Neutral Citation Number: [2020] EWCA Civ 619

Case No: A3/2019/0723

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**PROPERTY TRUSTS AND PROBATE LIST (Ch D)**
**HIS HONOUR JUDGE PELLING QC, SITTING AS A JUDGE OF THE HIGH COURT (HC-2016-000411)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2020

**Before:**

**LORD JUSTICE PATTEN**
**LORD JUSTICE COULSON**
and
**LADY JUSTICE ROSE**

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**Between :**

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| **SIMER KAUR DHILLON** | **Appellant** |
| **- and -** | |
| **(1) BARCLAYS BANK PLC & ANR** | **Respondent** |
| **(2) CHIEF LAND REGISTRAR** | |

**Mr Mark Warwick QC and Ms Camilla Chorfi** (instructed by **Rainer Hughes Solicitors**) for the **Appellant/Claimant**
**Mr Timothy Polli QC** (instructed by **Dentons UK**) for the **1st Respondent/Defendant**
**Mr Nicholas Trompeter** (instructed by **the Government Legal Department)** for the **2nd Respondent/Defendant**

Hearing dates : 24th March 2020

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# Approved Judgment

"Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am, Thursday 14th May 2020."

**LORD JUSTICE COULSON:**

## 1. INTRODUCTION

1. The appellant ("Mrs Dhillon") seeks to appeal against the order of His Honour Judge Pelling QC, sitting as a judge of the High Court ("the judge"), in which he dismissed her claim that the Land Register be rectified by the removal of a charge made in favour of the 1st respondent ("BB") dated 20 November 2002. Both BB and the 2nd respondent, the Chief Land Registrar ("CLR") seek to uphold the judge's order, although both have filed Respondent's Notices which raise a variety of other issues, some directly relevant to Mrs Dhillon's claim, and others relevant to what I regard as a wholly subsidiary dispute as to whether, if the Register was rectified, BB would be entitled to an indemnity from the CLR as a result.

2. All parties strove to make good their submissions by demonstrating the potentially harsh consequences for them if their arguments were not accepted. Thus, Mrs Dhillon complained that, if the Register was not rectified, she could be forced out of the property where she has lived for the best part of thirty years. By contrast, BB pointed out that it would be quite unjust if their charge on the property, now worth in excess of £600,000 (including legal fees), could be expunged in circumstances where they had unquestionably been the victims of fraud.

3. Like many cases concerned with rectification of the Register, this is a case concerned with mortgage fraud. There is no suggestion that Mrs Dhillon was involved in the fraud which was perpetrated by her husband: indeed, the judge found that both the relevant transfers had been effected using her forged signature. In addition, although the particular facts of the case have given rise to a number of disputes about the precise mistake that was required to be rectified and what, ultimately, is the proper resolution of the difficulties created by the fraud, the underlying issue on appeal remains straightforward. Under paragraph 3(3) of Schedule 4 of the Land Registration Act 2002 ("the 2002 Act"), the court must alter/rectify the Register "unless there are exceptional circumstances which justify its not doing so." The judge found that there were such exceptional circumstances in the present case which justified not rectifying the Register. The sole question for this court is whether he was wrong so to find.

4. The structure of this Judgment is as follows. In Section 2, I set out the relevant factual background and the material parts of the judgment below. In Sections 3 and 4, I note – but decline to decide - two jurisdictional points taken by BB. In Section 5, I deal with the nature and scope of Mrs Dhillon's title in the property. In Section 6, I address the central issue raised by this appeal, namely whether this is a case of 'exceptional circumstances' under paragraph 3(3) of Schedule 4 of the 2002 Act and, if so, whether the non-rectification of the Register is justified. At Section 7, I address the dispute (originally arising between the CLR and BB but belatedly taken up by Mrs Dhillon) about the relevance of the potential indemnity from the CLR if the Register were to be rectified. There is a short summary of my conclusions at Section 8.

5. At the outset of this Judgment, I would wish to express my gratitude to counsel for the excellence of their written and oral submissions, including the written submissions provided by all three parties after the conclusion of the hearing. This was, I think, the

first civil appeal to be conducted remotely as a result of the current health crisis and, thanks to the skill of counsel, the hearing can be accounted a significant success.

