

Chapter 3

Question 1: What risks does C, a party planning to acquire a right in land, face when acquiring such a right? How might a registration system protect C against such risks?

This question is considered in sections 3.2.1 and 3.2.2. The first extract in section 3.2.1 identifies two main types of risk that C might face: (i) the risk that A, the party with whom C deals, does not in fact have the power to grant C the right that A is purporting to grant C (e.g. because A does not in fact have a right in the land); (ii) the risk that B, a stranger to the deal between A and C, may already have a right in the land that will bind C.

There are two main strategies a registration system might then use to protect C: (i) a guarantee: C knows that, if A is registered as holding a right, A does indeed have that right; and that if B is *not* recorded on the register as having a pre-existing property right, B does *not* have such a right; (ii) insurance: C knows that, if A is registered, but it turns out that A does not have the power to grant C a right in the land, or if it turns out that B has an unregistered right that does bind C, then C will receive compensation (an indemnity payment) from the registry. Of course, any registration system can use a mixture of those two strategies, using a guarantee in some cases, and insurance in others. The LRA 2002 does not offer a complete guarantee, nor complete insurance coverage. Even after the Court of Appeal's decision in *Swift 1st Ltd v Chief Land Registrar*, it is possible for C, in some cases, to be bound by an unregistered right of B without receiving any indemnity: this is the case, for example, if B has an overriding interest.

Question 2: What is the difference between 'dynamic security' and 'static security'?

This question is considered in section 3.2.3 and in the extract in that section. 'Dynamic security' favours the position of C, a party newly acquiring rights from a registered party. 'Static security' instead favours the position of B, a party who was previously registered as holding a right. For example, consider a case in which B is registered as freehold owner. X, by means of fraud or forgery, has itself registered in place of B, and then transfers its registered title to C, who is innocent of X's misconduct. Dynamic security then favours protecting C; static security instead favours B. Note that, as discussed at section 3.3.2.4, it is not quite an all-or-nothing question, as it is possible to design the system so that, at least in some cases, the losing party receives compensation from the registry, by means of an indemnity payment.

Question 3: Is it accurate to regard the LRA 2002 as implementing a system of 'title by registration' rather than one of 'registration of title'?

This is a big question explored not only in section 3.3, but also in more detail in Chapter 18. Note that in *Swift 1st Ltd v Chief Land Registrar*, Patten LJ at [41] did identify a general principle, said to lie behind not only the LRA 2002 but also its 1925 predecessor, that: "*the register is a complete record of all enforceable estates and interests except for overriding interests and that it is registration rather than the transfer which confers title.*" As clear from the extract in section 3.3.1, the Law Commission, in the work which led to the LRA 2002, aimed to ensure that the Act was underpinned by the idea of "title by registration". As noted in the discussion of that extract, however, this prioritisation of dynamic security is not absolute: indeed, the reference by Patten LJ to overriding interests indicates one important means by which the security of C can be undermined. The possibility of rectification, discussed in more detail in Chapter 15, also gives the lie to the idea of a "complete and accurate" register. For further discussion of the issues, see e.g. A Goymour, "Mistaken Registration of Land: Exploding the Myth of 'Title by Registration'" [2013] CLJ 617, S Gardner, "The Land Registration Act 2002 – the Show on the Road" (2014) 77 MLR 763 and Lees, 'Guaranteed Title: No Title, Guaranteed' in in Goymour et al (eds) *New Perspectives on Land Registration* (Oxford: Hart Publishing, 2018).

Question 4: What is the effect of entering a notice on the register recording B's interest in the registered land?

This question is discussed in section 3.3.3. The important point is that entering a notice of B's interest on the register does not guarantee the existence of that interest, or entitle B to any indemnity if the interest is not protected. The effect of a notice in relation to a registered estate therefore differs from the effect of registering the estate itself. A notice still has an important effect, however, as it prevents C, a party later acquiring a right in the same registered land, from using the lack of registration defence (set out in LRA 2002, s 29) against B's right. In the language of the LRA, s 29(2)(a)(i) ensures that 'the priority of [B's] interest is protected' as B's right has been made 'the subject of a notice in the register.'

Question 5: Does the result in *Walker v Burton* show that too much protection is given by the LRA 2002 to a registered proprietor in possession?

The decision in *Walker v Burton* is discussed in section 3.3.2.3. It provides a good example of the point that the fact of registration may protect a party even after it transpires that, but for the registration, that party would have had no valid claim to a right in the land. In particular, it shows that if a party is both registered as the holder of a legal estate *and* is in possession of the land, the protection given to that party by the LRA 2002 is particularly strong, as the grounds on which the register can be rectified are limited, even if it can be shown that the registration of that party is a "mistake". The effect on this of the Law Commission's 2018 Report *Updating the Land Registration Act 2002*, which more clearly recognises the need to balance protection of a registered party with the claims of others, remains to be seen.

