on those who have suffered a substantial loss considering the value of land can run into millions. For example, in *Guy* where the losses of the value of the land ran over 35 million for the value of the land at issue and over 100 million for the registered charge. If Guy had been able to obtain the indemnity for either of those 'mistakes' (if it had been held in such a way) this would have been a considerable sum for the Land Registry and in turn the tax- payer to pay out. The 2018 Report considers

[305] Emma Lees, 'Guaranteed Title: No Title, Guaranteed' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), '*New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018) Chapter 7
[306] *Ibid*
[307] *Swift 1st Ltd v Chief Land Register* [2014] EWHC 4866 (Ch), [2015] EWCA Civ 330, [2015]Ch 602
[308] *Knights Construction v Roberto Mac Ltd* [2011] EWLandRA 2009_1459, [2011] 2 EGLR123
[309] Emma Lees, 'Guaranteed Title: No Title, Guaranteed' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018) Chapter 7
[310] [2011] EWLandRA 2009 1459, [2011] 2 EGLR123
[311] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018) at Chapter 13 at 14.15

that the cap on indemnity would be lowered over a period.,[312] The writer considers this proposal to be an erosion of the principle of insurance and an unsatisfactory outcome. A cap may result in losses that will not be covered by compensation and therefore an injustice will most certainly be suffered by some.[313] The 2018 Report poses an interesting question as to exactly what extent the Land Registry would be expected to compensate someone for a loss,[314] and one which surely requires some thought considering the increase in fraud.

The Court of Appeal decision n *Swift 1st*[315] is closely linked to that of *Fitzwilliam*[316] and *Malory*[317] regarding issues of indemnity. The issue within all three cases was whether registered title could be split into both beneficial and legal ownership (this has been previously discussed).[318] The issue in *Swift 1st* was of the payment of an indemnity from the removal of a registered charge. The holders of the registered charge (Swift) had consented to the removal because it had been obtained by way of a forged disposition. The issue for the court was whether to rely on the previous cases of *Fitzwilliam* and *Malory* in which an indemnity was not made available to the party who suffered a loss. Within *Swift 1st* the court held that Swift who lost the monetary value of the registered charge were held to be entitled to an indemnity, for a reason that Lees considers to be 'statutory fiction.'[319] This statutory fiction is brought about by the provisions of Schedule 8 Para 1 (2) (b) which states that registration following a forged disposition should be considered as a valid reason for assessing loss.[320] This decision was appealed.

On appeal it was held that an indemnity was payable to *Swift 1st* and furthermore it was held that the registration of Swift was not based on forgery for the purpose of rectifying

[312] *Ibid* at 14.15
[313] *Barclays Bank v Guy* [2008] EWCA Civ 120, [2008] 2 EGLR 74 *Barclays Bank v Guy No 2* [2010] EWCA Civ 1396, [2011] 1 WLR 681 *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] Ch 216 Both saw a party in the case deprived of the possibility of an indemnity.
[314] n (311*)* at 14.21
[315] [2015]EWCA Civ 330, [2015] Ch 602
[316] [2013] EWHC 86 (Ch), [2013] 1 P & CR 19
[317] [2002] EWCA Civ 151, [2002] Ch 216
[318] There is no need to visit the case facts again at this point as they have been considered in full earlier in the thesis.
[319] Emma Lees, 'Registration make – believe and forgery – Swift 1st Ltd v Chief Land Registrar' [2015] L. Q. R. 131
[320] *Ibid*

the register and indemnity. One previous issue with providing an indemnity was that the courts previously held that if the person who lost legal title 'A' remained in occupation then this constituted as an overriding interest over any further interests and therefore no indemnity was payable.[321] In *Swift 1st* 'A' remained in occupation of the land and this should have been seen as the conclusion to the case and it should have followed precedent. The court altered this position and went further in holding that where *forgery* has occurred the alteration of the register can be classed as prejudicial to those who suffer the loss and as a result rectification can occur.[322] The prejudicial effect that was faced by Swift was the reasoning that by denying rectification of the registered charge this gave rise to a loss of powers and status to Swift (powers they had gained via the registered charge), the loss of the charge therefore removed the powers and prejudicially affected Swift.[323]

*Swift 1st* clarifies that a forged disposition will allow for an indemnity to arise, yet forged dispositions are only one of the many reasons why the register may be altered and therefore offers a limited insight into when an indemnity will be possible. *Swift 1ST* is clearly at odds with the decisions in *Malory* and *Fitzwilliam* which established that an indemnity would not arise due to the creation of a trust based on an overriding interest. From this point Lees concludes that 'whatever one's views on the power of statutory magic, it is clear still not all is well in the murky world land registration of make believe.'[324] A further issue is what is to become of overriding interests that are not a result of forgery, clearly the overriding interest takes priority and such prior interest then replaces the registered interest. What then follows is that no indemnity will be payable to those who have suffered a loss. The only way to counteract this scenario is in the off- register position that does not accord with the LRA 2002.

Lees considers that there is some form of altering the meaning of the indemnity provisions to fit with what may be seen to be fairer results and to enable an indemnity to be claimed, yet other areas of indemnity are still obscure.[325] The reason for this is

[321] See the earlier reasoning of *Malory* and *Fitzwilliam*
[322] [2015] EWCA Civ 330, [2015] Ch 602 [51]
[323] *Ibid*
[324] Emma Lees, 'Registration make – believe and forgery – Swift 1st Ltd v Chief Land Registrar' [2015] L. Q. R. 131
[325] *Ibid*

the lack of consistency with the provisions in Schedule 4 and the understanding of 'mistake' for the rectification provisions. Yet one factor remains stable and that is the recognition that a refusal of an indemnity is considered to be unfair and this collective view can be suggested to be the reasoning as to why the so called 'statutory magic' is required.[326] The inconsistency in the way in which an indemnity is decided upon is in direct conflict with the basis of the insurance principle which is based on the reasoning that those who lose out should be able to be compensated for their loss.

The basis of the insurance principle is to allow someone to be compensated for a loss. The premise is one which has a basic foundation and on the face of it appears a satisfactory outcome to those who suffer a loss. The scheme for indemnity within the LRA 2002 is neither straightforward nor clear and there are set criteria which must be fulfilled before an indemnity can be obtained. If a claim is made which does not satisfy the criteria then an indemnity is not payable no matter how great the losses, as seen in *Guy*. Again, we see that the factual matrix is case specific to obtaining an indemnity in land law and this depends very much on the facts of a given case. .It could be argued that the rigid rules in obtaining an indemnity is important, especially as the compensation would be paid from the land registry itself who may have difficulties in paying out vast sums in compensation to individuals who may have contributed to their own losses.

This chapter sought to explore the first research question and analyse the provisions of the LRA that are not working as well as they should be. It can be seen from the above analysis that no title in land is absolute and there is no guarantee for those registered on the land register that they will keep their land should a challenge be made. The author claims that, at best, the title guarantee is a form of *qualified indefeasibility* or a mere *policy aspiration* envisioned by the Act. The chapter has shown the complexity in the case law that comes before the courts, often there are two innocent parties from which the judiciary have to decide who shall 'keep the land'. It can be seen that the Act does not always appear to protect 'C' as it should and there are times when the original owner 'A' sees the land returned to them. There have been some important decisions

[326] See Underhill LJ in *Gold Harp* at [98], *Knights Construction* considered above

in case law since the enactment of the LRA 2002 that have tried to resolve the issue of these type of disputes in land ownership.

It can now be determined with some certainty that the LRA 2002 does not convey both legal and beneficial ownership, it only conveys legal ownership on to those who are registered. It is also perhaps clearer that at times when a dispute moves from A to B to C the judiciary follow one of two paths, either the narrow or the wide application of the term mistake, one of which would see the land retained by the current owner and one that would see the land rectified back to the original owner who suffered the original loss. Finally, the chapter considered the role of indemnity in the Act and assessed the provisions as a suitable solution to those who have suffered a loss. The author considers that the provisions for indemnity are not seen to be an adequate protection for those who have suffered a loss and at times do not compensate for those who seek to keep the mud and not the money.[327]

To conclude, the LRA 2020 appears to be on the one hand a flexible and working piece of legislation and one that allows for case facts to be interpreted on a case-by-case basis. However, it is perhaps this flexibility and lack of certainty and structure which has encouraged the judiciary at times to push the boundaries beyond the interpretation of the Act. It could be argued that the Act has clear policy aims of protecting those who are registered, when this is not always done. It is therefore argued by the author that the Act has produced results in case law which show the registered proprietors are not always protected as they should and that the register is not as conclusive as portrayed. The author considers that the alteration provisions are not applied in a consistent manner and that is credited to the lack of clarity in the term mistake which has led to some cases in which those who perhaps should have been protected have not been.

[327] Amy Goymour, 'Mistaken registrations of land: exploring the myth of "title by registration" [2013] C. L. J. 72 (3)

# CHAPTER THREE

*This chapter analyses the four Law Commission Reports which deal with land registration. An examination of the Law Commission Reports helps to gain an insight into what have been the issues since the enactment of the Act from the perspective of academics and practitioners. The 2018 Law Commission report also makes proposals for change which are included in an amended Bill which will be critically analysed by the author in this chapter insofar as it relates to the issues under discission in this thesis. This chapter examines the second research question.*

## The Law Commission Reports

The three most recent Law Commission Reports[328] (one was written prior to the enactment of the LRA 2002 and two were written post enactment of the LRA 2002) will be analysed in depth insofar as they are relevant to the issues in this thesis and represent the position of the Law Commission in both the development and the performance of the LRA 2002 following its enactment. In the most recent Report (2018), suggestions have been made for alteration to parts of the LRA 2002, and a proposed Bill has been drafted. These changes will be analysed within this section along with any academic comments that have followed.[329]

## 3.1 The Law Commission Report *Land Registration for the Twenty First Century, A Consultative Document* (Law Com No 254, 1998)

Prior to the enactment of the LRA 2002 the Law Commission produced a consultation document concerning the issues of land legislation in England and Wales. The legislation in force at that time was the LRA 1925. The Law Commission consultation document[330] (referred from here on as the 1998 Report) was 'seeking views on much

[328] Law Commission, *Land Registration for the Twenty-first Century: A Conveyancing Revolution* (Law Com No 271, 2001)
Law Commission, *Updating the Land Registration Act 2002* (Law Com No 227, 2016)
Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018)
[329] Academic opinion on the newest Law Commission Report (380) is limited as the release date for such was mid 2018.
[330] Law Commission, *Land Registration for the Twenty- First Century: A Consultative Document* (Law Com No 254, 1998)

more extensive reforms to the land registration system with a view to the complete replacement of the Land Registration Act 1925'[331] and the Land Registration Rules 1925'.[332] The Report states that the LRA 1925 was 'very complicated' and furthermore included a further 'several hundred rules' to be followed.[333] The 1998 Report sought to 'put forward a blueprint for conveyancing over the next two to three decades'.[334] The blueprint that the Report was considering was to be the draft Bill of the LRA 2002 which would be developed following the 1998 Report and response to it.

The 1998 Report focused on the security of the title of registered land and considered ways in which title by registration could become more secure for those who held registered title in land. The focus on making land ownership more 'secure' for the purchaser appears to be of the greatest importance to those considering the new legislation. The 1998 Report envisioned that the new legislation (the LRA 2002) would create a more simplistic body of law for land registration,[335] and thus would make land ownership and purchases of land more secure. The 1998 Report considered both the provisions for rectification of the register and indemnity. It considered the link between rectification of the register and indemnity by stating that they are a 'process by which mistakes in the register are corrected, and that any person who suffers a loss as a result of either rectification or a decision not to rectify is entitled to be indemnified by the registry.'[336] The statement also considers the state guarantee to land in that those who suffer a loss should be indemnified, and it was clearly on the mind of the legislators that these processes needed to be somewhat streamlined. Considering that the term 'mistake' is of the greatest importance to both alteration and to indemnity it is not clearly defined in the 1998 Report, except to make the specific link between mistake in the register and that of the provision for rectification. It could be concluded that at the time of the 1998 Report the issues created by the lack of the definition had yet to be considered in full.

