Case No: A3/2015/2002

Neutral Citation Number: [2017] EWCA Civ 1013
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION (CARDIFF DISTRICT REGISTRY)
HIS HONOUR JUDGE MILWYN JARMAN QC
[2015] EWHC 1543 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2017

Before:

LORD JUSTICE KITCHIN
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE HENDERSON

- -

Between:

NRAM Ltd	**Claimant/ Respondent**
- and –	
(1) Paul Morgan Evans **(2) Susannah Jane Evans**	**Defendants/ Appellants**
- and -	
The Chief Land Registrar	**Intervenor**

- -
- -

Miss Nicole Sandells (instructed by Walker Morris LLP) for the Respondent/Claimant
The Appellants/Defendants appeared in person
Nicholas Trompeter (instructed by Government Legal Department) for the Intervenor

Hearing date: 10 May 2017

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Judgment

Lord Justice Kitchin:

Introduction

1. This is an appeal from the judgment of HH Judge Jarman QC given on 29 May 2015 in the Cardiff District Registry of the Chancery Division and his consequential order directing that the Land Register be altered by re-registration of a charge dated 26 November 2004 against the title of the home of the appellants, Mr and Mrs Evans, at 22 Parc Penscynnor, Cilfrew, Neath ("the property") and dismissing a claim by Mr and Mrs Evans for relief against the respondent, NRAM, under the Data Protection Act 1998. The material terms of the judge's order have been stayed pending this appeal.

2. The appeal raises interesting issues concerning the legislative scheme set out in Schedule 4 to the Land Registration Act 2002 ("the LRA 2002") and the power it confers on the court to make alterations to the register for the purpose of correcting a mistake or bringing the register up to date.

The legal framework

3. Section 65 of the LRA 2002 provides that Schedule 4 to the Act, which makes provision about alteration of the register, has effect.

4. Schedule 4 reads, so far as material:

> "*Introductory*
>
> 1. In this Schedule, references to rectification, in relation to alteration of the register, are to alteration which—
>
> (a) involves the correction of a mistake, and
>
> (b) prejudicially affects the title of a registered proprietor.
>
> *Alteration pursuant to a court order*
>
> 2 (1) The court may make an order for alteration of the register for the purpose of—
>
> (a) correcting a mistake,
>
> (b) bringing the register up to date, or
>
> (c) giving effect to any estate, right or interest excepted from the effect of registration.
>
> (2) An order under this paragraph has effect when served on the registrar to impose a duty on him to give effect to it.
>
> 3 (1) This paragraph applies to the power under paragraph 2, so far as relating to rectification.

(2) If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless—

(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.

(3) 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 its not doing so.

…

Rectification and derivative interests

8. The powers under this Schedule to alter the register, so far as relating to rectification, extend to changing for the future the priority of any interest affecting the registered estate or charge concerned. …"

5. For the purposes of this appeal it is also necessary have in mind Schedule 8 to the LRA 2002 which has effect by virtue of s.103 of the Act.

6. Schedule 8 reads, so far as relevant:

Entitlement

1 (1) A person is entitled to be indemnified by the registrar if he suffers loss by reason of—

(a) rectification of the register,

(b) a mistake whose correction would involve rectification of the register,

…

(3) No indemnity under sub-paragraph (1)(b) is payable until a decision has been made about whether to alter the register for the purpose of correcting the mistake; and the loss suffered by reason of the mistake is to be determined in the light of that decision.

…

Claimant's fraud or lack of care

> 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.
>
> (2) Where any loss is suffered by a claimant partly as a result of his own lack of proper care, any indemnity payable to him is to be reduced to such extent as is fair having regard to his share in the responsibility for the loss.
>
> (3) For the purposes of this paragraph any fraud or lack of care on the part of a person from whom the claimant derives title (otherwise than under a disposition for valuable consideration which is registered or protected by an entry in the register) is to be treated as if it were fraud or lack of care on the part of the claimant.
>
> …
>
> *Interpretation*
>
> 11 (1) For the purposes of this Schedule, references to a mistake in something include anything mistakenly omitted from it as well as anything mistakenly included in it.
>
> (2) In this Schedule, references to rectification of the register are to alteration of the register which—
>
> (a) involves the correction of a mistake, and
>
> (b) prejudicially affects the title of a registered proprietor."

The background

7. The following summary of the facts material to this appeal is drawn in large part and with gratitude from the judgment of Judge Jarman. In the autumn of 2004, Mr and Mrs Evans applied to Northern Rock, as NRAM was then known, for a mortgage advance to assist them to purchase the property for a price of £208,000. The application was accepted and Mr and Mrs Evans were offered a loan of £197,000 to be secured by a first legal charge over the property. They were also offered an unsecured loan of £21,400. Mr and Mrs Evans accepted the offers and the entire loan (the "2004 loan") was given one mortgage account number, namely 52850F-56522.