## 2. THE FACTUAL BACKGROUND

### 2.1 The Relevant Events

6. The appeal is concerned with a three-storey house at 47, Moresby Road, London E5 9LE ("the property"). It has two reception rooms and five bedrooms. Mrs Dhillon has lived there since August 1993. At that time, she was a secure tenant. The property was owned by the London Borough of Hackney ("Hackney") who was the registered freehold proprietor.

7. By 1999, Mrs Dhillon had acquired a right to buy the property under the Right to Buy legislation. She had commenced the process of exercising that right, but this had stalled because, as the judge found, Mrs Dhillon did not have the means of making the necessary payment of £167,000 to Hackney. At [23] and [71] the judge found expressly that Mrs Dhillon could not have afforded to purchase the property from Hackney and that, at the relevant time, she was in arrears with her rent. As the judge found:

> "This would have meant that the best she could have hoped to achieve by exercising her right to buy would have been to purchase and then sell on thereby profiting from the margin between the purchase and the sale price and, possibly entering into a leaseback arrangement with the purchaser."

8. On 9 September 2002, Hackney executed a deed transferring to Mrs Dhillon its freehold estate in the property ("Transfer 1"). The judge found that Mrs Dhillon knew nothing about Transfer 1 and that her signature on the conveyance was forged. The judge also found that Mrs Dhillon knew nothing about and had not been involved in the payment of the purchase price of £167,000.

9. Eleven days later, on 20 September 2002, the property was transferred again to a company called Crayford Estates Limited ("CEL"). The apparent purchase price was £250,000 ("Transfer 2"). Again, the judge found that Mrs Dhillon knew nothing about Transfer 2 and that her signature on the conveyance had also been forged. On the same day, CEL charged the property to a lender, Commercial Acceptances Limited.

10. The judge treated both Transfer 1 and Transfer 2 as void, applying the principles in *NRAM Ltd v Evans* [2017] EWCA 2013; [2018] 1 WLR 639. That finding is not challenged on appeal: indeed, it has always been Mrs Dhillon's case that both those transfers were void and that stance has never been disputed by either of the respondents.

11. On 3 October 2002, CEL was registered as the legal proprietor of the freehold estate in the property, in place of Hackney[1]. The charge in favour of Commercial Acceptances Limited was registered against the freehold. On 18 October 2002, CEL refinanced the loan from Commercial Acceptances Limited with a mortgage from the Woolwich Plc (now BB) and granted it a first legal charge over the property. That charge was

[1] There had been an application by Mrs Dhillon to be registered as owner, but this had not been processed at the time of, and was then overtaken by, the transfer to CEL.

registered on 20 November 2002. It is that charge ("the BB charge") which Mrs Dhillon is now seeking to remove from the Register.

12. It appears that Mrs Dhillon was taken to Pakistan by her husband, Mr Hussain, in the autumn of 2002 and she was not able to return to London until July 2003. She then discovered that CEL had let the property to tenants. The matter was eventually reported to the police and Mr Hussain was arrested. He was subsequently tried and convicted of fraud. It appears that, in the present proceedings, the evidence as to the precise charges that Mr Hussain faced was unsatisfactory, but the judge accepted at [29] that, amongst other things, Mr Hussain had been convicted of offences related to the forgery of Transfer 1 and Transfer 2.

13. On 25 April 2006, CEL was struck off the Register of Companies. As a consequence, the property vested in the Crown as *bona vacantia.* The Crown disclaimed the property on 21 January 2009 and the property escheated. Although CEL objected to the escheat, their objection had no effect.

14. On 17 February 2010, Mrs Dhillon applied to the court to have the property vested in her name ("the Title Transfer proceedings"). I deal with the outcome of those proceedings in greater detail in Section 5 below but, for present purposes, it is sufficient to note that, on 21 October 2010, Master Moncaster ordered that there be vested in Mrs Dhillon "all the estate and interest which immediately prior to its dissolution was vested in CEL". On 15 November 2010, Mrs Dhillon was registered as proprietor of the property, subject to BB's charge. Although CEL sought to set aside the order, that application was dismissed by Chief Master Marsh on 9 January 2013.