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[331] Law Commission, *Land Registration for the Twenty- First Century: A Consultative Document* (Law Com No 254, 1998)
[332] Law Commission, *Land Registration for the Twenty- First Century: A Consultative Document* (Law Com No 254, 1998)
[333] Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (Law Com No 254, 1998)
[334] Robert Abbey and Mark Richards , *The Land Registration Act 2002* (Oxford University Press 2002)
[335] *Land Registration for the Twenty-first Century: A Consultative Document* (Law Com No 254, 1998) para 1.3 states that there were 148 Sections of the LRA 1925 and some several hundred rules under it
[336] *Ibid* para 2.36

The 1998 Report was of the view that that the previous legislation in force at the time (the 1925 Act) was satisfactory but did require revision to make things simpler and more streamlined. The emphasis in the 1998 Report was on creating a system which would now become both secure for the purchaser and efficient in regard to the conveyancing process. It stated that 'any reforms should simplify the existing system and establish a clear, workable and coherent body of law.'[337] It was clear that any future legislation should try to clear the deficiencies of the past; and in part the LRA 2002 has achieved this, by simplifying previous land legislation and giving security to the purchaser and for which it must be given credit.

## 3.2 Law Commission '*Land Registration for the Twenty First Century: A Conveyancing Revolution'* (Law Com 271, 2001)

Following the 1998 Report, the Law Commission produced– '*Land Registration for the Twenty – First Century – A Conveyancing Revolution',* Law Commission Report 271, 2001 (the 2001 Report). This 2001 Report responded to and expanded on what had already been considered and discussed within the 1998 Report, namely that of a total revision of the law of land registration in England and Wales. The 2001 Report contained within it the proposed new Bill for land registration, 'The Land Registration Act 2002'. This 2001 Report regarded its contents and the proposed Bill within it as a 'conveyancing revolution',[338] and made statements that the purpose of the proposed Bill was one that was 'both bold and striking'.[339] The choice of words for the introduction of the 2001 Report, suggests that the feeling for the Act was indeed favourable at the time and it was felt that the LRA 2002 would completely revolutionise land law legislation in England and Wales.

[337] Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (Law Com No 254, 1998)
[338] Law Commission, *Land Registration for the Twenty First Century: A Conveyancing Revolution* (Law Com No 271, 2001) the title of the Report is 'Conveyancing Revolution' there could be the suggestion that the proposed Bill had at the forefront of its mind how to make changes in land legislation to make the process of conveyancing easier.
[339] *Ibid* para 1.1

The proposed Bill contained within the 2001 Report revised some areas of land law legislation entirely,[340] and on that basis Abbey and Richards argued that new newly suggested Bill could be described as somewhat 'revolutionary'.[341] One emphasis in the creation of the new Bill was that it would both improve the 'home buying process' (purchase of land) and make that process more secure for the purchaser.[342]

> …the bill forms part of a comprehensive programme for the delivery of a thorough going modernisation in registration law and in conveyancing services. It is the better kind of law reform: clarifying principles, reforming practices and making the law simpler and more accessible. But above all this is a practical bill. It will make home buying and selling quicker, simpler and cheaper and will make a real difference to people's lives.[343]

The emphasis here, is that of making the process of conveyancing and land ownership a simpler one and one with enables trust in land registration, the focus at this point being on *dynamic* security and the protection of the purchaser. This emphasis on security and stability is the same as described within the previous 1998 Report and it appears that this is a clear intention for the Law Commission moving forward.

The proposed Bill considered how to make a move towards electronic land registration. This move to E- conveyancing is discussed in further Law Commission Reports especially as to the failure of electronic land registration to be fully realized.

> The fundamental objective of the bill is that, under the system of electronic dealing with the land that it seeks to create, 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 enquires and inspections.[344]

The main focus of the LRA 2002 was upon the creation of a much simpler land registration system which could be created online via electronic conveyancing methods. In addition another objective of the proposed Bill appears to be focused on the

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[340] Robert Abbey and Mark Richards, *Blackstones Guide to the Land Registration Act 2002* (Oxford University Press 2002)
[341] *Ibid*
[342] n (340)
[343] The Lord Chancellor (Lord Irvine of Lairg) discussing the proposed bill in Hansard 03/07/2001 vol 626 cc776-801
[344] Law Commission, *Land Registration for the Twenty First Century: A Conveyancing Revolution* (Law Com No 271, 2001) para 1.5

conclusiveness of the register and the mirror principle, providing the register should be a true and accurate reflection. In regard to the protection of the purchaser the 2001 Report states that it is 'the registration and the registration alone which confers the title' i.e., the conclusiveness of the register contained in s58. This was a pivotal point of the Act as it revised previous legislation from being 'not a system of registration of title but a system of title by registration'.

The 2001 Report considers the issues of the provisions of alteration, rectification, and indemnity, within the LRA 1925.[345] The Land Registration Act 1925 allowed rectification of the register to occur as a discretionary provision. The 2001 Report states that this discretion would be usually exercised where the rectification is used to correct a mistake on the register via the provisions for alteration of the register. All other types of change of name on the register were not classed as rectification and therefore it is suggested within the 2001 Report that a distinction between the two was required.[346] The LRA 1925 did not have any other name for other types of changes to legal title which is now referred to as the alteration of the register.[347] These provisions were considered to be unsatisfactory within the 2001 Report and therefore as a result required revision and clarity.[348]

The 2001 Report makes clear that the proposals for change in the area of the legislation that governs what is now called the alteration of the register, 'bear no resemblance to the previous Land Registration Act 1925.[349] The premise of the LRA 2002 was therefore to completely restructure the alteration provisions from the previous legislation. One clear change is that the proposed Bill has changed the wording in the alteration provisions from 'rectification' to 'alteration', and rectification has now become a form of alteration of the register, as has been explained in the introductory chapter, and analysed in chapter two. The 2001 Report notes how the newly proposed

[345] Law Commission, *Land Registration for the Twenty First Century: A Conveyancing Revolution* (Law Com No 271, 2001) para 10.1
[346] Law Commission, *Land Registration for the Twenty First Century: A Conveyancing Revolution* (Law Com No 271, 2001) para 10.2
[347] *Ibid* at 10.2
[348] *Ibid* 10.5-10.28
[349] *Ibid at* para 10.5

provision (the LRA 2002) construes a narrower meaning for rectification than the Land Registration Act 1925.[350]

The 2001 Report considers the statutory defence of a proprietor who is in possession of the land which is available to those who face a challenge to their legal title.[351] The statutory defence and its limitations bears a similarity to the provision of s82(3) of the LRA 1925, which considers when alteration of the register can occur to a proprietor in possession of the land. The LRA 2002 states the only two exceptions for when such alteration can occur.[352] This is in contrast to the four exceptions which were in use in the Land Registration Act 1925.[353] Further explanation was given in the 2001 Report as to whom would be classed as a 'proprietor in possession'[354] as previous legislation was not clear on the point. A proprietor in possession is an important statutory defence in claims against legal title in land, as we have seen.

The 2001 Report turns to look at indemnity provisions for the proposed Bill[355] and makes comparisons to the Land Registration Act 1925 as it then stood. It is explained that the indemnity section of the Land Registration Act 1925 (s83) had already been amended by s2 of the Land Registration Act 1997, and as a result it did not require specific attention in the 2001 Report and within the newly proposed Bill. The 2001 Report does give an idea as to what may constitute a mistake for the purpose of the LRA 2002 in the section on indemnity,[356] and where it is discussed the discussion is around in what circumstances will an indemnity be payable.

[350] *Ibid at* para 10.14
[351] *Ibid at* 10.13
[352] Alteration cannot occur unless the proprietor in possession consent unless;
Schedule 4 3(2)(a) he has by fraud or lack of proper care caused or substantially contributed to the mistake or
(b) it would for any other reason be unjust for the alteration not to be made
[353] Previous exceptions were found in s82 (3) of the Land Registration Act 1925
[354] Law Commission, *Land Registration for the Twenty First Century: A Conveyancing Revolution* (Law Com No 271, 2001) para 10.17
[355] Law Commission, *Land Registration for the Twenty First Century: A Conveyancing Revolution* (Law Com No 271, 2001) para 10.29
[356] *Ibid* at 10.32 – 10.38

## 3.3 Law Commission 'Updating the Land Registration Act 2002: A Consultation Paper (Law Com 227, 2016) and the responses in the Law Commission 'Updating the Land Registration Act 2002' (Law Com 380, 2018) – A Contrast

The updated consultation paper by the Law Commission, the (2016 Report) was created partially as a result of the issues encountered following the enactment of the LRA 2002. Hopkins states that the purpose of the 2016 Report was not to consider ways to reform the LRA 2002 as a whole, but to review certain aspects of the LRA 2002 seen to be causing complexities and difficulties by way of its operation.[357] Hopkins is referring to what can be seen in the inconsistent outcomes in case law said to be caused by the deficiencies in the LRA 2002. The 2016 Report states that the LRA 2002 is being considered as there is 'scope for clarification or amendment.'[358] In fact the 2016 Report states that it is clear that this 'scope for clarification or amendment' is required in a number of areas. The Law Commission have attributed several factors to the underperformance of parts of the LRA 2002, such as fraud, the lack of fulfillment of the aim of electronic conveyancing, and the global economic crisis as creating problems with the Act, along with the recent recession.[359]

The Law Commission produced a response to the 2016 Report referred to here as the 2018 Report, and there were some 70 responses to the 2016 paper[360] in which there were fifty-three proposals made for change to the LRA 2002.[361] All fifty-three proposals are not relevant to this thesis and therefore only relevant ones will be considered. The suggestion by the Law Commission is that the responses from the 2016 Report have allowed for the Law Commission to consider changes to policy of the LRA 2002 that are considered to be necessary. The 2018 Report stresses that the areas of the LRA 2002 which are causing the most concern are that of the provisions for the alteration of the register, the rectification provisions and that of the scheme for indemnity. The Law Commission have declared that the reforms to the LRA 2002 are to make the Law more 'efficient and certain and promote the principles underlying the

[357] Nick Hopkins and Sarah Dawe, 'Whose land is it anyway?' N.L.J 166 (7695) 11
[358] Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (Law Com No 227 2016)
[359] *Ibid at 1.6*
[360] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018) at 1.36
[361] Nick Hopkins and Joshua Griffin, 'Updating the Land Registration Act 2002' [2018] Conv 3

LRA 2002'.[362] In proposing the reforms the Law Commission has proposed to amend the LRA 2002 in a draft Bill.[363]

The 2016 Report considers what the issues are with the LRA 2002 post enactment; states that there has been an increase in title registration fraud[364] and that this has been a difficult matter to resolve. The increase in fraud has been attributed to the volume of litigation that has come before the courts.[365] The 2016 Report considers that some of the issues of the Act have been contributed to by a failure in technology, with the suggestion being that technology was envisioned to have developed differently at the time in which the legislation was developed.[366] The suggestion that technology is potentially at fault is certainly a factor which would explain the lack of progress in E-conveyancing, and it can be argued that technology, however well developed, cannot be completely infallible when it comes to title fraud. The 2001 Report also considers the 'economic downturn and domestic recession as having significant implications on mortgage decisions and on property transactions.'[367] This suggestion is that a housing market that performs well is at the forefront of government policy. Therefore, to keep stability and growth in the housing market the government needed to promote a form of legislation that has the ability to do that.

Dixon reflects upon the '*Updating the Land Registration Act 2002'* (2016 Report) and states:

> it is anybody's guess what the fate of the report will be, although given that the final proposals are likely to be presented as technical legislative changes rather than the expression of new policy aims, perhaps there is a reasonable prospect of amending legislation. If, of course, any is needed[368]

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[362] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018) at 1.42

[363] The 2018 Report and the Draft Bill can be accessed here; https://www.lawcom.gov.uk/project/updating-the-land-registration-act-2002/

[364] Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper,* (Law Com No 227 2016) para 1.6

[365] Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New perspectives on land registration: Contemporary Problems and Solutions*(Hart 2018) Preface. There is a discussion within the chapter of volume of case law coming before the courts which is as a result of title fraud.