8. Mr and Mrs Evans signed a mortgage deed dated 26 November 2004 which expressly incorporated Northern Rock's standard mortgage conditions of 2001. Clause 3 of the deed provided:

> "This mortgage secures further advances. We are not obliged to make further advances."

9. Condition 1 of the standard conditions defined the expression "mortgage debt" in these terms:

> "(a) all of the money you owe us from time to time under any offer, including any unpaid interest, costs and fees;
>
> (b) if there is only one of you, all other money you owe us from time to time; and
>
> (c) if there is more than one of you, all other money all of you together owe us from time to time, even if we cannot enforce our claim for any of that money against any one or more of you;
>
> Including any costs and fees and any interest under condition 13.7 but excluding any money the mortgage is not security for because of condition 3.4;"

10. Condition 3 provided:

> "3.1 The mortgage is security for the mortgage debt.
>
> 3.2 The mortgage is a continuing security. This means that we will not release the mortgage until the mortgage debt is paid in full, and until we owe no duty to make further advances that would form part of the mortgage debt.
>
> 3.3 Section 93 of the Law of Property Act 1925 does not apply to the mortgage. This means that we will not release any mortgage for the mortgage debt before the mortgage debt is paid in full.
>
> 3.4 The mortgage is not security for any money you owe under a regulated agreement within Part V of the Consumer Credit Act 1974, unless you agree otherwise in writing."

11. On 23 December 2004, Mr and Mrs Evans were registered as proprietors of the property and the charge was entered onto the Charges Register.

12. By September 2005, Mr and Mrs Evans had four accounts with Northern Rock and were making payments totalling just over £1,700 each month. By letter dated 11 September 2005, they asked the bank if they might convert these accounts and the loans they represented into a single account and loan and by doing so reduce their monthly payments.

13. On 21 November 2005, Northern Rock responded and made Mr and Mrs Evans an offer of replacement loan facilities comprising an interest only secured loan of £213,128 and an unsecured loan of £22,311. The offer was made subject to the bank's 2005 general offer conditions, clause 4 of which provided that the principal part of the loan had to be secured by a first legal charge over the property.

14. Mr and Mrs Evans accepted this new offer and, on 15 December 2005, the entire loan (the "2005 loan") was issued from which the 2004 loan was redeemed. The 2005 loan was given a new account number, namely 54950D-09581. No amendment was made to the Land Register.

15. By the end of 2005, Mr Evans was experiencing serious financial difficulties. He drew up proposals for an individual voluntary arrangement (an "IVA") which included details of the property, identified account number 54950D-09581 and specified the amount of his indebtedness to the bank as being £215,127.80 by way of secured debt and £51,995.31 by way of unsecured debt for which he and Mrs Evans were jointly liable. Mr Evans made it clear that the IVA would not affect the rights of the bank as secured creditor; nor would it affect the rights of the bank to pursue Mrs Evans in respect of the unsecured debt. On 6 March 2006, the proposals were put to and accepted by a meeting of Mr Evans' creditors, including the bank, and the IVA was duly entered into.

16. Mr and Mrs Evans did their best to meet their mortgage obligations but, by letter dated 28 April 2006, they wrote to the bank acknowledging that their mortgage account was in arrears and asking for the bank's agreement to a repayment schedule. Agreement was reached and for a time they made payments under it. Unfortunately, Mrs Evans' financial situation deteriorated through that year and in January 2007 she too proposed an IVA to her creditors. This addressed the property and the 2005 loan in a similar manner to that of Mr Evans. But on this occasion the bank did not accept the proposal and soon afterwards it obtained judgment against Mrs Evans for the extent of the unsecured borrowing for which she was jointly liable. On 20 February 2007, the bank obtained final charging orders against Mrs Evans' beneficial interest in the property. In due course these were protected by restrictions on the registered title.

17. In August 2007, Mr and Mrs Evans executed assignments purporting to transfer their beneficial interests in the property to their respective mothers. In October 2007, Mr Evans presented a debtor's petition for bankruptcy and in January 2008, Mrs Evans did the same. In their respective statements of affairs, they identified the bank as a secured creditor in the sum of £221,256.17 under account number 54950D-09581. As the judge explained, the official receiver considered whether the August 2007 transfers were transactions at an undervalue or were made to place Mr and Mrs Evans' interests in the property beyond the reach of creditors, but formed the view that they were not since the secured borrowing exceeded the value of the property.

18. Mr and Mrs Evans were discharged from bankruptcy in the usual way and over the course of the next six years they continued to make repayments in respect of the secured component of the 2005 loan.

