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The meaning of mistake

The inevitable lot of mankind? Amy Proferes on 'mistake' in Schedule 4 of the Land Registration Act 2002

IN BRIEF

- Clarity on the meaning of mistake.
- Rectification will be sparingly exercised, and applications should be carefully considered prior to issue.

Schedule 4 of the Land Registration Act 2002 (LRA 2002) allows the court to order alteration of the Land Register for the purpose of correcting a mistake, bringing the register up to date, or giving effect to any estate, right or interest excepted from the effect of registration. Under paragraph 1 an alteration involving the correction of a mistake and prejudicially affecting the title of a registered proprietor is deemed to be rectification, rather than simple alteration. This distinction is significant. Rectification against a proprietor in possession who does not consent will only be ordered if he has caused or substantially contributed to the mistake by fraud or lack of proper care, or if it would be otherwise unjust not to make the order. Such 'qualified indefeasibility' therefore prefers an innocent transferee who is in possession of the land. In addition, a proprietor who suffers loss as a result of rectification may be entitled to an indemnity from the Registrar.

Unhelpfully LRA 2002 does not define 'mistake' for the purposes of Schedule 4. Recognised examples include double registration (ie including the same parcel of land in more than one title), typographical errors, dispositions made contrary to a restriction, and entries deleted in error.

This article will consider two recent decisions which provide some further clarity on the meaning of mistake: *NRAM v Evans* [2017] EWCA Civ 1013, [2018] 1 WLR 639 and *Antoine v Barclays Bank plc & Ors* [2018] EWHC 395 (Ch), [2018] All ER (D) 130 (Mar).

NRAM v Evans

In *NRAM v Evans*, Mr and Mrs Evans's solicitor had written to NRAM demanding that a 2004 loan charged against the property be removed from the register, as it had been discharged. However, the letter failed to make clear that the loan had been discharged by a further loan from NRAM, which was now (on NRAM's case) secured by the same charge. An NRAM employee overlooked the second loan and arranged for the charge to be removed, leaving the existing loan unsecured.

NRAM claimed for rescission of the e-DS1 which had resulted in the removal of the charge, along with an order re-registering the charge. The claim form sought an order that the register 'be rectified &/or be brought up to date' while the Particulars of Claim sought an order that the register be 'altered and/or brought up to date by re-registration'. At first instance the judge found that the mistake in the e-DS1 was a mistake which entitled NRAM to rectification. Mr and Mrs Evans appealed.

In the Court of Appeal, Kitchin LJ ruled that there had not been a mistake in the sense envisaged by LRA 2002, because at the time the charge was removed the eDS-1 was valid. Noting the relevant sections of *Megarry & Wade: The Law of Real Property* and *Ruoff & Roper: Registered Conveyancing*, he confirmed at [52] that the relevant time for determining the mistake is the time of registration: '…both of these formulations focus on the position at the point in time that the entry or deletion is made. That, so it seems to me, must be right. If a change in the register is correct at the time it is made it is very hard to see how it can be called a mistake.'

Therefore a 'voidable', rather than void, disposition, will not amount to a mistake, because its rescission does not retrospectively remove its validity at the time the entry was made. At the time of registration, it was a valid disposition. The relevant mistake for the purposes of Schedule 4 is the entry on the register itself, rather than any mistake which resulted in that entry. See [59]: 'In my judgment, the registration of a voidable disposition such as that with which we are concerned before it is rescinded is not a mistake for the purposes of Schedule 4 to the LRA 2002. Such a voidable disposition is valid until it is rescinded and the entry in the register of such a disposition before it is rescinded cannot properly be characterised as a mistake. It may be the case that the disposition was made by mistake but that does not render its entry on the register a mistake, and it is entries on the register with which Schedule 4 is concerned. Nor, so it seems to me, can such an entry become a mistake if the disposition is at some later date avoided. Were it otherwise, the policy of the LRA 2002 that the register should be a complete and accurate statement of the position at any given time would be undermined.'

Alteration was still appropriate for the purpose of bringing the register up to date (the position taken by the Chief Land Registrar, intervening), but as there was no mistake this was alteration rather than rectification and no indemnity was owed.

It is therefore confirmed that dispositions later found to be void will qualify as mistakes, but voidable dispositions will not—a distinction which *Emmet & Farrand on Title* notes has been described as 'outrageous'. The Supreme Court denied permission to appeal in February 2018, so despite criticisms *NRAM v Evans* is now settled law.

Antoine v Barclays Bank plc & Ors

What, however, would the position be where there is an underlying forged document which is void, but the actual entry on the register is the result of a court order? *Antoine v Barclays Bank plc & Ors*, handed down in March 2018, provides the answer. The claimant was the administrator of the estate of his father Mr Joseph. In 2006, a Mr Taylor issued proceedings against the estate based on a loan of £11,000 made to Mr Joseph in 1987. The loan was secured against a property owned by Mr Joseph and evidenced by three documents. Mr Taylor's case was that Mr Joseph had defaulted on the loan and, under the terms of the agreement, he was entitled to have the property transferred to him, alternatively repayment of the £11,000. Mr Antoine, living in New Zealand and unaware

of the proceedings, did not repay.