[366] n (358) at 1.6

[367] *Ibid*

[368] Martin Dixon, 'Updating the land registration Act 2002: title guarantee, rectification and indefeasibility' [2016] Conv 6

The final comment made by Dixon is of interest. The issue of land registration and title guarantee has for a long time has appeared to have caused significant issues with legal academics and practitioners alike. The case law analysed in chapter two, shows that the application of the Land Registration Act 2002 has been inconsistent and the resolution of the A-B-C type of dispute in chains of ownership to be complex and one which is yet to be resolved fully. It is the author's view that the LRA 2002 needs revision in the areas considered within the thesis and the 2016, 2018 Law Commission Reports.

Dixon suggests since the Act has been in force it has 'triggered some significant litigation as well as 'generating a sizable amount of controversy.'[369] Dixon considers that the LRA 2002 has created specific issues in 'the meaning of title guarantee' (s58 of the Act), and the scope of the power to alter the register (alteration provisions).[370] Although Dixon suggests that there are issues created by the Act 2002, however, he considers that 'it is, therefore, not immediately apparent to everyone that the 2002 Act actually needs updating.' Dixon here appears to be arguing that even though the LRA 2002 may be viewed as being somewhat problematic, the legislation is not defective enough to warrant revision in full. The writer considers that Dixon is perhaps referring to the policy behind the legislation that is the issue.[371] The policy behind the LRA 2002 appears to be to simplifying the conveyancing process and protecting the purchaser, but it is difficult to see how the Act can balance both policy aims effectively without problems arising.

The 2016 Report considers the 'promise of title,'[372] where it is suggested that the purchaser should be able to rely on the register for what is entered on it, in essence the guarantee to title. The question that the 2016 Report raises is how secure is that promise?[373] The answer, as previously considered, is that no title is absolute and all titles are susceptible to challenge, with no time limit on when that can arise.[374] Throughout both Reports the premise of the Act, however, remains clear.

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[369] *Ibid*
[370] n (368)
[371] n (368)
[372] Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (Law Com No 227, 2016) para 13.1
[373] *Ibid* 13.2
[374] n (365)

> The 2018 Report makes the point that the purchaser should feel secure and that this title should not be questioned, giving the reasoning that owners powers should be free from limitations.[375]

This statement is clear in the aim of the Act. However, the aim of the LRA 2002 does not portray how the Act has been applied within case law as we have seen in chapter two. The 2016 Report discusses the term 'mistake' within the LRA 2002 and 'the close link between the mistake and indemnity provisions, which means that the interpretation of mistake as the purpose for altering the register carries particular significance'[376] The 2016 Report moves on to state that 'mistake' is classed as a broad concept and highlights the difference between a A-B case and an A-B-C case stating in each that the question of title promise or the indefeasibility question is one yet still to be answered.[377]

***State guarantee of title in the 2016 Law Commission Report***

The 2016 Report states its objectives relating to the register's guarantee to title in land, and that the register makes the positive promise that it will be the registered proprietor who owns the land.[378] This promise is to be kept, even for dispositions that are forged.[379] The question is the strength of the conclusiveness or indefeasibility and how that is seen to be working in the LRA 2002. The 2016 Report gave several suggestions for the objectives of the Act in regard to the guarantee of title which are:

(1) *Clarity*: it should be possible to determine the answer in each situation as easily and with as little litigation as possible.

(2) *Finality*: there must come a point, at some stage in a chain of transactions, when there is no question of a registered proprietor losing his or her title because of a mistake that occurred.

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[375] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018) at 5.9
[376] n (372) at 13.6
[377] Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (Law Com No 227, 2016) para 13.11
[378] *Ibid at 2.47*
[379] Consider the previously discussed A-B-C scenario in which even if the disposition from A-B is invalid there is a possibility that the disposition from B- C is valid due to the provisions of the powers of the owner found in S.23, 24 and 26 of the LRA 2002

(3) *Fact-sensitivity*: the rules used to determine who gets the land and who gets an indemnity need some in-built flexibility to ensure that the land should pass to or remain in the ownership of the person who most needs it or values it.

(4) *Reliability of the register*: to be able to rely on the register means knowing that if title is lost, either because the register transpires to have been wrong, or because something happens to remove a name from the register when it should not have been, then an adequate indemnity will be available. An adequate indemnity is one that fully compensates a person for his or her loss, in the cases where the party who takes an indemnity is not only innocent of fraud but also has taken all proper care.[380]

Each of the objectives above may be seen as giving rise to a system which is flexible in its approach, yet the LRA 2002 has appeared at times to be inflexible and rigid in its approach to case law, as we have seen. The objectives of the Law Commission are attractive, but unfortunately, in practice matters have been far from straightforward, given the uncertainty in case law at times. The 2016 Report makes the case for potential reform in this area stating that there are two major problems in the operation of the operation of indefeasibility in the LRA 2002.[381]

The suggestion in the 2016 Report is that the answer to the question of indefeasibility lies within the provision of alteration and indemnity.

***Alteration of the register***

**The 2016 and 2018 Reports proposals for change:**

1) firstly, is the retention of the broad use of 'mistake' in the provisions of alteration and rectification of the register.

2) secondly, the removal of issues created by *Malory*, which would be set out clearly in the statute.

[380] Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (Law Com No 227, 2016) para 13.16-13.21 this gives a more detailed understanding of the issues
[381] n (377) at 13.38

3) clarifying the position of A- B- C and so on in a chain

The first point that is made (above) and within the 2016 Report is that there is a close link between the provisions of alteration and indemnity, and that the interpretation of 'mistake' carries significance for both provisions.[382] The 2016 Report considers the issue of 'mistake' and the position of 'C' in the A-B-C chain. The suggestion is that the term 'mistake' was given a more prominent role in the LRA 2002 than in the LRA 1925. In considering this point it is difficult to see why then the legislators would not have clarified the term in a more specific way, to allow for some clarity and consistency. In considering the third point above the 2016 Report states that the disposition between A-B can now at times be classed as one that is fatally flawed from the outset.[383] However, the disposition from B-C can be classed as one that is fully legal and correct.[384] This suggests that it can be argued that in an A-B-C chain, the registration of 'C' is one that is not a mistake, and this view is one which fits with the aim of the Act.

In discussing reform, the 2016 Report makes it clear that in considering the main objectives of the Act, that they cannot be achieved perfectly.[385] One suggestion for reform is for the clarification of the term 'mistake' within the Act for the provisions for alteration and indemnity. The 2016 Report, however, does not consider that a statutory definition of 'mistake' would be of any benefit to those who seek to rely on such a provision.[386] One reason for the lack of enthusiasm for a statutory definition may be the argument that a definition of the term may lead to inflexibility in the application of the term.

A second proposal in the 2016 Report, and linked to point two above, is the removal of the overriding interest argument created in *Malory* 1 and 2.[387] The author considers

[382] Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (Law Com No 227, 2016) para 13.6
[383] This determination that the transaction from A-B can be seen as fatally flawed follows the previous argument that the transaction can be seen to be one that is void and generally follows a fraudulent disposition.
[384] This follows the argument that 'C' has purchased in 'good faith' and placed reliance upon the register at the time of purchase. The argument focuses upon the validity of 'B' title as per S.58 of the LRA 2002 and that of the owner's powers found in s 23, 24 and 26.
[385] Law Commission *Updating the Land Registration Act 2002: A Consultation Paper* (Law Com No 227, 2016) para 13.75
[386] *Ibid* at 13.76
[387] *Malory Enterprises v Cheshire Homes* (UK) Ltd [2002] EWCA Civ 151

that this removal of either of the *Malory* arguments in full would remove a form of injustice which *Malory* created with its creation of beneficial ownership, as we have seen. The removal of the overriding interest and beneficial interest argument will re-enforce the fact that the LRA 2002 confers only a legal title to those who are registered.[388]

Emphasis within the 2016 Report is placed on a proprietor in possession of the land at the point at which the title to land is challenged.[389] The 2016 Report proposed that if 'A' lost legal title to 'B' or 'C' but remained in possession of the land, as seen in *Malory* or *Knights*, then the register should be rectified to place 'A' back on to it.[390] This argument drew some criticism from the consultees of the 2016 Report who considered what may occur if 'A' remained in possession but 'C' was registered as the legal owner. The suggestion from the consultees was that this type of factual matrix often draws sympathy for 'A' rather than logic from the case at hand.[391]

A ten -year long stop is proposed in the 2016 Report for the purpose of rectification of the register in an attempt to bring a sense of finality to claims.[392] The 2018 Report in Recommendation 24 makes the proposal that the longstop of 10 years should apply from when the mistake had occurred. There are exceptions to this rule for when a proprietor is in possession of the land or when the new proprietor has contributed to the mistake by fraud or lack of proper care.[393] The author considers this to be a narrow caveat and the ten -year longstop may have the potential to cause injustice to those who do not discover that such a mistake has occurred for many years, which by assessing the case law is a valid opinion. There is the argument that a 10-year longstop could be seen to bring about stability and can indeed promote finality. However, an example of

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The Malory argument is split into two distinct arguments both based around overriding interest and that of beneficial ownership of land. Both of the arguments are seen to be unsatisfactory in nature and the 2016 Law Commission Report considers both arguments and how the LRA 2002 responds to them. (Law Commission '*Updating the Land Registration Act 2002: A Consultation Paper* (Law Com No 227, 2016) para 13.42-13.64

[388]Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (Law Com No 227, 2016) para 13.58 (the comment here refers to the reasoning that the LRA 2002 confers legal title on to the registered owner with the suggestion that there is no suggestion of a split between legal and beneficial ownership).

[389] Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (Law Com No 227, 2016) para 13.109

[390] *Ibid* at 13.109

[391] *Ibid* at 13.111 to 13.114

[392] *Ibid at 13.123*

[393] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018) at 13.100

when there is the potential for injustice can be seen, in *Parshall v Hackney*[394] where the issue was that of a double registration: one registered in 1904 'A' and one in 1980 'B'. 'B' possessed the land from 1988 and 'A' was removed from the register in 2000. 'A' sought to have the register altered to make 'A' the sole registered proprietor. 'B' initially sought to rely on adverse possession however Mummery LJ considered that the case could only be resolved with the provisions for the alteration of the register.[395] Clearly the 10-year longstop would not be sufficient in this case given the length of time between the loss and the discovery.

Double registration or multiple registration is an issue compounded by the 2002 Act. This is title registration of the same plot of land to two title holders as was the issue in *Parshall*.[396] The Law Commission have considered that cases similar in nature should be decided upon the areas of indefeasibility, alteration and indemnity and not that of adverse possession. This proposition is one which now accords with the principles of the LRA 2002. The Draft Bill considered within the 2018 Report consists of a revised version of Schedule 4, which reflects the propositions in the 2016 Report. Hopkins considers that the revised version of Schedule 4 to be more prescriptive than Schedule 4 at present. Hopkins considers that this is a 'price worth paying,' to have a revised scheme which works better than the present one and keeps certainty and flexibility at the forefront of its ambitions.[397] The author agrees with Hopkins to a point but does question whether the Act can promote both certainty and flexibility simultaneously, or whether this too would cause more of a struggle in trying to achieve the right balance.