19. Accordingly, from 2005 to 2014, Mr and Mrs Evans treated the major part of the 2005 loan as being secured under the 2004 charge. In the summer of that year they changed their position, however. By letter dated 18 August 2014, the solicitors acting for them wrote to NRAM, as Northern Rock had by then become, referring only to account number 52850F-56522 and continuing:

> "We are advised that the mortgage, secured on the property, was discharged on the 13 December 2005, yet your registered

> charge dated 26 November 2004 is still shown as registered in the Charges Register of title number CYM90651.
>
> The attached letter from yourselves states that in fact the loan was redeemed on the 13 December 2005, yet your registered charge dated 26 November 2004 is mistakenly still shown in the Charges Register of title number CYM90561.
>
> The paperwork you have provided our client with confirms that the loan has been redeemed, and we would therefore be grateful if you could please provide the appropriate DS1 or End Notification for the entry to be removed from our clients registered title.
>
> We look forward to hearing from you."

20. The attached letter had been sent by Northern Rock to Mr and Mrs Evans on 16 March 2006. It reads, so far as relevant:

> "Dear Mr and Mrs Evans,
>
> **Mortgage Account No 52850F-56522**
>
> Thank you for your letter of 7 March 2006, the contents of which we have noted.
>
> I can confirm that the above mortgage [was] redeemed on 13 December 2005.
>
> If you have any queries in relation to this please contact me …"

21. It seems to me that the letter of 18 August 2014 presented a far from complete picture of the true position. It made no mention of the 2005 loan; nor did it say that Mr and Mrs Evans had treated the major part of that loan as being secured by the 2004 charge.

22. The letter was received by NRAM and processed by an employee (whose identity remains unknown) in the administrative office. It appears that the system then in use for account 52850F-56522 was checked and it was found that the 2004 loan had been redeemed. Unfortunately, the employee failed to find the 2005 loan and, no doubt believing that all debts for which the 2004 charge was security had been redeemed, released the charge by submitting an e-DS1 electronic discharge via the Land Registry portal. The judge found that the deficiency in NRAM's system which allowed the mistake to be made was, with the benefit of hindsight, obvious and careless, but it was not appreciated at the time. It has now been rectified.

23. The letter was then passed to NRAM's unsecured loans department where, in October 2014, the two restrictions entered on the Land Register in 2007 were noted, a further search was carried out and the existence of the 2005 loan came to light. NRAM then contacted the solicitors acting for Mr and Mrs Evans and informed them that the e-DS1 should never have been submitted. It also registered a unilateral notice of the bank's interest in the property.

The proceedings, trial and judgment

24. On 28 November 2014, Mr and Mrs Evans issued proceedings against NRAM seeking an order for the sale of the property under s.91 of the Law of Property Act 1925, an order that NRAM's unilateral notice against the property be removed and costs and damages.

25. Shortly afterwards, NRAM issued proceedings against Mr and Mrs Evans seeking, in its claim form, rescission of the e-DS1 on the grounds of mistake and an order that the register be "be rectified &/or be brought up to date". In its particulars of claim, it sought an order that the register be "altered and/or brought up to date by re-registration" of the charge against the property "as if it had never been removed".

26. Mr and Mrs Evans counterclaimed that, among other things, NRAM was holding and had given incorrect personal information to credit reference agencies for the purpose of producing credit reports, and that they were entitled to compensation and an order requiring NRAM to correct the personal data it held about them under, respectively, s.13 and s.14 of the Data Protection Act 1998.

27. The two sets of proceedings were consolidated and came on for hearing before the judge on 28 and 29 May 2015. Mr and Mrs Evans appeared in person and NRAM was represented by counsel, Miss Nicole Sandells. There were two main issues at trial so far as the e-DS1 was concerned: first, whether the 2004 charge was effective to secure the major part of the 2005 loan on the property; and secondly, if it was, whether the e-DS1 could and should be set aside on the basis that the bank had made a mistake.

28. The judge had little difficulty with the first issue. In his judgment of 29 May 2015, he held:

> "25. Throughout these proceedings Mr and Mrs Evans have maintained that the charge does not on its terms secure the 2005 loan, and Mr Evans so maintained in cross-examination. In my judgment it is clear that it does. It says so on its face. Moreover in the 2001 conditions, which were incorporated into the charge, it was specified that the charge was to secure the mortgage debt which was defined to include all of the money which Mr and Mrs Evans owed to the bank from time to time under "any offer." In my judgment that is sufficiently wide and clear to include the offer under which the 2005 loan was made. Mr Evans submitted that this did not amount to an "all monies" clause and referred to examples of such clauses. In my judgment, however, the wording is clear enough.
>
> 26. I am satisfied therefore that the charge was effective to secure the 2005 loan on the property. On the bankruptcy of Mr and then Mrs Evans, his and her estate vested in the Official Receiver as trustee pursuant to section 306(1) of the 1986 Act, but by reason of section 283(5), subject to the bank's charge."