In July 2007 Mr Taylor obtained an order that he be registered as the proprietor (the Vesting Order). The change was duly entered on the register. In February 2008 Mr Taylor obtained a loan of £80,000 from Barclays Bank, which he secured on the property. Mr Antoine, having learned of the 2006 proceedings, had the Vesting Order set aside (albeit without prejudice to Barclays' rights) on the basis that the loan documents were forgeries and therefore the order had been obtained by fraud. Mr Antoine was registered as proprietor, but the charge remained on the title. The 2006 proceedings were left to drift.

In 2016 Mr Antoine issued proceedings against Barclays and the Chief Land Registrar, seeking declarations that the loan documents were void and an order that the register be rectified by the deletion of the Barclays charge. The 2006 and 2016 proceedings were heard together.

Joanna Smith QC, sitting as a Deputy Judge of the High Court, ruled that the underlying documents were indeed forgeries. The question then to be decided was whether the registration of Mr Taylor as proprietor, and of the subsequent charge, were mistakes. Mr Antoine argued that the Vesting Order, having been obtained on the basis of fraudulent documents, was not valid. Registration on the basis of that order was therefore a mistake. Barclays and the Chief Land Registrar did not dispute that the documents were forgeries, but nonetheless maintained that no mistake had been made for the purposes of Sch 4 of LRA 2002.

In the judge's view the case at hand presented a novel issue: where a vesting order has been induced by fraud, does the registration of that order amount to a mistake for the purposes of Sch 4? She ruled that it does not, for the reasons given below.

A vesting order is a disposition by operation of law, pursuant to s 9 of the Law of Property Act 1925, and must be completed by registration. It is not for the Registrar to look behind the order. The authorities on the validity of court orders are clear: an order is valid and binding until such time as it is set aside. As stated in *Firman v Ellis* [1978] 1 QB 886 (CA), 'a document emanating from the court and good on its face…must be acted on until declared void by the court'. 'Void' in this context signifies the court having no choice but to set it aside, rather than void *ab initio*: *In re F (Infants)(Adoption Order: Validity)* [1977] Fam 165 CA. The distinction between void and voidable dispositions set out in *NRAM v Evans* applies either directly or by analogy, and vesting orders will fall into the same category as voidable dispositions.

> *"The power of alteration is, by its very nature, contrary to the 'mirror of title' ideal of the Land Registry"*

As made clear in *NRAM v Evans*, the relevant date for finding a mistake is the date of registration. Registration of Mr Taylor as proprietor occurred prior to the setting aside of the Vesting Order. Therefore at the time of registration no mistake existed. Once registered as proprietor, Mr Taylor was entitled to exercise 'owner's powers' pursuant to s 24 of LRA 2002, including charging the property. Whatever right Mr Antoine had to apply to set aside the Vesting Order was not protected on the Register when the legal charge was registered, and the charge took priority over it under s 29 of LRA 2002.

The judge did state that, if she had found the initial registration to have been a mistake, then the registration of the legal charge could have been removed as a consequence of that mistake, following *MacLeod v Gold Harp Properties Ltd* [2014] EWCA Civ 1084, [2015] 1 WLR 1249. Rectification will operate retrospectively to give the person whose title has been restored to the register priority over any interests created after it was removed. In this case, the registration of the legal charge was not the consequence of a prior mistake, as the initial registration had not been a mistake, and the charge must remain.

The resulting position is a somewhat unsatisfactory one: had the disposition been made as a direct result of a forged document, it would have been a mistake which could be rectified. However as forged documents had instead been used to obtain a court order, there was no mistake to be corrected. Although the judge recognised that the claimant would suffer apparent injustice as a result, her primary concern was with maintaining the indefeasibility of the Register (see [116.10]): 'There is a wide point of public policy and principle here. If the registration of title pursuant to a Court Order, valid on its face at the time of registration, could be impugned as a mistake, the statutory provisions I have set out above and the policy of the LRA as to the conclusiveness of registration might well be undermined. Indeed there might even be broader implications for the inviolable status of court orders.'

Summary

The power of alteration is, by its very nature, contrary to the 'mirror of title' ideal of the Land Registry. The Law Commission's consultation on updating the 2002 Act, carried out in 2016, suggests that change may be on the way with regard to alteration and rectification; the resulting report and draft bill are scheduled to be published in summer 2018. In the meantime, the indication from the courts is that rectification will be sparingly exercised, and applications for such should be carefully considered prior to issue. **NLJ**

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