***Mistake in the 2016 and 2018 Law Commission Reports***

The term 'Mistake' has given rise to much uncertainty since the enactment of the LRA 2002.[398] The 2018 Report confirms that there is a lack of consistency or understanding as to what is meant by mistake in Schedule 4, but the Report does say that the definition of mistake in *Ruoff and Roper* is one which reflects what is being considered within

[394] [2013] EWCA Civ 240, [2013] Ch 568
(*Parshall v Hackney*) was decided while the LRA 1925 was still in force, the principles are considered to be the same)
[395] *Ibid* at [85]
[396] n (394)
[397] Nick Hopkins and Joshua Griffin, 'Updating the Land Registration Act 2002' [2018] Conv 3?
[398] n (389) at *13.64*

case law.[399] The 2018 Report considers that a statutory definition of 'mistake' should be included in the LRA 2002.Whereas the author considers that although this may clarify the interpretation of 'mistake', this may also create a rigid form of law and one that cannot adapt to complex cases to which case facts should be considered on an individual basis. The Law Commission considered if the 'mistake' on the register is a registered charge, or a charge effected by a mistaken proprietor then those who are affected by the charge should not have the ability to oppose the rectification of such. In the author's opinion this will have the potential to cause both positive and negative results. Positive if *Barclays Bank v Guy*[400] is considered, as the registered charge would be removed and this would most certainly have been a positive outcome for *Guy*, yet for those who effect such a registered charge this can be said to be somewhat arbitrary, and compensation would need to be recovered from the indemnity provisions, this position is far from clear.

One recommendation the 2018 Report makes is for the clarification of the treatment of subsequent transactions following a 'mistaken one'.[401] The 2018 Report suggests that all subsequent transactions following a 'mistaken one' should be also classed as a 'mistake'. This can be when the chain moves from A-B-C and in theory further. The author considers this to be a valid proposition in some cases, though the author is aware that all of the case law follows their own factual matrices, with no two cases being identical. If following a 'mistake' all subsequent transactions are considered to be void, this would protect the original owner of the land 'A'. However, this would militate against the proposition that s 58 of the LRA 2002 is conclusive and work against all of the policy aims of the LRA 2002.

The author considers that resolving the issues discussed would make the LRA 2002 more effective and streamlined as it would address the areas of the Act seen to be problematic at present. It could be suggested that the resolutions to the issues

[399] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018) at 13.16 Ruoff and Roper define mistake as something constitutes as a mistake if the registrar would not have made the entry if they were aware of the mistake at the time of the registration (*Ruoff and Roper: Registered Conveyancing* (London, Sweet and Maxwell, 2003) (loose-leaf) para 46.0009

[400] [2008] EWCA Civ 452, [2008] 2 EGLR 74
*Barclays Bank v Guy* No 2- [2010] EWCA Civ 1396, [2011]1 WLR 681

[401] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018) at 13.135 (Recommendation 26)

considered may not work as the author is of the opinion that land legislation is designed to fit many variations of case law and cannot allow itself to be a one size fits all entity.

***Indemnity in 2016 and 2018 Law Commission Reports***

The Law Commission has considered the scheme for indemnity in the LRA 2002 in both the 2016 and the 2018 Reports, Hopkins has said that this is the first review of indemnity since the Land Registration Act 1997 was enacted, with provisions that revised the scheme for identity.[402] One point that Hopkins makes is that the current indemnity scheme was not designed with the current level of fraud in mind.[403] Title fraud is present in many of the cases concerning registered title and the alteration of the register. It is clear that the scheme for indemnity is also in need of review. It appears that the primary concern for the prevention of title fraud within the 2016 and 2018 Reports was to enhance 'identity checks' on those purchasing and registering land.[404] It is suggested that by reducing title fraud somewhat, there may be a reduction in the volume of case law which comes before the courts-

The proposals for reform in the 2016 and 2018 Reports include:

*1) placing a cap on the level of indemnity that can be claimed by an individual.*

*2) reform of the duties of care owed to the land registry.*

*3) reform of issues arising from identity fraud.*

*4) reforms relating to mortgages.*[405]

One of the proposals is that greater care should be taken by those who are registered, in that they potentially could enter on the register a restriction so that any application for sale or mortgage would need to be stringently checked. However, no process is infallible, and fraud may always find a way to circumvent the process. Placing such a burden on those registered may also prove to be difficult as not everyone is aware of

[402] Nick Hopkins and Joshua Griffin, 'Updating the Land Registration Act 2002' [2018] Conv 3
[403] *Ibid*
[404] Nick Hopkins and Joshua Griffin, 'Updating the Land Registration Act 2002' [2018] Conv 3
[405] Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (Law Com No 227, 2016) para 14.19

the potential threat to legal title and furthermore lack of knowledge in one person may be taken to be a lack of care to another.

The Law Commission have proposed to introduce a statutory duty of care for solicitors or the mortgage company, for the purpose of assessing the identity of an individual[406] in the belief that this would help to combat title fraud. Hopkins considers that a statutory scheme for 'duty of care' for the purpose of assessment of indemnity would be a positive one and is of the view that many of the consultees showed favour towards the introduction of such.[407] The author considers this to be a practical solution to tackle the issue of title fraud. Professionals should be readily checking identities as part of their work and would be fully aware of the possibility of fraudulent transactions. Hopkins considers that the introduction of a statutory scheme for a duty of care would benefit both the public and professionals alike, for if a solicitor neglects their duty, they will be liable for the loss and should they have completed their duty as required they will be protected by the statutory scheme.[408]There may be the argument that placing a burden on solicitors may give rise to criticism from practitioners, who may feel that any loss and search for compensation may fall upon them to resolve, which is over and above there ordinary roles.

In considering a cap on the level of indemnity that can be claimed, the 2016 Report proposes that a form of private insurance may fulfil the shortfall from the cap. In brief, a form of reliance on private insurance may lead to an erosion of the insurance principle which is one of the core pillars of the land registration system in England and Wales. The 2018 Report suggests that the cap would only be considered when the claim was classed as 'exceptional', but there is no specific explanation as to what would be considered such.[409] Perhaps, fortunately, the cap was dismissed by the consultees and the author wholeheartedly agrees that this is the right decision. The cap would not offer the compensation much needed by those who have suffered a loss. The proposals for the indemnity scheme appear to consider the issues that have arisen in the current scheme. It appears that the basis for reform should lie with making the perpetration of fraud harder and therefore less fraud will lead potentially to less case law on the matter.

[406] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018) at 14.13
[407] Nick Hopkins and Joshua Griffin, 'Updating the Land Registration Act 2002' [2018] Conv 3
[408] *Ibid*
[409] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018) at 14.15

Unfortunately, as with many types of fraud, the fraudsters generally evolve with more sophisticated means and one must be constantly vigilant.

## 3.4 Conclusion

The issue of land legislation had come before the Law Commission on occasions prior to and following the enactment of the LRA 2002. The two most recent Reports in 2016 and 2018 have dealt with the issues that the LRA 2002 has said to have created whilst it has been in force. The Law Commission have responded to those issues and have made some 53 proposals for change which are contained within a revised Draft Bill. The author has considered some of those proposals that are relevant within this chapter. What is notable is that the Law Commission are alive to the issues and are seeking to address them. The author is of the view that some of the proposals are logical, such as the imposition of a duty of care on solicitors, though notably this should not seek to place blame on solicitors for every occurrence of fraud. The author is critical of the suggestion of a 10 year long stop. Case law at times has highlighted that it can be many years before a discovery of a loss is made and a ten year long stop may prevent an innocent party from seeking a redress. The writer considers that private insurance offered to purchasers may allow for compensation to be claimed in an easier manner, however the author is alive to the possibility that this may erode the insurance principle. It will be interesting to see if the Draft Bill is enacted and what impact that may have on case law in the future.

# CHAPTER FOUR

## Land Registration in Australia

This chapter will make a short comparison with the jurisdictions of Australia. The rationale for choosing Australia is for the similarity between its system for land legislation and that of England and Wales. Both the systems in Australia and England and Wales have within them a form of indefeasibility of title which operate in a similar manner, although it is suggested that the systems in Australia are stronger in respect of indefeasibility of title. Both systems have ways in which challenge to legal title can be made via provisions within the legislation and both systems have provisions for the alteration of the legal title. The writer will consider if the provisions from the Australian system could be useful in the LRA 2002 and may help the LRA to balance its competing policy aims.

Historically, Australia made use of a common law system of land registration.[410] This is considered to be a direct result of the fact that Australia was at one time an English colony and therefore governed by the received laws of England. Mackie has stated that 'unlike other areas of law in Australia, the land law system has continued to follow an English model in some extent'.[411] Similar again to registration of land in England and Wales, estates in Australia are classified as either freehold or leasehold when purchased and registered. One other notable comparison to be made is that in Australia the land registry has become mostly computerized, paving the way for electronic conveyancing. Electronic conveyancing was the main focus of the LRA 2002 and has been addressed in the Law Commission Reports both prior to and following its enactment.[412] Notably in England and Wales e- conveyancing has yet to be realized in full.

In Australia, the previous common law system of land registration (the deeds system) required verification of title to the land to be confirmed by way of tracing the title chain

[410] Australian Courts Act 1828 S 24. This section provided that all laws that were in force in England on the 25th of July 1828 applied also to colonies in Australia.
[411] Ken Mackie, *Australian Land Law in Context* (Oxford University Press 2011)
[412] Law Commission, *Land Registration for the Twenty First Century: A Conveyancing Revolution* (Law Com No 271, 2001)

back to the original Crown grant of land.[413] This type of common law system of land registration in England and Wales was considered to be defective as it depended on tracing back the chain of the title, which could often be lengthy and time consuming. Australia now mainly follows a system of land registration called the 'Torrens' system, and this system differs from the traditional Common Law system. Both systems (Australia and England and Wales) have what can be called state guarantees to land via a register that is conclusive, with the Australian system often referring to this as indefeasibility and the English system interchanging the terminology between both indefeasible and conclusive. The Torrens system was first introduced in South Australia in 1858 and was called the Torrens system after Sir Robert Torrens who was responsible for the enactment of the system.[414] Now *nearly* all freehold land in Australia is registered under the Torrens system. Chambers refers to the popularity of the Torrens system in Australia, by stating that it has now been adopted in other countries such as New Zealand and certain provinces in Canada.[415] Although the Torrens system is widespread throughout Australia, it has faced criticism and there has, been the suggestion that the Torrens system is often not in favour with common law judges within Australia.[416]

The Torrens system unlike its predecessor the common law system does not require the purchaser in land to trace the title back in order to establish whether the title is good. The premise is that the register created from the Torrens system provides safety and certainty for the purchaser. The existence of the Torrens system means that purchasers of land in Australia are under no requirement to trace back the title to confirm the *validity* of title; they can rely on what the register shows them, in a similar manner to that in England and Wales. The initial idea envisaged was that the Torrens system would present an accurate and clear presentation of property rights in land in Australia. This appears to be a focus on the mirror principle of land registration. The Torrens system provides for both legal and equitable rights and as a 'general rule property rights to Torrens land are legal if they are registered and equitable if unregistered'.[417]

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[413] n (411)
[414] Robert Chambers, *An Introduction to Property Law in Australia* (First Edition 2001, Thomson Reuters 2013)
[415] *Ibid*
[416] *Canadian Pacific Railway Co Ltd v Turta* [1954] SCR 427; [1954] 3 DLR 1
[417] Robert Chambers, *An Introduction to Property Law in Australia* (First Edition 2001, Thomson Reuters 2013)

In short order, the system of purchasing land via the Torrens system requires the registrar to create an electronic folio for the documents and records concerning the land, with each document being assigned a reference number,[418] and as a result the registrar creates a certificate for the purchaser of the land. In Australia, the certificate of land also provides the purchaser of the land the opportunity to see any other interests in the land such as mortgages, easements, leases and covenants. The ability to see any interests which may bind a purchaser can only have benefits to those who purchase land, enabling them to be certain that they will not face any challenge to their title in the future. This system is unlike that of England and Wales whereby the system of land registration at present appears to produce circumstances by which title is not secure contrary to the efforts of the LRA 2002, and whereby interests can be left off the register and undiscoverable to the purchaser in land.