29. The judge was not much troubled by the second issue either. He held that the bank had indeed made a mistake; that this mistake had been induced by the solicitors' letter

of 18 August 2014; and that the bank had been careless in not linking the two loan accounts before issuing the e-DS1; but that, in all the circumstances, it would be unconscionable to leave the mistake uncorrected:

> "34. In my judgment the bank in issuing the e-DS1 to the Land Registry did make a distinct mistake. It thought in so doing it was obliged to do so because the 2004 loan had been redeemed and there was nothing more to secure. It was not mere inadvertence. The mistake was induced because of the terms of the solicitors' letter which referred to the 2004 loan account number and not the 2005 loan account number, which I have found was secured on the property. It was careless of the bank not to link the two before issuing the e-DS1. That mistake however was central to that issue. Had the bank realised that the 2005 loan was still secured on the property it would not have issued the e-DS1. The consequences of so doing are serious. The bank would lose its security for the 2005 loan. Mr and Mrs Evans, having taken that loan thinking it would be secured on their property and having dealt with it as such in their respective bankruptcies would (or their respective mothers now would) be left with an unencumbered property. In my judgment it would be unconscionable to leave the mistake uncorrected."

30. It followed that the claim by NRAM to rescind the e-DS1 on the grounds of mistake succeeded. This finding is reflected in the declaration made by the judge at paragraph [2] of his order:

> "2. The e-DS1 dated 28 August 2014 that discharged the charge dated 26 November 2004 made in favour of the Claimant over the property was provided by mistake."

31. It is also reflected in the order for rescission which the judge made at paragraph [3] of his order:

> "3. That discharge of the Claimant's first legal charge over the Property dated 26 November 2004 is rescinded and set aside."

32. The judge then turned to the alteration of the register. In that regard, he reasoned that, since Mr and Mrs Evans were in possession as registered proprietors, rectification of the register could only take place if they had contributed to the error by a lack of proper care:

> "35. In my judgment the bank is entitled to be re-registered as proprietor of the charge which secures the 2005 loan, see section 65 and schedule 4 of the Land Registration Act 2002. As Mr and Mrs Evans are in possession as registered proprietors, rectification of the register can only take place if they have contributed to the error by lack of proper care…"

33. As to that, the judge continued, again at paragraph [35], that Mr and Mrs Evans had indeed contributed to the error by a lack of proper care:

> "… In my judgment by referring only to the 2004 loan and not the 2005 loan in their solicitors' letter of August 2014, they did so contribute. Miss Sandells accepts that this will not entitle the bank to pursue Mr or Mrs Evans for pre-bankruptcy debts to the extent that these are unsecured."

34. These findings were then reflected in paragraph [4] of his order:

> "4. The Land Register be altered and/or brought up to date by re-registration of the Claimant's charge dated 26 November 2004 against the title of the Property as if it had never been removed and with the priority originally held."

35. There followed a consideration by the judge of the complaints made by Mr and Mrs Evans that NRAM, as a data controller, was holding and had published to credit reference agencies incorrect personal data about them.

36. The judge was not satisfied that NRAM was holding or had provided to credit reference agencies any incorrect information concerning Mr or Mrs Evans. He accepted that there was a reference in one credit report to a county court judgment against Mr Evans when it should have referred to Mrs Evans but he found that this information had been supplied not by the bank but a company engaged by the Lord Chancellor's department to maintain a record of county court judgments. He therefore dismissed the claim.

The appeal

37. Mr and Mrs Evans sought permission to appeal on three grounds: first, that the judge ought to have found that, on the proper construction of the mortgage deed and the standard conditions incorporated into it, the mortgage did not apply to the 2005 loan and that it was therefore unsecured; secondly, that the judge erred in ordering the rectification of the register to reinstate the registration of the 2004 mortgage deed because (a) there was no mistake which required correction or (b) if there was such a mistake, it was one for which Northern Rock was wholly responsible and Mr and Mrs Evans did not in any relevant way contribute to it; and thirdly, that the judge erred in failing to find that NRAM was holding incorrect data about them and that it had provided such data to credit reference agencies. The judge refused permission to appeal. However, at an oral hearing before Sir Timothy Lloyd on 29 June 2016, Mr and Mr Evans were granted permission to appeal on the second ground (save in so far as it depended on the first ground) and on the third ground, but not on the first ground.