15. Before setting out Mrs Dhillon's claim in these proceedings, it is instructive to record the current figures and values. Before the judge, the evidence was that the property was now worth in the region of £1 million. It was noted that the value of the BB charge (excluding legal costs) was £508,142.52. That figure had grown significantly since the date of the original charge because neither Mrs Dhillon, nor anybody else, has ever paid BB anything either by way of interest or in respect of the capital sum. Including legal costs, but excluding the cost of the appeal, the full debt is £651,195.42. As Mr Polli QC submitted on behalf of BB, the figures mean that, if the property was sold at value and the full debt paid off, Mrs Dhillon would be left with equity of around £350,000.

## 2.2 The Pleaded Issues

16. As explained in greater detail below, the relevant statutory provisions distinguish between an alteration of the Register, on the one hand, and a rectification of the Register, on the other. A rectification is an alteration which corrects a mistake and prejudicially affects the title of a registered proprietor.

17. On 11 February 2016, Mrs Dhillon issued the present proceedings seeking rectification of the Register by the removal of the BB charge. The claim for rectification is noted on the claim form, issued on 11 February 2015; and it is identified at paragraph 19 of the Particulars of Claim and paragraph (1) of the prayer. Moreover, at paragraph 19.4 of the defence of the CLR, the CLR expressly raised what became the central issue before the judge, namely that, because there were exceptional circumstances within the meaning of paragraph 3(3) of Schedule 4 to the 2002 Act, there should be no rectification of the Register. In her reply, Mrs Dhillon put that contention in issue. The

centrality of this debate is also reflected in Mrs Dhillon's grounds of appeal, which are all concerned with paragraph 3 and the concept of 'exceptional circumstances'.

18. Neither the CLR, nor anyone else, has ever pleaded that this was somehow not a claim for rectification, but merely a claim for alteration of the Register under rule 126 of the Land Registration Rules 2003. Although Mr Trompeter (on behalf of the CLR) sought to argue before the judge that this was a claim for alteration not rectification, because that potentially strengthened the CLR's case that he was not obliged to indemnify BB if the Register was rectified, I have concluded that this submission is not open to the CLR. It has never been pleaded; indeed, on one view, it is contrary to the CLR's pleaded defence.

19. This is not, I hope, a dry technical point. The question of the relief being claimed by Mrs Dhillon was central to this case. If the CLR had wanted to say that this was not a case of rectification at all, then it was required to plead such a contention. That was in order that the parties could properly marshal their arguments to address that submission and so that, in due course, the court would know what issues it was being asked to decide. It is too often the case in civil litigation that the pleadings become forgotten as time goes on, and the trial can become something of a free-for-all. That is not appropriate. I can only echo and agree with the recent warning by David Richards LJ in *UK Learning Academy Ltd v Secretary of State for Education* [2020] EWCA Civ 370 when he said:

> "47. I would add here that I endorse the view expressed by the judge to the parties at the trial and repeated in his judgment at [11] that the statements of case ought, at the very least, to identify the issues to be determined. In that way, the parties know the issues to which they should direct their evidence and their challenges to the evidence of the other party or parties and the issues to which they should direct their submissions on the law and the evidence. Equally importantly, it enables the judge to keep the trial within manageable bounds, so that public resources as well as the parties' own resources are not wasted, and so that the judge knows the issues on which the proceedings, and the judgment, must concentrate. If, as he said, there was "a prevailing view that parties should not be held to their pleaded cases", it is wrong. That is not to say that technical points may be used to prevent the just disposal of a case or that a trial judge may not permit a departure from a pleaded case where it is just to do so (although in such a case it is good practice to amend the pleading, even at trial), but the statements of case play a critical role in civil litigation which should not be diminished."

20. For these reasons, therefore, I reiterate my view that the central issue in this appeal was whether the judge was wrong not to rectify the Register pursuant to paragraph 3(3) of Schedule 4 of the 2002 Act.

## 2.3 The Judgment Below

21. The judge's judgment ([2019] EWHC 475 (Ch)) contains a detailed analysis of the facts and the relevant law. His factual findings are at [6] - [43]. As previously noted, the two most significant findings for present purposes are that: i) Mrs Dhillon could not have afforded to buy the property; and that ii) her signatures on both Transfer 1 and Transfer 2 were forged and not put there with her authority.

22. At [44] - [52] the judge rejected BB's submission that Mrs Dhillon's claim was an abuse of process because it could and should have been brought as part of the Title Transfer proceedings dealt with by Master Moncaster (paragraph 14 above). That argument was rejected and there is no appeal against that finding.