## 4.1 State guarantee to title in Australia and England and Wales

As we have seen, in England and Wales, the provisions concerning the conclusiveness of the register are to be found within s58 of the LRA 2002. There is a state guarantee to compensation in the indemnity provisions which is provided for those who suffer a loss if something goes wrong. Similarly, the Torrens system also offers compensation to those who suffer a loss, and this compensation in Australia is paid from the assurance fund. In Australia one key difference is that a person can and often does take out an additional form of private insurance against any losses that may occur from land transactions. Moore et al consider that taking out a private form of insurance is a much simpler way to claim compensation than trying to claim compensations under the Torrens system.[419] Private insurance is discussed in the Law Commission Report in 2018, with consideration given to whether this would be a suitable solution for those who suffer a loss . The author considers the concept of private insurance is worthy of consideration, especially if it made compensation easier to obtain and did not prejudice

[418] Robert Chambers, *An Introduction to Property Law in Australia* (First Edition 2001, Thomson Reuters 2013)
[419] Anthony P Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters 2009)

the individual who had suffered a loss. The author would like to note that the downside is that reliance on private insurance may hypothetically lead to a lesser reliance or discontinuance of the indemnity provisions in England and Wales. In contrast to England and Wales the claims for compensation in Australia vary from state to state and there are rules in each for when such compensation can be sought.

## 4.2 Challenges to an indefeasible title in land in Australia

The author considers it important to understand the amount of security there is in the Torrens system for those who hold legal title to land. Griggs states that the concept of indefeasibility in Australia has never been recognized as an absolute concept,[420] which is similar to England and Wales where all titles are open to the possibility of challenge. Griggs states that there are express exceptions to indefeasibility in Australia, as there are in England and Wales. In each jurisdiction the concept of indefeasibility does have certain exceptions placed upon it, and these exceptions, whether explicit or inferred mean that the legal title will not be protected as an indefeasible title. It should be noted that the Torrens statutes specifically set out a number of these exceptions though they vary from state to state,[421] and there are also some that are not set out in statute.[422] In England and Wales perhaps the most common reason why a title is not secure is due to a 'mistake', although as discussed there is little clarity surrounding this terminology.

The most important of the exceptions to an indefeasible title in Australia is fraud.[423] It should be noted that as in England and Wales not all types of fraud constitute an exception to indefeasibility, and there are of course other exceptions. As with the provisions in the LRA 2002 the provisions within the Torrens system can be seen by some to be complex and lacking in clarity. Griggs et al argue that other issues in the provisions appear to be because of the lack of consistency in the 'non-uniform and ad hoc treatment of the area of the exceptions to indefeasibility.'[424]Griggs et al argue that

[420] Lynden Griggs 'Indefeasibility and mistake- the utilitarianism of Torrens' [2003] Australian Property Law Journal 10
[421] South Australia does not hold an express exception when a forged document has occurred
[422] Anthony P Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters 2009)
[423] Lynden Griggs 'Indefeasibility and mistake- the utilitarianism of Torrens' [2003] Australian Property Law Journal 10
[424] Anthony P Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters 2009)

like the provisions for the conclusiveness of the register in England and Wales this area of the law and the question of indefeasible title poses something of an issue.

The problems associated with fraud in the Torrens system of Australia is similar to the concept of 'mistake' in England and Wales. Fraud and 'mistake' lack clear definition and it is often left to the courts to decide when a fraud has occurred.[425] For fraud to have occurred in Australian land law there is a requirement for personal dishonesty or moral turpitude of those who commit the fraudulent transaction[426]. Personal dishonesty and moral turpitude have been considered in the case of *Stuart v Kingston*[427] in which per Starke J stated

> It is no longer in doubt that the fraud which can invalidate a registered title ….is actual fraud on the part of the person whose title is impeached. And actual fraud is 'fraud in the ordinary popular acceptance of the term' i.e. 'dishonesty of some sort', 'fraud carrying with it grave moral blame'…[428]

If a title in land has been gained fraudulently, then that title is subject to be challenged and is potentially defeasible. In Australia this will generally affect only the proprietor who has fraudulently gained the legal title and not subsequent transactions as considered above. This operates in a similar way to the 'A' and 'B' disputes in England and Wales, in which, it is possible in certain circumstances to rectify the legal title back to the original owner. As in England and Wales, in Australia any fraud from previous owners is irrelevant unless the fraud was known about or suspected at the time.[429] There is therefore a narrow meaning to what constitutes fraud within the Torren's system and this is affected further by the 'notice' provision which provides that a 'registered transferee of an interest is not to be affected by actual or constructive notice of any pre-existing unregistered interest or trust'.[430]

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[425] n (420)
[426] Ken Mackie, *Australian Land Law in Context* (Oxford University Press 2011)
[427] (1923) 32 CLR 309
[428] *Ibid* at [356]
[429] *Assets Company Ltd v Mere Roihi* [1905] AC 176; [1905] UKPC 10 at 210
[430] Penny Carruthers, 'A Tangled Web Indeed: The English Land Registration Act and Comparisons with the Australian Torrens System' [2015] UNSWLawJL 46

In the Torrens system the defeasible transaction can only be the one between 'A' and 'B' and not to any subsequent purchasers. Therefore, the fraud only affects 'A' to 'B' transactions and if 'B' passes the title to 'C' via a legal disposition, 'C' will remain unaffected. There are four further exceptions to an indefeasible title in Australia. They are: an 'in personam claim founded in law or equity which gives rise to a remedy concerning the land'; the registrar's power to correct the register; overriding legislation; and that of lack of consideration from the proprietor for the interest in question. It should be noted that that the Real Property Act 1886 (SA)[431] contains a provision which sets out when an indefeasible title may be subject to challenge from a prior interest.

*Mistake in the Torrens system*

Unlike the system under the LRA 2002 the use of the term 'mistake' does not feature heavily in the Torren's system nor does it co-exist between provisions. This is unlike the use of the term from within the rectification and the indemnity provisions in the LRA 2002. In understanding 'mistake' in the Torrens system, it appears that one of the situations for when a 'mistake' occurs is when a 'mistake' is made to 'wrong boundaries.'[432] Should such a wrong boundary be included in 'A's title which is then passed to 'B' even though that title contains the wrong boundary information the title remains indefeasible.[433] 'Mistake' applies to challenges to indefeasibility that arise from a claim that is classed as *in personam* and this has the potential to 'significantly and severely restrict the operation of indefeasibility.'[434] It is submitted that the operation of 'mistake' in Australia is of a completely different nature in its operation than in England and Wales.

## 4.3 Indefeasibility in Australia – A comparison

As discussed, the Torrens system contains within it, a concept called 'indefeasibility'. It is this system of indefeasibility that this thesis seeks to compare with the

[431] Real Property Act 1886 (SA) S 71
[432] *Canadian Pacific Railway Co Ltd v Turta* [1954] SCR 427; [1954] 3 DLR 1
[433] Robert Chambers, *An Introduction to Property Law in Australia* (First edition 2001, Thomson Reuters 2008).it should be noted that this only applies to those in the Northern Territory, Queensland and Tasmania
[434] Lynden Griggs, 'Indefeasibility and mistake- the utilitarianism of Torrens' Australian Property Law Journal [2003] 10

conclusiveness of the register in England and Wales. Indefeasibility is regarded as a core concept to the Torrens system.[435] Barwick CJ explains the concept of indefeasibility as,

> The Torrens system of registered title… is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formally had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor[436]

Barwick CJ is referring to the fact that in Australia once land has been registered by the proprietor, that proprietor's title is considered to be indefeasible. The concept is similar to that of s58 of the LRA 2002. The statement appears to be quite simple and in theory one that would work effectively should you be the individual who owns the land and has not suffered a loss. The term indefeasible is suggestive to mean that no one is able to challenge a legal registered title in Australia. This is not the case, as the validity of title can be challenged where the legal title has been gained by any invalid means, such as fraud or where there is *in personam* liability (personal conduct)[437]

The concept of indefeasibility is said to be 'well entrenched' in the Australian legal system.[438] Penny Carruthers states that the Torrens system is so well entrenched in Australia that;

> under the system of registered land title in Australia, known as the Torrens system, 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.[439]

Carruthers argues that the question of indefeasibility in Australia is quite stable and produces outcomes that are predictable. This stability and predictability within a system

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[435] Ken Mackie, *Australian Land Law in Context* (Oxford University Press 2011)
[436] *Breskvar v Wall* (1971) 126 CLR 376 at [385]
[437] Ken Mackie, *Australian Land Law in Context* (Oxford University Press 2011)
[438] Anthony P Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters 2009)
[439] Penny Carruthers 'A Tangled Web Indeed: The English Land Registration Act and Comparisons with the Australian Torrens System' [2015] UNSWLawJL 46

is one to which the land law system in England and Wales aspires with its dual policy aims. Carruthers feels that the system for the conclusiveness of the register in England and Wales acts somewhat consistently with the Torrens system and should in theory provide the same outcome. [440] The author would suggest that the discussions within the thesis highlight that this is not so in practice as the outcome of case law does not appear at times to follow the main objective of the Act.

Indefeasibility in the Torrens system provides three different forms of protection for the those with registered property rights, essentially three strands to the on thread. These three rights are (1) priority over unregistered rights, (2) protection form the effects of notice, and (3) protection from interference with possession.[441]

*1) Priority over unregistered estates*

This is thought to be *the* primary indefeasibility provision within the Torrens system.[442] It gives registered property rights priority over unregistered rights. An example of what this means can be found within the Land Title Act 1994 (Qld) which states that 'a registered proprietor of an interest in a lot holds the interest subject to registered interests affecting the lot but free from all other interests'.[443] It is clear this provision relates to indefeasibility of title. This shows that a title is free from all unregistered interests unlike in England and Wales where unregistered interests can prejudice the rights of the title holder.

*2) Protection from notice*

Protection from notice is a form of protection for the registered proprietor from the effects of notice. Chambers considers this was 'to relieve the burden on the person who was wishing to acquire property rights from needing to investigate whether the current registered owner had a valid title, which was free from any unregistered property

[440] *Ibid*
[441] Robert Chambers, *An Introduction to Property Law in Australia* (First Edition 2001, Thomson Reuters 2013)
[442] *Ibid*
[443] Land Title Act 1994 (Qld), S 184

rights.[444] As with the previous provision there is emphasis on the protection for those who wish to purchase land or property and enabling that process to be one which could be done with ease and with clarity.

*3) Protection from interference*

Anyone who purchases land ('C' in the scenarios considered in this thesis) would obviously want to know that that purchase is a secure and a safe one, free from any claims to the land in question. Chambers states that the Torrens system provides for additional protection for the purchaser of land.[445]

Surprisingly, the language used in the Torrens system is not always specific when referring to indefeasibility. In fact, 'the word indefeasible is only used in four of the eight jurisdictions'.[446] Although specifically not referred to by name, the concept of indefeasibility is apparent, and is clearly meant by whatever terminology is used within the statute. Terms widely used within the Torrens system to describe indefeasibility are 'notice' 'paramountcy' or even 'protection for purchasers'.[447] Moore et al argue that it is the use of the word 'paramountcy' which sets out the most 'positive statement of indefeasibility.'[448] This terminology is used in the statutes of the states of New South Wales, Victoria, Western Australia and Australian Capital Terrority. The statutes states:

> notwithstanding the existence in any other person of any estate or interest which, but for this Act may be held to have priority, the registered proprietor of any estate or interest in the land shall, except in the case of fraud and subject to other various exceptions which differ from jurisdiction to jurisdiction, hold the land, estate or interest subject only to the encumbrances, estates or interests recorded in the folio of the registrar[449]

[444] Robert Chambers, *An Introduction to Property Law in Australia* (First Edition 2001, Thomson Reuters 2013)
[445] *Ibid*
[446] Anthony P Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters 2009)
[447] *Ibid*
[448] Anthony P Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters 2009)
[449] Cited from Griggs book, wording is not precise- from the Real Property Act 1900 (NSW), S 42(1); Transfer of Lands Act 1958 (Vic), S 42(1); Transfer of Land Act 1893 (WA) S 68; Land Titles Act 1925 (ACT) S 58.