38. At the hearing of the appeal, Mr and Mrs Evans have appeared in person, just as they did at the trial, but they also rely upon two detailed written skeleton arguments largely settled by Mr Martin Hutchings QC. NRAM has been represented by Miss Sandells, as it was at the trial. We have also had the benefit of written and oral submissions made by Mr Trompeter on behalf of the Chief Land Registrar (the "CLR") who was given permission to intervene by Patten LJ by order dated 6 December 2016.

39. I shall deal first with the issues arising on the appeal by Mr and Mrs Evans against the judge's order rescinding the e-DS1 and for the alteration of the register; and secondly with the issues arising on the appeal by Mr and Mrs Evans against the judge's dismissal of their claim for compensation and for an order requiring NRAM to rectify the data it controls under, respectively, s.13 and s.14 of the Data Protection Act 1998.

40. Mr and Mrs Evans submit that it is clear from paragraph [35] of the judgment that the judge recognised, correctly, that NRAM was seeking an order for the rectification of the register to correct a mistake within the meaning of paragraph 1 of Schedule 4; that they did not consent to rectification and were in possession of the property; that unless NRAM could satisfy the court that either paragraph 3(2)(a) or (b) of Schedule 4 was satisfied, no order reinstating the charge could be made; and that NRAM only relied for this purpose upon paragraph 3(2)(a) and the contention that Mr and Mrs Evans had by lack of proper care caused or substantially contributed to the mistake. What is more, say Mr and Mrs Evans, confirmation of the fact that NRAM was seeking an order for rectification is to be found in the judge's order, for in making that order retrospective in its effect, he must have been using the power conferred by paragraph 8 of Schedule 4, and this power is limited to cases of rectification. They also submit that NRAM did not invite the judge to make an order for alteration of the register on any other basis and that it should not be permitted to do so now; and further, that no alteration adversely affecting a proprietor in possession should ever be made unless the need for the alteration has been occasioned by the proprietor's fraud or lack of proper care, or it would for some reason be unjust for the order not to be made.

41. Nevertheless, Mr and Mrs Evans continue, the judge fell into error in finding that paragraph 3(2)(a) was satisfied in that they had by lack of care caused or substantially contributed to the mistake. The judge had no basis for saying that the reference in their solicitors' letter of 18 August 2014 to only one loan account amounted to a lack of proper care. The solicitors referred in that letter to the mortgage and the bank's own letter of 16 March 2006 and so gave the bank every piece of information from which, assuming it had reasonably efficient systems, it could ascertain the position exactly. They were under no duty to do more.

42. Further, say Mr and Mrs Evans, the judge fell into error in considering, as he did at paragraph [35] of his judgment, whether they had contributed to the mistake and he ought instead to have asked himself whether they had "caused or substantially contributed" to the mistake. Had he done so, he would or ought to have found that they had not. The bank had itself caused the mistake by submitting the e-DS1 to the Land Registry as a result of its own carelessness in failing to check the relevant account balances. They had neither caused it nor had they substantially contributed to it. Alternatively, their contribution, if any, was *de minimis*. They were entitled to assume that the bank would act competently.

43. I should also say at this point that Mr and Mrs Evans have made an application to this court by notice dated 24 November 2016 for an indemnity from the CLR under Schedule 8 of the LRA 2002. They say that if, contrary to their principal submission, the bank is entitled to rectification then they are entitled to be indemnified by the registrar for all the losses they have suffered or will suffer in consequence.

44. Miss Sandells, for NRAM, has developed her submissions as follows. She submits that the primary case advanced by NRAM at trial was that, having set aside the e-

DS1, NRAM was entitled to an order that the register be altered to bring it up to date. In other words, the case fell squarely within paragraph 2(1)(b) of Schedule 4. Here the judge set aside the e-DS1 for mistake and then, in paragraph [4] of his order, directed that the register be altered by bringing it up to date. Miss Sandells continues that the judge's order should be upheld by this court on this basis.

45. Miss Sandells also submits that NRAM advanced an alternative case at trial, namely that it was entitled to an order for the alteration of the register for the purpose of correcting a mistake. This alternative case was, she continues, developed as follows. Alteration of the register to correct this mistake would not prejudicially affect the title of Mr and Mrs Evans and so it would not amount to rectification within the meaning of paragraph 1 of Schedule 4. Furthermore, even if such alteration would amount to rectification, it would be to correct a mistake to which Mr and Mrs Evans had, by lack of proper care, substantially contributed and it would in any event be unjust for the alteration not to be made. Accordingly, the requirements of paragraph 3(2)(a) and (b) were satisfied. Miss Sandells submits that, in so far as the judge did not accept these submissions, he should have done so and accordingly we should uphold his order for these further reasons too.