23. At [53] - [63] the judge dealt with what he called the "alteration and rectification issues". I consider some of these passages of the judgment in greater detail when considering the grounds of appeal. But the heart of the judgment is concerned with 'exceptional circumstances', in accordance with paragraph 3(3) of Schedule 4 of the 2002 Act. The judge's conclusions were as follows:

> "68. In my judgment the defendants are correct in the submissions they make. If and to the extent that the claimant relies on the Moncaster Order then she ought to be in no better position than CEL would have been in had it still been the registered proprietor. It had borrowed money in order to finance the acquisition of the Property and had charged the Property as security for its borrowings from BB. As between it and BB, either there was no mistake that required alteration or it would be obviously not unjust for the register not to be altered as long as CEL was the registered proprietor, or those facts would constitute exceptional circumstances that would justify a court not making the order sought. As I have said earlier in this judgment, the effect of the Moncaster Order was to place the claimant in no better position than CEL would have been in. Thus, if and to the extent that the claimant relies on her position as registered proprietor by virtue of the Moncaster Order, any alteration that had the effect of placing her in a better position than CEL would have been in would not be just and would provide an exceptional reason why the register should not be altered.
>
> 69. The only basis on which the claimant can say that she is entitled to be placed in a better position than CEL would have been in is if she is entitled to adopt and rely on Transfer 1. However, that is a void disposition that has never been registered. In seeking to rely on Transfer 1, the claimant is seeking to rely on a document that she maintains she did not see at the time, did not sign and which she maintains was the first stage of the fraud of which she had no knowledge and to which she was not party, by which her right to purchase the Property was hijacked by Mr. Hussain…
>
> 71. She is however seeking to place herself in a better position than she could ever have been in by relying on a void disposition. As I have explained, she did not have any capital of her own. She rented the property from Hackney but was in substantial arrears with her rent. Although she asserts that the money needed to exercise her right to buy would have come from her children there is no evidence that this is so other than her assertion and I have concluded that it is improbable that she could have afforded to purchase the Property from Hackney otherwise than by selling it on at a profit and retaining the difference between the purchase price (including repayment to Hackney of any right to buy discount) and the price at which it could be sold on. This would have meant that the best she could have hoped to achieve by exercising her right to buy would have been to purchase and then sell on thereby profiting from the margin between the purchase and the sale price and, possibly entering into a lease back arrangement with the purchaser.

> 72. On that basis, by not ordering the alteration she seeks the claimant will be left in much the position she would have been in had her exercise of her right to buy proceeded in the only way that on the evidence it could have proceeded. She will be left with the Property (which is now valued at in excess of £1 million) but subject to a charge that can be discharged only by selling the Property or, which seems highly unlikely, obtaining replacement borrowing to discharge the BB secured loan. This outcome also gives effect to the Moncaster Order because it placed her in the shoes of CEL and CEL would have had no case for seeking alteration as long as it remained the registered proprietor of the Property."

## 3. JURISDICTION ISSUE 1: WOULD THE REMOVAL OF THE CHARGE BE THE RECTIFICATION OF THE RELEVANT MISTAKE?

24. Mr Polli QC's first jurisdictional argument was to the effect that the removal of the BB charge would not constitute the rectification of the relevant mistake. He submitted that there were a number of authorities for the proposition that, for it to be a mistake which justified rectification, the focus had to be on what the Registrar did, or did not do, at the point of time at which he did or did not do it: see *NRAM v Evans* at paragraphs [46] - [52]; and *Antoine v Barclays Bank Plc and the Chief Land Registrar* [2018] EWCA Civ 2856; [2019] 1 WLR 1958 at paras [39] - [47]. Mr Polli QC argued that the relevant mistake was the entry of CEL as the freehold proprietor in place of Hackney on 3 October 2002, and not the entry of BB's charge on 20 November 2002. Accordingly, he said that the court had no jurisdiction to remove the charge because such removal would not be the rectification of the relevant mistake.

