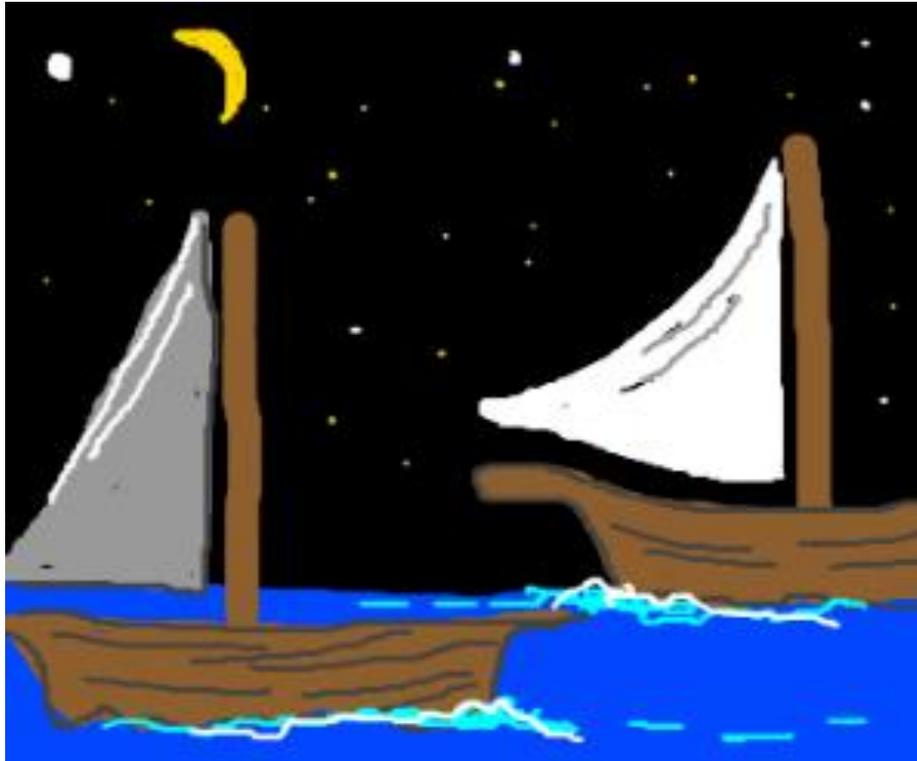


Fraud and the Land Registration Act 2002

Timothy Morshead QC
Landmark Chambers

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“Where the register is rectified under the principal Act by reason of fraud or mistake which has occurred in a registered disposition for valuable consideration, and which the grantee was not aware of, and could not by the exercise of reasonable care have discovered, the person suffering loss by the rectification shall likewise be entitled to indemnity under this section.”

- Registered proprietor (Odell) of a charge taking under a forged transfer of the charge
 - Registration cancelled
 - Kekewich J at first instance: indemnity awarded
 - Court of Appeal (Vaughan Williams LJ): no indemnity
 - Law Commission's summary: "Because the transfer was a forgery and therefore of no effect, he was not regarded as suffering any loss, even though he had been registered": Law Com 271 para 10.31(2)
- = a case about indemnity + forgery, not indemnity + overriding interests

“(1) Where the register is rectified under this Act, then, subject to the provisions of this Act—
(a) any person suffering loss by reason of the rectification shall be entitled to be indemnified; and
(b) if, notwithstanding the rectification, the person in whose favour the register is rectified suffers loss by reason of an error or omission in the register in respect of which it is so rectified, he also shall be entitled to be indemnified.

...

(4) Subject to the following provisions of this section, a proprietor of any registered land or charge claiming in good faith under a forged disposition shall, where the register is rectified, be deemed to have suffered loss by reason of such rectification and shall be entitled to be indemnified under this Act.

(5) No indemnity shall be payable under this Act—

(a) on account of any loss suffered by a claimant wholly or partly as a result of his own fraud or wholly as a result of his own lack of proper care; ...”

= statutory reversal of *Odell*: excludes the argument that rectification of the register to remove a forged and therefore invalid disposition causes no loss to the registered proprietor because he derived no title from a void disposition.

= legislation about indemnity + forgery, not indemnity + overriding interests

- Land Registration Act 1925, section 70(1)
 - Including section 70(1)(g): “the rights of every person in actual occupation of the land ... save where enquiry is made of such person and the rights are not disclosed”.
 - Land Registration Act 2002, Schedule 3
 - Including para 2: ““An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for-
 - ...
 - (b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so;
 - (c) an interest—
 - (i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and
 - (ii) of which the person to whom the disposition is made does not have actual knowledge at that time;
 - ...”
- = principle of general application in registered conveyancing: registered title is subject to all overriding interests; no separate provision made for cases of forgery.