46. Mr Trompeter, for the CLR, submits that, on proper analysis, the judge was empowered only to make an order under paragraph 2(1)(b) of Schedule 4, that is to say an order for the alteration of the register for the purpose of bringing it up to date. He continues that rectification in the context of Schedule 4 means an alteration which (a) involves the correction of a mistake in the register and (b) prejudicially affects the title of a registered proprietor. In this case, however, when the Land Registry gave effect to the e-DS1 and removed NRAM's charge, the e-DS1 had not been avoided. It was a valid disposition. Accordingly, removal of the charge did not amount to or generate any mistake in the register. Nor was there a mistake in the register following the rescission of the e-DS1 for the question whether there is or is not a mistake in the register must be addressed and answered at the time of the relevant entry or deletion. The subsequent rescission of the e-DS1 did not retrospectively convert the earlier deletion of NRAM's charge into a mistake within the meaning of Schedule 4. The register did, however, need alteration to bring it up to date and the judge was right so to order.

47. In addressing all of these submissions it seems to me that the correct starting point is to consider whether, in the circumstances of this case, the alteration of the register that the judge was invited to order is properly classified as having been made for the purpose of bringing the register up to date within the meaning of paragraph 2(1)(b) of Schedule 4 or as having been made for the purpose of correcting a mistake within the meaning of paragraph 2(1)(a) of that schedule.

48. The term "mistake" is not defined in Schedule 4 although paragraph 11 of Schedule 8 provides that, for the purposes of that schedule, it includes mistaken omissions. It is therefore of no surprise that the term is generally understood to have a broad if somewhat uncertain scope and to encompass a wide range of circumstances, including, for example, the accidental registration of particular land in two different titles. I also recognise that, in cases where the correction of a mistake will prejudicially affect the title of a registered proprietor, the LRA 2002 makes provision, in Schedule 8, for an indemnity by the registrar in the circumstances there set out. This mechanism for imposing the risk associated with the validity of a transaction on

the registrar may be of great value to a disponee but it necessarily follows that, if the alteration does not amount to a mistake, it will not be available.

49. Despite the scope and largely undefined nature of the term "mistake" in this context, the Law Commission noted in its 2016 Consultation Paper No. 227 entitled "Updating the Land Registration Act 2002" at 13.79 to 13.80 that a degree of consensus appeared to be emerging as to its boundaries. In that regard the Law Commission referred to *Megarry & Wade, The Law of Real Property* 8th ed. whose editors observe at 7-133 that:

> "What constitutes 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 at 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 in which 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 otherwise have made." (footnotes omitted)

50. The editors of *Megarry & Wade, The Law of Real Property* go on to provide various examples of mistakes, the first of which is the case where a person has been registered as proprietor pursuant to a void disposition, such as a forged transfer, or where the transfer was of land which the seller had already sold. Interestingly, the editors note that there is no mistake where the registrar registers a transfer that is voidable but has not been avoided at the date of registration.

51. The Law Commission also referred to *Ruoff & Roper, Registered Conveyancing* looseleaf ed. The authors of this work adopt, at 46.009, very much the same formulation as that of the editors of *Megarry & Wade, The Law of Real Property*:

> ""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 an entry in the register that he would not have 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 an entry which he would not have deleted; had he known the true state of affairs at the time of the entry or deletion. The mistake may consist of a mistaken entry in the register or the mistaken omission of an entry which should have been made. Whether an entry in the register is mistaken depends upon its effect at the time of registration…. "

52. It will be noted that 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.

53. It does mean, however, that, as the editors of *Megarry & Wade, The Law of Real Property* noted, a distinction must be drawn between a void and a voidable disposition. On this analysis, an entry made in the register of an interest acquired under a void disposition should not have been made and the registrar would not have made it had the true facts been known at the time. By contrast, a change made to the register to reflect a transaction which is merely voidable is correct at the time it is made. The same distinction is drawn by the authors of *Ruoff & Roper, Registered Conveyancing* who say, again at 46.009:

> "… So the entry of an estate or interest purportedly arising under a void disposition is a mistake. The entry made in the register does not reflect the true effect of the purported disposition when the entry was made. However, the entry of a person as having acquired an estate or interest under what proves to be a voidable disposition is not a mistake. Unless it had been rescinded at the date of registration, the disposition would be valid and it would not be a mistake to enter the disponee as the proprietor of the estate or interest under it…."