The various Torrens statutes each portray the meaning of the concept of indefeasibility differently, yet, all hold the same core meaning of the word, be it with a slightly differing terminology. The emphasis and reasoning of the term 'indefeasible' holds a striking similarity to the meaning and inference of the provision found in s58 of the LRA 2002.

The Torrens statutes that use the term 'paramountcy' for inferring indefeasibility often contain an additional entry to reinforce that indefeasibility provision, and this is referred to as an ejectment provision. These provisions provide that 'no person can maintain an action to recover the land against a registered proprietor except in particular named circumstances.[450] In Australia and within the Torrens statutes there is a strong inference for protecting those who have registered interests in land above all else.

*Defeasible transactions in land*

Defeasible title in Australia occurs due to a defeasible transaction in land. This is somewhat similar in nature to a voidable transaction in England and Wales. The similarity lies in the fact that both hold a title which is potentially flawed and is therefore open to challenge. Fraud had been suggested to be an exception to the indefeasible title in Australia and will be discussed below as it is of the greatest relevance to the thesis. There are several other reasons as to why a title in land may have derived from a defeasible transaction and it is not the purpose of the thesis to visit them all here.[451] Examples of defeasible transactions are: taking advantage of another, deception and unfair conduct. The author will briefly consider the provisions for challenging indefeasibility and indemnity in the Torrens system below.

[450] Anthony P Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters 2009)
[451] For a more detailed overview please see Anthony P Moore, Scott Grattan and Lynden Griggs, *Australian Real Property Law* (Thomson Reuters 2009) Chapter 9

## 4.4 Deferred and immediate indefeasibility in Australia

The Torrens statutes have what is referred to as 'deferred indefeasibility'.[452] Deferred indefeasibility appears to follow a similar concept to that of a voidable disposition.[453] Deferred indefeasibility means that if a person becomes registered as a result of a void document then this person acquires only a defeasible title as discussed above and as opposed to an indefeasible title. As a result of holding a defeasible title in land a former registered proprietor can bring an action to be restored back on the title.[454] This is an easy concept to follow in the 'A' to 'B' chain, however things become more complicated in the Torrens system when that defeasible title is sold to another 'C'. What follows is that should a defeasible title be conveyed to another in the chain ,'C', then 'C' would acquire a title that is indefeasible, giving protection to C' who purchased in good faith. This is similar to the A-B-C chain, and the nature of voidable discussions previously.

At first sight, the results to which deferred indefeasibility can give rise appear to be of a similar nature to those in *Barclays Bank v Guy*.[455] In a typical A-B-C scenario discussed in this thesis- in that should 'A' lose the land or property to by way of a fraudster 'B' without knowledge or consent, and 'B' then created a legal charge, called 'C'. The concept of deferred indefeasibility highlights that 'A' can cancel the transaction to 'B' as 'B's' title would be classed as deferred indefeasible title (potentially defeasible). However, as title or a charge has been passed to 'C', this is now problematic, in that 'C' now holds an indefeasible title as a registered interest holder. 'A's recovery of their own title is therefore burdened by the charge of 'C'.[456]
However, in Australia, (contrary to what occurred in *Guy* and *Stewart* where no indemnity was payable)'A' in this scenario would be able to obtain compensation to pay off the charge from what is known as an 'assurance fund'. In England and Wales,

[452] Penny Carruthers, 'A Tangled Web Indeed: The English Land Registration Act and Comparisons with the Australian Torrens System' [2015] UNSWLawJL 46
[453] The idea of deferred indefeasibility is suggested to have been established in the case of *Gibbs v Messer* [1891] AC 248 (PC)
[454] *Ibid*
[455] [2008] EWHC 893 (Ch) [2008] EWCA Civ 452, [2008] EWCA
[456] At this point a deferred title looks similar in nature to the narrow interpretation of the LRA 2002 seen in *Barclays Bank v Guy* and *Stewart v Lancashire Mortgage Corporation Ltd* and discussed above in the section on 'the narrow interpretation' of the LRA 2002.

the possibility to obtain the indemnity is limited and as seen often not available due to the transaction between 'B' and 'C' being considered a valid transaction.

A further and more complex issue arises in the type of scenario where 'A' is impersonated by 'X' and title is passed to 'B' who then grants a legal charge in favour of 'C'. All three, A-B-C, are innocent parties and this creates a complex issue which needs a resolution. 'A' in this scenario, and with deferred indefeasibility, could see the land returned to them with a form of insurance to pay the legal charge of 'C', yet 'B' could potentially be left with nothing for their transaction with 'X', which can appear to be somewhat harsh to the lay observer.[457]

In order to remedy the potential harshness of deferred indefeasibility,[458]immediate indefeasibility was introduced in Australia. Cooke has stated that immediate indefeasibility is a 'starling' provision to an English Lawyer[459] as it acts in opposition to the rule of *nemo dat quod non habet,* you cannot give what you do not have.[460] The provision appears to accord with the premise in the LRA 2002 which aims to give protection to 'C' the purchaser. By reference to the above scenario that involved 'X''s immediate indefeasibility, would allow for 'B' to keep the land and the registered charge 'C', and for 'A' to claim the compensation from the assurance fund. This too can be argued to portray a harsh result in that 'A' would probably be seeking return of his land and the offer of compensation may not be suitable, especially when considering the argument by Goymour for A wanting the 'mud and not the money'.[461] Furthermore, consideration should be given to 'A' who may not wish for the action to recover title to be taken under the concept of deferred indefeasibility.

It was in the case of *Frazer v Walker*[462] that immediate indefeasibility was established as a preference in Australia when considering case law that came before the courts. At its core immediate indefeasibility means that the registration of a person or a charge, albeit from an invalid document, is still given the same priority as if it were a valid one

[457] Robert Chambers, *An Introduction to Property Law in Australia* (First Edition 2001, Thomson Reuters 2013)
[458] *Ibid*
[459] Elizabeth Cooke, *The New Law of Land Registration* (Hart publishing 2003) 103
[460] *Ibid*
[461] n (367)
[462] [1967] 1 AC 569

and thus it receives an equal property right. In considering the scenario above again, but under the consideration of immediate indefeasibility, 'A' would have no title and both 'B' and 'C' would now hold titles that are indefeasible. The suggestion within the Torrens system is that immediate indefeasibility takes preference over deferred indefeasibility in all cases however harsh the results may be for 'A'.[463] The suggestion is that 'A' can then recover their losses from an assurance fund however unpalatable.

The author will now make a short comparison with the Torrens system and some of the case law from England and Wales. In *Barclays Bank v Guy*[464] (decided in the England and Wales using the narrow application of the LRA 2002), applying the Australian concept of deferred indefeasibility, and as fraud had occurred, , 'A' could be able to have 'B' removed from the register, but the title of 'C' (the charge) would remain secure. The difference under the Torrens system, is that 'A' would have the ability to claim some compensation from the assurance fund to pay the charge, unlike in England and Wales. Clearly this scenario gives a good result for both 'A' and 'C', as 'A' has the land returned and is able to claim a form of compensation to pay 'C', leaving 'A's title free then from 'C's interest (when paid). 'C' is also satisfied as the charge remains and is paid via the compensation. It can be considered that 'C' would not be concerned with where the redemption monies comes from, as all that matters is that the charge is satisfied. Notably 'B' would also lose out, especially if the transfer had been conducted by X .

The second case to compare is *Knights Construction v Roberto Mac*[465] (decided under the wider application of the LRA 2002). *Knights Construction* has been considered in full earlier in the thesis in regard to the law in England and Wales. For the purposes of this section, the point to make is that it consisted of a 'mistaken' registration on the land register. In Australia there is an 'exception' to the indefeasible title from wrong description of registered title.[466] However, this only binds 'A' and 'B' in such a scenario, and once the land has been transferred, the exception ceases to exist.

[463] Robert Chambers, *An Introduction to Property Law in* Australia (First Edition 2001, Thomson Reuters 2013)
[464] [2008] EWCA Civ 452, [2008] 2 EGLR 74
[465] [2011] EWLandRA 2009_1459
[466] Penny Carruthers, 'A Tangled Web Indeed: The English Land Registration Act and Comparisons with the Australian Torrens System' [2015] UNSWLawJL 46

Therefore, had the facts of *Knights Construction* occurred in Australia, 'C' could have obtained a valid indefeasible title leaving 'A' to claim compensation from the assurance fund. This is the opposite to what actually occurred in *Knights Construction* in England and Wales in which 'A' saw the registered title returned to A via the rectification provisions of the LRA 2002. Therefore, 'C' in *Knights Construction* was left with no land and the only option was to try to obtain a remedy under the indemnity provisions of the LRA 2002 It can be argued that the Torrens system accords with the intention of the LRA 2002 in seeking to protect the title of 'C' and not 'A', Conversely, it is suggested that *Knights Construction* did not chime with the aim of the LRA 2002 in that 'A' received the land back notwithstanding the registered interest of 'C'.

It can be summarized that the system in Australia operates in part in a similar manner to that of England and Wales. Both jurisdictions have the policy aspiration to create a title that is conclusive or indefeasible and in addition both jurisdictions have provisions whereby the registered title can be altered to replace the registered owner. What is different in both jurisdictions is the process by which that can be done and furthermore Australia appears to be more receptive to the possibility of a loss being suffered with the use of the private form of insurance. This notion of private insurance can appear to be attractive as a 'safety net' to an owner of land, however the author is of the view that the reliance on a private form of insurance can and would lead to an erosion of the insurance principle in England and Wales. What can be seen from the case law considered above, is that dependent on which route is chosen in Australia to resolve the dispute in land ownership, be it immediate or deferred indefeasibility, the outcome can be seen to be very different. What is apparent is that both systems are clear in their aim to protect the registered title holder and to promote the protection of dynamic security.

# CONCLUSION

The purpose of this thesis was to critically analyse if the dual policy aims of the LRA 2002 were having an effect on the Act's performance. A further purpose was to examine the struggle that the dual policy aims create between protecting rights and interests of the title holder and that of aiding smooth conveyancing. There is also a focus on the struggle between the protection of dynamic security and that of static security . This thesis has sought to evaluate the inconsistent way in which the LRA 2002 has been applied to cases, highlighted by the narrow and wide application of mistake.[467] The inconsistency has been credited to giving arbitrary results in case law and results that do not accord with the official policy aim of the Act to protect the rights and interests of the registered title holder. In fact, the concerns created by the Act have been considered by the Law Commission and a revised Draft Bill has now been produced. The areas of the LRA 2002 that have been suggested to be causing the issues are that of the conclusiveness of the register found in s58, the provisions for alteration in Schedule 4, and indemnity which is contained in Schedule 8 and it was these upon which the author sought to focus..

The mirror principle and the insurance principle have been at the forefront of considerations by the author, as these were primary considerations in the development of the Act and are therefore pivotal to the thesis when questioning the Act's performance. There has been a brief examination of the system for land registration in Australia, the Torrens system, which has its own form of indefeasibility that acts in a similar manner to the system in England and Wales, The Torrens system was briefly compared to the system in England and Wales and to some of the case law in England and Wales that had been analysed previously. This thesis considers disputes in land, notably what happens when land is transferred from 'A' without their knowledge or permission. In this type of scenario there are often two innocent parties 'A' and 'C', and what can be seen in this type of scenario is the difficulty for any legislation to be able to protect both 'A' and 'C' adequately. Unfortunately, it appears that there has to

[467] Nick Hopkins ,'Updating the Land Registration Act 2002' [2018] Conv 3

be a loser in such scenarios be it 'A' or 'C'. The thesis has also considered what would happen in two party cases where the dispute is between 'A' and 'B'.