- Chowood became registered as proprietor of land including some woodland
- Woodland already occupied by a third party
- Third party (Lyall) had occupied long enough to acquire title by adverse possession
- Register rectified under section 82 of the Land Registration Act 1925 to show Lyall as proprietor of the woodland
- Chowood claimed indemnity
- Clauson J: no indemnity payable because no loss caused to Chowood: Chowood's title was always subject to Lyall's overriding interest
- Rectification of the register in order to give effect to an overriding interest does not amount to loss for the purpose of the indemnity provisions

= a case about indemnity + overriding interests, not indemnity + forgery

- *Malory Enterprises Ltd v. Cheshire Homes Ltd* [2002] Ch 216
Fraudulent transfer of land to Cheshire Homes
Transferred the legal estate but left the rightful owner with a beneficial interest in the property
Rightful owner sought rectification of the register and damages for trespass against Cheshire Homes
Arden LJ held that
 - the rightful owner remained in possession of the land at the date of the transfer so that its right to have the fraudulent disposition set aside and the register rectified took effect as an overriding interest under s.70(1)(g) of the 1925 Act
 - although registered as proprietor, Cheshire Homes was only vested with bare legal title, the beneficial interest remaining throughout with the rightful owner
- Followed and applied in relation to the 2002 Act in *Fitzwilliam v. Richall Holdings Services Ltd* [2013] 1 P&CR 19 (Newey J)
 - = case about rectification + overriding interests + effect of registration as proprietor, not indemnity

(Attempted) codification of *Chowood*: no longer is every “alteration” of the register a “rectification”.

Schedule 8, para 11(2): “Rectification” now requires a combination of

- (a) an “alteration” of the register which
- (b) involves the correction of a “mistake” and
- (c) “prejudicially affects the title of a registered proprietor”

Indemnity only payable in the circumstances listed in Schedule 8, para 1(1): various circumstances involving “mistakes” etc but, relevantly:

- “(a) rectification of the register
- (b) a mistake whose correction would involve rectification of the register”

What happened to s83(4)?

Forgery provision now in Schedule 8, para (2)(b):

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

... (b) the proprietor of a registered estate or charge claiming in good faith under a forged disposition is, where the register is rectified, to be regarded as having suffered loss by reason of such rectification as if the disposition had not been forged.”

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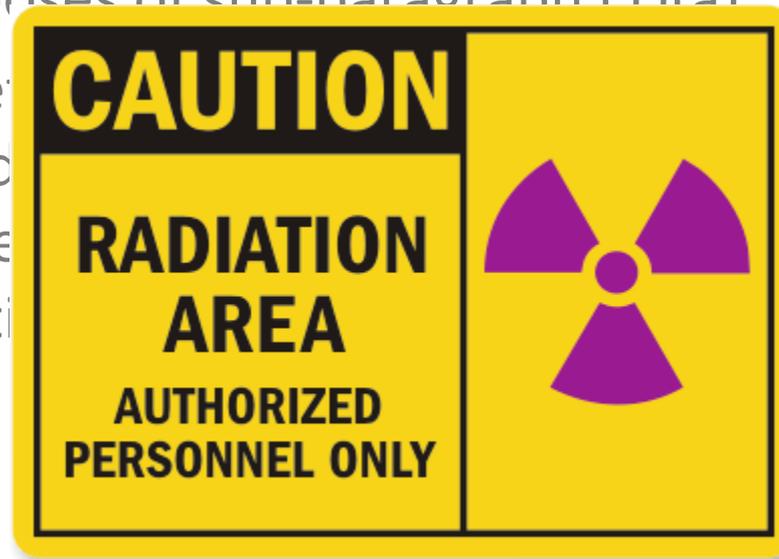
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Language seems to muddle-up two principles: the language intended to codify *Chowood* (effect of overriding interests) has been muddled-up with language intended to preserve s83(4) (overturning *Re Odell*).

How do the two principles speak to each other?

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Deliberate or inadvertent?

How do the two principles speak to each other?

- If *Malory* is correct, then the muddle must be inadvertent, because otherwise there would never be a case in which Schedule 8, para 1(2)(b) could apply.

- A case about indemnity + overriding interests + effect of registration
- *Malory* overturned
- Therefore, it cannot be said that the new indemnity provisions are necessarily inadvertent: it can at least be said that they might be intended to confine indemnity for cases of forgery to those where the rightful owner cannot assert an overriding interest.
- But despite overturning *Malory* , the Court of Appeal has held that the right of indemnity is not lost even though the rightful owner was in actual occupation and the claimant for indemnity did not take the precautions (inspection etc) for taking free of the occupier's overriding interests.