54. I cannot say that the point has been free from controversy, however. In *Baxter v Mannion* [2011] EWCA Civ 120, [2011] 1 WLR 1594 the Court of Appeal held that, where a statutory condition which was a prerequisite for registration on the basis of adverse possession had not been satisfied, the occupier's registration constituted a mistake which the registrar had the power to correct. In the course of his judgment, Jacob LJ said this at paragraph [31]:

> "Fourthly her [counsel for the occupier's] reliance on *Ruoff & Roper, Registered Conveyancing* is misplaced. Their suggestion that there is a distinction to be drawn between a void and a voidable transaction, interesting though it is, sheds no light on an application made by someone not entitled to apply. I would add that I would reserve my position as to whether the authors are right in their proposed distinction: it is difficult to see why, for instance, a transaction induced by fraudulent misrepresentation (which would only be voidable) could not be corrected once the victim had elected to treat it as void."

55. Similarly, the authors of *Emmet and Farrand on Title* looseleaf ed. make the following observations about this distinction in Volume 1, para 9.028:

> "The implications of this legalistic distinction for registered proprietors and purchasers, as well as conveyancers, has been described as outrageous. 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…"

56. Nevertheless, the distinction is, in my view, principled and correct and it derives further support from the decision of the Court of Appeal in *Norwich and Peterborough Building Society v Steed* [1993] Ch 116. In that case, a transfer of a property, induced by the fraud of the transferees, was voidable but not void. An innocent building society advanced a sum of money to the transferees on security of a charge which the transferees executed and which was registered in the charges register. The question to which the case gave rise was whether the court had power under s.82 of the Land Registration Act 1925, the predecessor of the LRA 2002, to order the rectification of the register by deletion of the building society's registered charge. Section 82(1)(h), described by the Law Commission as a "catch-all", provided that the register might be rectified "in any other case where, by reason of any error or omission in the register, or by reason of any entry made under a mistake, it may be deemed just to rectify the register."

57. Scott LJ (as he then was), with whom Butler-Sloss and Purchas LJJ agreed, concluded it could not. He said this at page 135:

> "Paragraph (h) is relied on by Mr Lloyd. But in order for the paragraph to be applicable some "error or omission in the register" or some "entry made under a mistake" must be shown. The entry in the charges register of the building society's legal charge was not an error and was not made under a mistake. The legal charge was executed by the Hammonds, who were at the time transferees under a transfer executed by Mrs Steed as attorney for the registered proprietor. The voidable transfer had not been set aside. The registration of the Hammonds as proprietors took place at the same time as the registration of the legal charge. Neither registration was an error. Neither entry was made under a mistake. So the case for rectification cannot be brought under paragraph (h)."

58. It is to be emphasised that this was the position in relation to a voidable transfer. The decision would have been different had the transfer been void: see, for example, *Argyle Building Society v Hammond* (1985) 49 P&CR 148 (CA).

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. In this connection, I believe the authors of *Ruoff & Roper Registered Conveyancing* put it very well at 46.009 in saying:

> "An entry cannot retroactively become a mistake. It cannot be argued therefore that the rescission of a voidable transaction retroactively makes the entry which recorded the disposition - being an entry made at a time while the disposition was still effective - a mistake. That would undermine the policy of the 2002 Act that the register should be a complete statement of title at any given time. Consequent upon such rescission, application may be made for an order for alteration of the register to reflect the rescission. This would, however, be an alteration for the purposes of bringing the register up to date … rather than for the purposes of correcting a mistake…."

60. The second issue is whether, in a case such as the present, the register can be brought up to date once the voidable disposition has been rescinded. In my judgment, it plainly can. Schedule 4, paragraph 2(1)(b) confers on the court a power to make an order for the alteration of the register by bringing it up to date; and paragraph 3(3) provides 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 its not doing so, as Norris J observed in *Garwood (as trustee of the estate of Adekumbi Ebrahim Fabumni-Stone) v Bank of Scotland plc* [2012] EWHC 415 (Ch), [2013] BPIR 450. In the present case, once the judge had rescinded the e-DS1, it was necessary to alter the register by bringing it up to date in such a way as to reflect the rights of the parties as the judge had found them to be. Subject to the question of the way that NRAM's case was put below, to which I next turn, there are in this case no exceptional circumstances which would justify a decision not to exercise the power to update.

61. The third issue is whether, as Mr and Mrs Evans contend, NRAM and the CLR are attempting to change the way the case was put below in an impermissible way. They say that NRAM's case before the judge proceeded correctly on the basis that it was seeking rectification of the register and not simply an order that the register be updated. Further, they continue, it is clear from the judge's judgment that he thought he was dealing with an application for rectification.