It can be argued that the fact of possession is important, as protecting the registered party then simply upholds the status quo and, as in *Walker* itself, that party may well have relied in good faith on having good title to the land (and note that the protection to such a party is much more limited if he or she has been fraudulent, or failed to take proper care). Of course, to decide if the level of protection is too great, it is necessary to have some criteria for determining the correct level of protection, and this raises the tension between dynamic and static security (see Q2) and the question of whether the LRA 2002 should strive to ensure "title by registration" (see Q3).

Question 6: What is the 'Malory 1' argument? Why did the Court of Appeal in the *Swift 1st* case reject the analysis? Does that court's analysis in *Nasrullah v Rashid* mean that the argument will still work in some cases?

This question is discussed in sections 3.3.5.1 and 3.3.5.2. It relates to the important broader question of when a judge might be able to look outside the system of the LRA 2002, even when deciding a case that relates to registered land. The 'Malory 1' argument (as it is referred to in the Law Commission's 2016 Consultation Paper) was one of the arguments accepted by the Court of Appeal in *Malory v Cheshire Homes*: even if C is registered as holding an estate in land, if the transfer to C was made by a fraudster (X), and without the consent of the former holder of the registered land (B), then whilst C has legal title to the estate, B retains his or her equitable interest in the land. This means that the 'guarantee' of title given to C as a result of C's registration is limited: statute ensures that C acquires legal title, but the position in equity may be quite different.

As noted in section 3.3.5.2, the *Malory 1* argument can cause problems for C, and might seem to be inconsistent with the aim of protecting C against rights that are not on the register. In the *Swift 1st* case, the Court of Appeal decided that its decision to accept that argument in *Malory v Cheshire Homes* had been made *per incuriam*: as a result of having overlooked relevant legal rules. In particular, the court in *Malory* had overlooked s 114 of the LRA 1925, which was interpreted by the court in *Swift 1st* as meaning that rules limiting the effect of fraudulent transactions were themselves limited by the statutory guarantees given by the Act to a holder of a registered estate. The decision in *Swift 1st* is very important, because the court proceeded on the basis that whatever the correct interpretation of the LRA 1925 on this point, the same interpretation must apply to the LRA 2002, as the wording of the equivalent sections in the 2002 Act is in all relevant respects identical.

The question regarding *Nasrullah v Rashid* is discussed in section 3.3.5.3. Specifically, the Court of Appeal in *Nasrullah* found that there are some "circumstances surrounding the acquisition and registration" (per Lewison

LJ (with whom King and Peter Jackson LJ agreed) at [35]) which may make it possible for B to argue that, whilst C has clearly acquired a *legal* estate, because of C's participation in a fraud, C holds that legal estate on trust for B. The Court reasoned that *Swift 1st* does not in itself prevent B from arguing that, owing to the circumstances surrounding another party's acquisition of the registered title, a trust has arisen in B's favour, giving B a *new* beneficial interest. Mirroring the distinction in the general law of property between simply taking another's property and tricking that other into parting with it, the Court held that if B's property is taken by X without any consent at all from B ('fraudulent taking'), an *immediate* trust can arise, so X holds that legal title on trust for B. By contrast, if B consents to the transfer to X, but that consent is procured by another's fraud ('fraudulently induced transfers'), B can rescind the transfer to X, but the transfer is valid until B chooses to rescind, and so there is no immediate trust in B's favour.

Thus, the Court's analysis in *Nasrullah* rests on a new beneficial interest being created (albeit immediately) in a 'fraudulent taking' situation. This differs to the rejection of the *Malory 1* argument in *Swift 1st* as B cannot simply claim to have retained an equitable interest despite X's registration, and so the Court's analysis in *Nasrullah* does not mean that the *Malory 1* argument will still work in some cases.

Question 7: Baroness Hale, in *Scott v Southern Pacific Mortgages Ltd*, referred to the system of land registration as 'merely conveyancing machinery.' Do you agree with that view? Do you think the Law Commission intended the LRA 2002 to be seen in such a light?

The extract from the Law Commission report which led to the LRA 2002, set out in section 3.3.1, makes clear that it intended the Act to have a substantive, and not merely procedural, effect. Rules about the circumstances in which rectification of the register may occur, for example, are not merely about "conveyancing machinery" as they determine the strength of the right held by the registered proprietor. Similarly, rules about overriding interests (at stake in *Scott v Southern Pacific*: see section 15.3.1.3) determine whether or not the unregistered right of B can be asserted against the registered proprietor C and thus have a determinative effect on the rights that the parties will enjoy in practice.

It is therefore easy to argue against Baroness Hale's statement; but it does at least indicate that the registration rules cannot be seen as wholly independent from the general principles and values of property law, and that judges may well be reluctant to reach results at odds with those principles and values: this is a point we explore further in Chapter 18.