Against this background, the following conclusions may be made:

The LRA 2002 when created, was in fact hailed to be a 'conveyancing revolution.'[468] It was the result of several years of work between the Law Commission and the Land Registry and revised the previous legislation (the LRA 1925) almost completely. Firstly, the greatest achievement of the LRA 2002 was to establish a system in which title is obtained by the registration process and not a process of registration of title, and this was the paramount shift in the way title registration was viewed. In this case then, the land register holds a most important position, in that it is the person or persons who are registered as the title holders who are afforded the protection that the Act has to offer by way of its provisions in s58. The issue that has arisen following the enactment of the LRA 2002 has been to what extent such a guarantee of title is upheld and how this works for subsequent purchasers of the land. For example, if 'A' has their title taken from them, fraudulently or otherwise, it is difficult to conceive a situation where 'A' would not want his land back, yet the policy factor of the statute is that it protects only the registered owner of the land who is 'C' or a party further on in the chain..

The main policy aims and objectives of the LRA 2002 were clear, bold and striking.[469] However, this thesis has shown, in answering the first research question, that the application of the legislation in cases that have come before the Courts is complex, difficult and somewhat onerous on the decision- making process of the Court. From the outset the LRA 2002 was clear that it contained within itself policy considerations that the Act would in theory enable conveyancing to be a secure process and one which could be achieved swiftly and with only minimal investigation into title required. The LRA 2002 is quite open in that it offers various guarantees within its provisions. It offers purchasers the 'state guarantee' to title via s58 which on paper can appear to be something of an absolute provision for a purchaser in land. It also offers the guarantee of compensation for those who suffer a loss via one of the reasons in the Indemnity

[468] Law Commission, *Land Registration for the Twenty First Century: A Conveyancing Revolution* (Law Com No 271, 2001) para 10.29
[469] *Ibid*

provisions in Schedule 8. The LRA 2002 tries to uphold the principles suggested by Ruoff (the mirror principle, the insurance principle and the curtain principle) although this thesis has shown that the principles are often not consistent with the practical application of the Act. Though appearing to have much to offer a purchaser and title holder, the writer considers that the LRA 2002 does not offer an absolute promise, only policy aspirations which to some extent can be argued to be attractive on paper and less attractive in practice.

The LRA is said to have caused a certain amount of controversy since its enactment. This the author considers to be a correct analysis of the performance of the Act. Section 58 of the LRA 2002 portrays that a registered title is conclusive, and that the Act protects the registered title holder. This would be 'C' in a chain of conveyance and would be the protection of dynamic security. It is clear from the case law that the state guarantee to title is not an absolute provision, firstly, the fact alone that Schedule 4 exists, means that a challenge to registered title can be made at any point. At present there appears to be no consistency within case law or from academics to the limits of the state guarantee save for the view that it is not absolute and can be best described as qualified indefeasibility. For this reason, it is difficult for the author quantify the extent to which a title would be secure, however secure they are deemed to be by virtue of the Act.

Lees offers an explanation on the conclusiveness of title and considers that the title guarantee is variable in the way it acts. The suggestion by Lees is that how conclusive the title will be, depends on how the title was gained or lost.[470] This is reflective of the argument between void and voidable. It is therefore the case facts that are of the greatest importance. The author believes that the thesis supports this conclusion. This relates to void and voidable titles in land, the first of which renders a title void from the outset and therefore alteration or rectification is suggested to be easier to obtain. The latter (voidable) means that title is open to challenge, but until it is the title remains valid. Much emphasis is placed upon the reasoning that a forged/ fraudulent transfer is one that is void and in that subsequent transfers can be classed as mistaken. There is the

[470] Emma Lees, 'Guaranteed Title: No Title, Guaranteed' in Amy Goymour, Stephen Watterson and Martin Dixon (eds),*New perspectives on land registration: Contemporary Problems and Solutions* (Hart 2018) Chapter 7

valid argument that even if 'A' to 'B' is created under a forged disposition the LRA 2002, the trio of owners powers found in ss 23, 24, 26 allows for 'B' to dispose of the land legally as he sees fit and therein lies the difficulty in seeing how the transaction from 'B' to 'C' is invalid.[471] It appears that it is the courts who decide on this point, which is based on the facts of the case.[472]

Another reason for the failure of the LRA 2002 to reach its full potential appears to be the lack of clarity in understanding what is meant by 'mistake' in the provisions for the alteration of the register (Schedule 4). This issue has been considered by academics and within a wealth of case law which is concerned with the provisions of Schedule 4 and in particular 'mistake'. The fact that the provisions of rectification of the register are concerned with 'mistake' and in turn closely linked to the indemnity process make the interpretation of the term such an important factor in the alteration provisions. 'Mistake' has been suggested to be finally clarified.[473] However, it appears that there are several different interpretations, and this adds only to the complexity of the matter. There are several versions of a 'mistake', such as simple mistakes (these can be from the land registry where title may have been entered wrongfully or not entered at all),[474] 'mistakes' that occur due to fraud[475] and 'mistakes' such as double registrations,[476] and each circumstance carries its own set of particular facts and issues. The issue is how the court deals with such matters as they have arisen. It appears that although 'mistake' is thought to have been clarified, the term still warrants further discussion and clarification when it comes before the courts.

[471] Emma Lees, 'Title by Registration: Rectification, Indemnity and Mistake and the Land Registration Act 2002 [2013] M. L. R 76 (1) Lees comments on the issue of such A-B-C transactions and on how the courts are trying to resolve such issues. Lees considers that a resolution to this matter is greatly needed.
[472] Some examples of case law which falls into the two categories-
Cases in which it was decided that all subsequent transactions were mistaken- *Ajibade v Bank of Scotland* [2008] EWLandRA 2006_0163
Cases in which only the transaction between 'A'- 'B' were seen to be mistaken- *Barclays Bank v Guy* [2008] EWCA Civ 452, [2008] 2 EGLR 74 *Odogwu v Vastguide* [2008] EWHC 3565 (Ch) *Stewart v Lancashire Mortgage Corporation Ltd* [2010] EWLandRA 2009_0086
[473] The suggestion is that clarification for the term 'mistake' lies within *Knights Construction v Roberto Mac* [2011] EWLandRA 2009_1459, [2011] 2 EGLR 123 and also within *NRAM Ltd v Evans* [2017] EWCA Civ 1013
[474] *Knights Construction v Roberto Mac* [2011] EWLandRA 2009_1459
[475] *Swift 1st v Chief land Registrar* [2015] EWCA Civ 330, [2015] Ch 602
[476] *Parshall v Hackney* [2013] EWCA Civ 240, [2013] Ch 568

A further issue is the use of the narrow and the wide interpretations of the term 'mistake' in the provisions of the Act. The narrow interpretation is said to accord with the LRA 2002, in that it tries to give the provisions Act its literal meaning and in doing so protecting 'C' in our scenario when 'C' is the registered owner of the land. The wider view allows for 'mistake' to be given a broad interpretation and in such allows to some extent further mistakes to classed as a result of the original mistake, a good example of this is seen in *Knights construction*. There is still a lack of clarity for when this type of application will apply. Lees made the suggestion is that the latter ( the wider view) accords with the principles of unregistered land and is often referred to as the off - register position. The author considers the wider view to be one that may achieve a form of fairness, taken from the position of those who have lost their land through no fault of their own. The author considers a preference for the narrow view would support the policy aim of the Act in protecting the registered owner, however, this application does not support 'A' who has lost the land. It could be said that the unfairness in a reliance on the narrow application is that 'A' is left to seek an Indemnity, which case law shows is not always straightforward.

The provisions for indemnity are found within Schedule 8 of the LRA 2002. The basis of the Indemnity provisions is to compensate those who have suffered a loss. This in turn forms a part of the insurance principle. It is the Land Registry who bear the brunt of this payment of compensation, as it is they who pay out the compensation to those who fulfill the criteria in Schedule 8. The indemnity process is considered not to have caused as much concern as Schedule 4 (the alteration provisions), yet they have proved problematic via the strong link between the two provisions and the use of the term 'mistake'. 'Mistake' is a term also of importance within Schedule 8 and yet it is also not clarified in this provision to any extent. The suggestion is that prior to *Gold Harp*[477]there were considerations for the reform of part of the indemnity process, yet *Gold Harp* is credited to giving a wider scope to when an indemnity can be claimed in certain circumstances via Schedule 8 1 (2) (b). This allows for an indemnity to be paid when a registered title holder (or charge) is registered following a forged disposition

[477] *Gold Harp properties Ltd v MacLeod* [2014] EWCA Civ 1084, [2015] 1 WLR 1249

and this title is rectified. It was these provisions which were relied upon in *Swift 1st* [478] to claim compensation for the loss of the registered charge.

A further area of concern within the thesis was that of the issue of overriding interests which created concern in *Malory* in which it was held that when an interest was seen to be overriding no indemnity would be payable to those who have suffered a loss. Malory also gave rise to the issue that title could be split into the legal and beneficial interest, with those who suffered a loss retaining the beneficial ownership. This second issue appears to have been resolved to an extent as *Malory* is no longer followed and it has been clarified that title in land can no longer be split. The Law Commission views *Malory* as still being problematic s and have made recommendations for *Malory* and for the overriding interest's argument to now be rejected.

In answering the second research question, we saw how the Law Commission have in the 2018 Report focused upon indemnity in a rather preventative way as opposed to trying to reform the provisions themselves. The Law Commission have considered the LRA 2002 and how to prevent title fraud in the first instance, which would in turn reduce the amount of compensation claims. The Law Commission are considering the need to impose a duty of care on solicitors, who are a part of the conveyancing process and furthermore introduce further identity checks on those purchasing land. The author considers this to be a good proposition. On the one hand a decrease in title fraud will most certainly have an impact upon the compensation claims that come before the Land Registry. On the other hand, this does place a large amount of responsibility on the solicitor or conveyancer who are facilitating the conveyancing process. This emphasis of a duty of care on solicitors does not however resolve the issue of the scheme for indemnity fully, nor does it make an indemnity easier to claim for those who have suffered a loss as it simply is an attempt to reduce the issue of fraud.

The Law Commission 2018 Report gave some 53 proposals for the revision of the LRA 2002, including a Draft Bill. The fact that the Law Commission have felt the need to

[478] *Swift 1st v Chief Land Registrar* [2014] EWHC 4866 (ch)

consult[479] and then create a Report[480] based upon the issues in the LRA 2002 highlights that the legislation is causing concern in its performance. One point to make appears to be that the Law Commission are not seeking to 'change the fundamental nature' of the Act.[481] This statement by Hopkins possibly refers to the fact that the policy aims of the LRA 2002 to make conveyancing a simpler and easier process in addition to the aims of the protection of rights and interests of the title holders in land remains the primary focus of the Act. The 2018 Report focused upon the areas of the LRA 2002 that are concerned with this thesis as well as other supplementary areas of concern in the Act. In reflecting upon the lack of clarity of the term 'mistake' the author considers that the lack of clarity potentially allows for flexibility in the application of the Act and allows for the judiciary to adapt to certain scenarios and certain case facts. The author believes that the flexibility in the LRA 2002 allows the judiciary to make use of general property law and the rules of unregistered land though this is sometimes at the detriment of applying the LRA 2002 in the manner it was intended.

In answering the third research question, the Torrens system in Australia was compared to the system in England and Wales. The reason for the choice was the similarities in the two systems. In addition, the Torrens system in Australia operates an indefeasible title which is said to operate in a stronger form than that of the indefeasibility in England and Wales. Australia operates a system where fraudulently obtained titles are able to be challenged, and in England and Wales this is often referred to as a voidable transaction. A difference between the two systems is the fact that private insurance operates in many of the land transactions in Australia and this private insurance is suggested to offer a quicker form of compensation than trying to obtain such from a state scheme. The author is of the view that private insurance would be of benefit domestically, yet there is the possibility of an erosion of the insurance principle and there would have to be a clear guideline to what would be covered from a form of private insurance in opposition to the insurance from the land registry.