62. I accept that the judge appears to have elided the question whether or not the issue by the bank to the Land Registry of the e-DS1 constituted a mistake with whether there was ever a mistake in the register. Moreover, he appears to have been of the view that the alteration of the register sought by NRAM would amount to rectification and that it was necessary for the bank to establish that Mr and Mrs Evans had contributed to that error by lack of proper care. It may be the case that, as Miss Sandells submits, this confusion resulted from the fact that the principal issues before the judge were first, whether the 2004 charge was ever effective to secure the main part of the 2005 loan; and secondly, whether the e-DS1 could and should be set aside for mistake. But

whether that is so or not, I am in no doubt that NRAM did properly advance a case before the judge that, if the e-DS1 were to be set aside for mistake, the register could and should be altered in order to bring it up to date. NRAM sought this relief in its claim form and its particulars of claim; and, in her skeleton argument for trial, Miss Sandells submitted that NRAM was entitled to an order that the register be altered to bring it up to date or that the register be rectified. I therefore reject the submission that NRAM and the CLR are attempting to change the way the case was put below in an impermissible way.

63. The fourth issue concerns the impact of these findings upon the judge's substantive reasoning, the order which he made and the application made by Mr and Mrs Evans for an indemnity from the CLR. In my judgment and for the reasons I have given, the alteration of the register to reflect the setting aside of the e-DS1 constituted not the correction of a mistake in the register within the meaning of Schedule 4, paragraph 2(1) but rather the bringing of the register up to date within the meaning of Schedule 4, paragraph 2(2). It follows that the alteration could not constitute the rectification of the register within the meaning of Schedule 4, paragraph 1. It also follows that it was not necessary for NRAM to establish, in accordance with Schedule 4, paragraph 3, that the alteration did not affect the title of Mr and Mrs Evans to the property, that Mr and Mrs Evans by fraud or lack of proper care had caused or substantially contributed to the mistake or that it would for any reason have been unjust for the alteration not to be made.

64. The consequences of these findings are, in my judgment, as follows. First, the judge fell into error in paragraphs 34 and 35 of his judgment in so far as he found that the alteration to the register sought by NRAM would constitute a rectification of the register within the meaning of Schedule 4, paragraph 1. Following the rescission of the e-DS1, NRAM was and remains entitled to be re-registered as proprietor of the 2004 charge and for the register to be altered to bring it up to date.

65. Secondly, the judge's order must be varied in so far as it directs that the register be altered by re-registration of the 2004 charge "as if it had never been removed and with the priority originally held". At the hearing of the appeal, Miss Sandells made clear that NRAM did not seek to sustain this part of the order and would consent to its deletion. In my judgment she was right to do so because the judge was purporting to exercise the power conferred by Schedule 4, paragraph 8 but, as we have seen, this is limited to cases of rectification. Further and in any event, it is a power to change for the future the priority of any interest affecting the estate and not in some way to backdate the alteration or, in the words of the judge's order, to re-register the charge "as if it had never been removed".

66. Thirdly, the application made by Mr and Mrs Evans for an indemnity from the CLR must be dismissed. This case falls outside the scope of Schedule 8, paragraph 1(1) for it involves neither rectification of the register nor a mistake whose correction would involve rectification of the register, and it has not been suggested that Mr and Mrs Evans are entitled to an indemnity on any other basis.

67. It only remains to deal with the appeal by Mr and Mrs Evans against the dismissal of their claim under the Data Protection Act 1998. They contend that the judge fell into error in failing to find that NRAM maintains data which record that they continue to owe debts which they are personally liable to pay but from which they were released

by their bankruptcy. Further, they continue, NRAM (or Northern Rock as it was known) has provided that data to credit reference agencies and they have led prospective lenders to believe that they continue to owe large sums to the bank which they are personally liable to pay when the true position is that they neither owe such sums nor are they liable to pay them.

68. I recognise that incorrect data of the kind to which Mr and Mrs Evans refer can be damaging but they were unable to draw to our attention any instance of a credit report which contained incorrect data provided by Northern Rock or NRAM. We were taken to two credit reports on Mrs Evans, one produced in March 2009 by Equifax, very shortly after the discharge of her bankruptcy, and the other produced by Experian in June 2014. It is true that the former report shows one sum due to Northern Rock of about £31,000 and the latter report shows this sum and a further sum due to NRAM (as Northern Rock had now become) of £23,000, in each case quite apart from the bank's interest in the property under the mortgage. However, as Miss Sandells has explained, Mrs Evans' interest in the property was charged with payment of these further sums prior to her bankruptcy and following her failure to comply with court orders for payment made in October 2006. Accordingly, while she ceased to be personally liable following her bankruptcy, these debts remained secured on the property and payable out of any proceeds of sale. In all the circumstances I am satisfied the judge was entitled to find as he did that Mr and Mrs Evans had not established that the bank holds any incorrect personal data about them or that any such incorrect data have been supplied by the bank to credit agencies.

Conclusion

69. For all of the reasons I have given, I would vary the order of the judge to the limited extent I have explained but otherwise dismiss the appeal.

Lord Justice David Richards:

70. I agree.

Lord Justice Henderson:

71. I also agree.