25. The judge dealt with this in short order at [59] - [60]:

> "59. The CLR accepts that if Transfer 2 is a forgery then in principle registration of Transfer 2 was a mistake and the register must be altered by removing the BB Charge applying LRA, Sched. 4, para 2(1)(a) and the principles referred to in para. 53-54 above. There is no necessity to do anything in relation to Transfer 2 because the claimant has been registered as proprietor pursuant to the Moncaster Order. Indeed, the claimant does not claim any relief of any sort in relation to Transfer 2. There is no requirement that the claimant should have an interest in the land in respect of which alteration is sought – see Paton v. Todd [2012] EWHC 1248 (Ch) *per* Morgan J at para. 51. In fact, by operation of the Moncaster Order, the claimant has the interest in the Property that CEL apparently had.
>
> 60. Mr Polli submits that this is an impermissible conclusion because "… C was never entitled to the freehold estate: she was no more than a secured tenant of the Property. Master Moncaster's vesting order already gives her more than she was ever entitled to" – see para. 25 of Mr Polli's opening submissions. Mr Trompeter takes a more circumspect line in his opening submissions, stating merely that "… it is worth reflecting on … first if [the claimant's] evidence is accepted then the registration of [Transfer 1] was just as much a mistake as the registration of [Transfer 2]. [The claimant] nowhere explains why she ought to be entitled to retain the benefit of the former, whilst avoiding the consequence of the latter …" In my judgment these are issues which if they are relevant at all are relevant only to the question whether there are exceptional circumstances

> that justify not making the order sought. I do not consider that Mr. Polli is right when he suggests that the facts that he relies on prevent the alteration sought by the claimant being the correction of a mistake. The mistake arises from the registration of the BB Charge when it is derived from a void disposition. The implied assertion that the Moncaster Order is wrongly made is not one that is open to BB because it amounts to a collateral attack on a final order made by a court with the jurisdiction to make it."

26. I agree with the judge's view that it is now impossible to set aside the Moncaster order. But I do not think that that was really the kernel of Mr Polli QC's submission: his argument was that it was not the registration of the charge that was the relevant mistake, but the original void transfer(s), so that the court had no jurisdiction to rectify the Register by removing the charge.

27. I have concluded that it is unnecessary to decide this issue because it makes no difference to the outcome of this appeal. For present purposes, I am content to assume (without deciding) that the court has the necessary jurisdiction. I acknowledge that the wider question, of whether a charge can be removed from the Register in circumstances where:

> (a) the person who was the registered proprietor of the land grants a charge to an innocent lender, as security for a loan;
> (b) the transfer of the land to the registered proprietor was in fact void; but
> (c) the application for rectification is limited to an application to remove the charge, and does not also seek to remove the registration of the title of the borrower;
>
> is not straightforward. It would be wrong to embark on a consideration of that issue in this case, where it is immaterial to the outcome of the appeal.

## 4. JURISDICTION ISSUE 2: ILLEGALITY

28. Mr Polli QC had a second reason for submitting that, as a matter of jurisdiction, the court should not entertain the claim for rectification at all. He maintained that Mrs Dhillon was seeking to pick and choose between the void transfers, by seeking to wind the clock back to a point in time after Transfer 1 (the void transfer from Hackney to her), but before Transfer 2 (the void transfer from her to CEL). He said that the attempt to adopt the first fraud, perpetrated by Mr Hussain on Hackney, whilst setting aside the second fraud (namely the transfer to CEL), was contrary to the public interest because it was contrary to the doctrine of illegality.

29. The judge gave that submission short shrift. He said at [70] that the point did not apply because Mrs Dhillon, having not been responsible for the fraud, was "not seeking to profit from her own wrong, but seeking to take advantage of another's wrong…".

30. In my view, that did not entirely meet Mr Polli QC's submissions on behalf of BB. In *Patel v Mirza* [2016] UKSC 42: [2017] AC 467, the Supreme Court was looking at a claim for restitution under an illegal agreement. At paragraph 29 of his judgment, Lord Toulson recognised and approved what is sometimes called the narrow rule as to illegality, noted by Lord Hoffmann in *Gray v Thames Trains Ltd* [2009] UKHL 331; [2009] AC 1339, and which Lord Toulson summarised as the principle "that you cannot recover damage which is the consequence of your own criminal act…"

31. Of course, that does not arise here because Mrs Dhillon was not herself guilty of any criminal conduct; on one view, as the judge noted, she was a victim of her husband's fraud. But what matters for this argument is the wider formulation of the principles identified by Lord Toulson at paragraph 120 of his judgment in *Patel v Mirza*:

> "120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

32. In reliance on this passage, Mr Polli QC argued that it would be contrary to the public interest to entertain Mrs Dhillon's application for rectification because it relied upon the fraudulent Transfer 1, and so was seeking to turn that fraud to her advantage. He said that denying Mrs Dhillon the removal of the charge would prevent her from benefitting from the illegal conduct and thereby maintain the integrity of the legal system. It would avoid encouraging others to commit a 'right to buy' fraud and therefore constitute a deterrent, without being a disproportionate sanction.