[479] Law Commission, *Updating the Land Registration Act 2002, A Consultation Paper* (Law Com No 227, 2016).
[480] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018)
[481] Nick Hopkins, 'Updating the Land Registration Act 2002' [2018] Conv 3

For the reasons advanced in this dissertation, the author is of the view that the LRA 2002 struggles to respond effectively and consistently to the challenges that it faces. It appears the judiciary are still making use of the off- register position and that of the rules of general property law in deciding to whom the land should be registered , and the principle of 'those who ought to be registered should be registered' has been considered in several cases. These types of decisions work directly against the LRA 2002 and its policy aims and highlight the struggle that the Act has in balancing its dual policy aims. The lack of certainty in knowing who will be afforded the protection of the Act appears to create a certain amount of uncertainty for those who own land and face a challenge to their title. There have been cases that have been decided on the basis that they follow the Act strictly. These at times can appear to be causing results that could be classed as unfair, in that a former owner deprived of their land can be left with nothing but an indemnity to chase, and in that regard may or may not be successful.

It has been argued by the author that the Act is nothing more than a set of policy aspirations from which the government can use to promote strength and stability in the housing market. It has also been argued that if the judiciary were forced to follow the Act to the letter, then this would potentially cause more arbitrary and complex results in case law than there is at present. The writer therefore considers, although flawed at times, the LRA 2002 is a flexible piece of legislation which operates in the best way possible. It is likely that with some fine tuning and making use of the suggestions in the 2018 Law Commission Report it has the potential to become a well-rounded piece of legislation.

## Bibliography

## Journal Articles


Berry J, 'Jeremy Bentham on land registration: outdated or outstanding' [1995] UCL Juris Rev 1

Cooke E, 'The register's guarantee of title Fitzwilliam v Richall Holdings Services Ltd [2013] EWHC 86 (Ch); [2013] 1 p & C. R . 19' [2013] Conv 4

Cooke E, 'Chickens coming home to roost Swift 1st Ltd v Chief Land Registrar [2014] All E.R. (D.) 12 (Feb)' [2014] Conv 5

Cooper S, 'Regulating Fallibility in registered land titles' [2013] C. L. J. 72 (2)

Cooper S, Resolving title conflicts in registered land [2015] L. Q. R. 131

Cooper S, 'Register entry pursuant to a court order subsequently set aside' [2019] Conv 1

Carruthers P, 'A Tangled Web Indeed: The English Land Registration Act and Comparisons with the Australian Torrens System' [2015] UNSWLawJL 46

Dixon M, 'Rectification and priority: further skirmishes in the land registration war' [2015] L. Q. R. 131 (April)

Dixon M, 'What sort of land registration system?' [2012] Conv 5

Dixon M, 'A not so conclusive title register?' [2013] L. Q. R. 129

Dixon M, 'The Past, the present, and the future of land registration' [2013] Conv 6

Dixon M, 'Title by registration or conquest' [2013] IJLBE 5 (3)

Dixon M, Updating the land registration Act 200: title guarantee, rectification and indefeasibility [2016] Conv 6

Dixon M, 'Fraud, rectification and land registration: a choice [2017] Conv 3

Gardner S, 'Alteration of the Register; an alternative view' [2013] Conv 6

Gardner S, 'The Land Registration Act 2002- the show on the Road' [2014] M. L. R. 77 (5)

Goymour A, 'Mistaken registrations of land: exploring the myth of "title by registration" [2013] C.L.J. 72 (3)

Goymour A, 'Resolving the tension between the land registration Act 2002's "priority" and "alteration" provisions [2015] Conv 235

Griggs L, ‘Indefeasibility and mistake- the utilitarianism of Torrens’ [2003] Australian Property Law Journal 10

Hopkins N, [2018] ‘Updating the Land Registration Act 2002’ [2018] Conv 3

Hopkins N and Sarah Dawe, ‘Whose land is it anyway?’ N.L.J 166 (7695) 11

Laville R, ‘Mistaken release of security: a new avenue to altering the land register [2017] JIBFL 10

Lees E, ‘Title by registration: rectification, indemnity and mistake and the Land Registration Act 2002’ [2013] M.L.R. 76(1)

Lees E, ‘Indemnity and the Land Registration Act 2002’ [2014] C. L. J 73 (2)

Lees E, ‘Registration make believe and forgery- Swift 1st Ltd v Chief Land Registrar’ [2015] L. Q. R. 131

Lees E, ‘Agency, Knowledge and good faith in land registration: Knightsbridge Property Development Corporation Limited v South Chelsea Properties Limited’ [2018] Conv 76

Lees K, ‘Parshall v Hackney: a tale of two titles’ [2013] Conv 3

Lees K, ‘NRAM v Evans: there are mistakes and mistakes…’ [2018] Conv 1

Low K, ‘The Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities’ [2009] MelbULawRw 7

Milne P, ‘A partially welcome decision’ [2019] Conv 1

Ollech J, ‘Property / Landlord & tenant: Baxter: take three’ [2011] NLJ 161

Owen G, ‘A new model for overreaching – some historical inspiration’ [2015] Conv 3

Owen G and Dermot Cahill, ‘Overreaching- getting the right balance’ [2017] Conv. 26

Proferes A, ‘The meaning of mistake’ [2018] NLJ 168

TBF Ruoff, ‘*An Englishman Looks at the Torrens System*’ (Sydney, Law Book Co of Australasia, 1957) 13

Smith R, ‘Land Registration; Rectification and Purchasers’ [2015] C. L. J. 74

Property Law Bulletin ‘Case Comment, Title: rectification not Available’ [2017] P. L. B. 37 (10)

Property Law Bulletin ‘Case Comment, How Reliable is a registered title’ [2018] P. L. B. 38 (8)

Xu L, 'What do we protect in land registration' [2013] L. Q. R. 129

**Books**

Abbey R, and Richards, M, *The Land Registration Act 2002* (First published in 2002, Oxford University Press 2011)

Bevan C, *Land Law* (Oxford University Press 2018)
Cooke E, *The New Law of Land Registration* (Hart Publishing 2003)

Dixon, M, *Modern land law* (11th edn, Routledge 2018)

*Emmet & Farrand on Title* (oose-leaf ed)

Grey K and Grey S F, *Elements of Land Law* (5th edn, Oxford University Press 2009)

Ruoff and Roper's registered conveyancing (loose-leaf)

Ruoff TBF, *An Englishman Looks at the Torrens System* (Sydney, Law Book Co of Australasia 1957)

Chambers R, *An Introduction to Property Law in Australia* (First edition 2001, Thomson Reuters 2008)

Goymour A, Watterson S and Dixon M (eds), *New Perspectives on Land Registration. Contemporary Problems and Solutions* (Hart Publishing 2018)

Mackie K, *Australian Land Law in Context* (Oxford University Press 2011)

Moore AP, Grattan S and Griggs L. *Australian Real Property Law'* (First edition 1991, Thomson Reuters 2011)

McFarlane B, Hopkins N and Nield S, *Land Law, Text, Cases and Materials'* (First published in 2009, Oxford University Press 2018)

**Legislation**

Land Registration Act 1925

Law of Property Act 1925

Land Charges Act 1925

Settled Land Act 1925

Trustee Act 1925

Administration of Estates Act 1925

Land Registration Act 2002

Land Registry Act 1862
Tribunals, Courts and Enforcement Act 2007 –
5 Anne c18, 6 Anne c35, 7 Anne c20
The Limitation Act 1980
Land Transfer Act 1897
Human Rights Act 1998 (HRA 1998)
Tribunals, Courts and Enforcement Act 2007

**Legislation of the jurisdiction**

Real Property Act 1886
Australian Courts Act 1828
Land Title Act 1994 (Qld)
Real property Act 1900 (NSW)
Transfer of Lands Act 1958 (Vic)
Transfer of Land Act 1893 (WA)
Land Titles Act 1925 (ACT)

European Convention on Human Rights (ECHR) Article 1 of Protocol 1 of the European Convention on Human Rights

**Consultation Papers**

Law Commission, *Land Registration for the Twenty- First Century, A Consultative Document* (Law Com No 254, 1998)
Law Commission Report, *Land Registration for the Twenty- First Century: A conveyancing Revolution* (Law Com No 271, 2001)
Law Commission, *Updating the Land Registration Act 2002, A Consultation Paper* (Law Com No 227, 2016).
Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, 2018)

**Case law**

*Ajibade v Bank of Scotland* HM Land Adjudicator, REF/2006/0163/0174

Antoine v Barclays Bank UK Plc [2018] EWCA 2846; [2019] 1 P & C. R. DG16; [2018] 12 WLUK 378 (CA (Civ Div)

*Barclays Bank v Guy* [2008] EWHC 893 (Ch) [2008] EWCA Civ 452, [2008] EWCA Civ 452 [2010] EWCA Civ 1396

*Bank of Scotland plc v King* [2007] EWHC 2747 (Ch), [2008] 1 EGLR 65

*Baxter v Mannion* [2011] EWCA Civ 120, [2011] 1 WLR 1594

*Bakrania v (1) Lloyds Bank (2) Souris* [2017] UKFTT 0364 (PC)

*Chowood's Registered Land, re* [1993] Ch 574

*Clark v Chief Land Registrar* [1993] Ch 294 (Ch)

*Freer v Unwins Ltd* [1976] Ch 288 (Ch)

*Knights Construction v Roberto Mac* HM Adjudicator, REF/2009/1459

*Knightsbridge Property Development Corporation Limited v South Chelsea Properties Limited* [2017] EWHC 2730 (ch)

*Fitzwilliam v Richall Holdings Services Ltd* [2013] EWHC 86 (Ch), [2013] 1 P & CR 19

*Gold Harp Properties Ltd v MacLeod* [2015] 1 WLR 1249

*Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] Ch 216

*NRAM Ltd v Evans* [2017] EWCA Civ 1013

*Odogwu v Vastguide.* [2009] EWHC 3565 (Ch)

*Parshall v Hackney* [2013] EWCA Civ 240, [2013] Ch 568

*Patel v Freddy's Ltd* [2017] EWHC 73 (Ch) (Ch D)

*Paton v Todd* [2012] EWHC 1248 (Ch)

*Pye v Stodday Land Ltd* [2016] EWHC 2454 (Ch), [2016] WLR 168

Rashid v Rashid [2017] UKUT 332 (TCC) (UT (Tax))

*Rachid v Nasrullah* [2018] EWCA Civ 2685: [2019] 1 P. & C. R DG18

*Stewart v Lancashire Mortgage Corporation Ltd* [2010] EWLandRA 2009_0086

*Scott v Southern Pacific Mortgages Ltd* [2015] AC 385 [96]

*Stoddy Land Ltd v Pye* [2016] EWHC 2454 (Ch), [2016] 4 WLR 168

*Swift 1st v Chief Land Registrar* [2014] EWHC 4866 (ch)

*Swift 1st v Chief Land Registrar* [2015] EWCA Civ 330 [2015] Ch 602

*Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL)

**Case law outside the jurisdiction**

*Assets Co Ltd v Mere Roihi* [1905] AC 176 [210]

*Canadian Pacific Railway Co Ltd v Turta* [1954] SCR 427; [1954] 3 DLR 1

*Breskvar v Wall* (1971) 126 CLR 376 at 385

*Frazer v Walker* [1967] 1 AC 569

*Gibbs v Messer* [1891] AC 248 (PC)

*Stuart v Kingston* 1923) 32 CLR 309

**Other**

https://dictionary.cambridge.org/dictionary/english/house

Sir Andrew Leggart, *Tribunals for Users- One System, One Service.* Report of the Review of Tribunals (2001)

The Lord Chancellor (Lord Irvine of Lairg) discussing the proposed bill in Hansard 03/07/2001 vol 626 cc776-801

Fixing our Broken Housing Market 2017 Cm 9352.

HM Land Registry, Business Strategy 2017 to 2022 (Nov 2017) pp11 and 15

Land Registry, *Report on Responses to E- Conveyancing Secondary Legislation Part 3* (2011) para 5.2 at http://www.landregistry.gov.uk/ data/assets/pdf file/0006/3102/econveyancing cons.pdf (last accessed on 03/03/19)