33. Again, I have concluded that it is unnecessary to decide this issue for the purposes of this appeal. I am content to assume that the decision in *Patel v Mirza* did not affect the court's jurisdiction to consider Mrs Dhillon's claim for rectification of the Register. I am also aware that, for the reasons set out in the judgment of Lewison LJ in *Nasrullah v Rashid* [2018] EWCA Civ 2685; [2020] Ch 37, the interplay between *Patel v Mirza* and the 2002 Act cannot be regarded as clear-cut.

34. Of course, this does not mean that the extent to which, however indirectly, Mrs Dhillon is seeking to rely on her husband's fraud is irrelevant to the court's consideration of the question of exceptional circumstances, and whether or not the non-rectification of the Register is justified. It is plainly relevant to those issues, and I therefore address it in Section 6 below. The inescapable fact that Mrs Dhillon is seeking to wind the clock back to a point in time between the two fraudulent transfers means that, inevitably, she is seeking to rely on the first act of fraud, namely the void Transfer 1, and it would be contrary to common sense, and any notion of justice, to consider the question of exceptional circumstances, and perhaps more particularly whether or not the non-rectification of the Register was justified, without having regard to that fact.

## 5. THE NATURE OF MRS DHILLON'S TITLE

35. The nature of Mrs Dhillon's title assumed considerable importance before the judge and on appeal. It is therefore appropriate to deal with it at the outset of my analysis.

36. In *Scmlla Properties Ltd v Gesso Properties (BVI) Ltd* [1995] BCC 793, Stanley Burnton QC, sitting as a Deputy High Court Judge, was dealing with a dispute under the Landlord and Tenant Act 1987 arising out of the insolvent liquidation of the landlord. He addressed in detail the doctrine of escheat, concluding that, on an escheat brought about by disclaimer, the Crown became the owner of the land in question freed from the previous freehold interest, but that the legal charge over, and the leases of the tenants created out of, the freeholds in question survived the disclaimer of those freeholds.

37. At page 798 the judge said:

> "It is because all land is held, ultimately, of the Crown that the definition of land in the *Law of Property Act* 1925 and in the *Land Registration Act* 1925 includes 'land of any tenure'. It is because the Crown cannot hold land of itself that the ancient lands of the Crown are not registered as freeholds. To this extent, there is a major, but unremarked, lacuna in the system of land registration in England and Wales.
>
> Tenure requires a tenant. At common law, in the absence of a tenant, an interest in land escheated to the lord holding the superior interest. As Megarry and Wade puts it (at p. 34 of the Law of Real Property):
>
> 'Escheat is a principle inseparable from tenure which ensures that land can never be without an owner, for if there is no tenant and no mesne lord it will return to the Crown.'"

He went on at page 804:

> "Thus the great weight of authority is in favour of automatic escheat. So is the principle of the thing. If the effect of disclaimer is that there is no tenant of the freehold, and clearly it is, then there is no one holding any interest below, or adverse to, that of the Crown. The Crown therefore has an unfettered right to the land; to put it more accurately, the Crown's seignory is no longer encumbered by the freehold interest."

38. It was Mr Warwick QC's submission, in reliance upon these passages, that as a result of the escheat, the previous freehold title to the property was expunged and that a new freehold title was created. He said that the Crown therefore obtained that new freehold, and that the order made by Master Moncaster vested that new freehold with Mrs Dhillon, subject to the BB charge which she now sought to remove.

39. Mr Polli QC and Mr Trompeter disagreed with that analysis. They said that the position was this:

(a) By reason of CEL's registration as proprietor, CEL acquired Hackney's title;

(b) Upon the registration of the mortgage granted by CEL to BB, BB acquired the registered charge, leaving CEL with the equity of redemption;

(c) When CEL were struck off, CEL's title - subject to BB's mortgage -vested in the Crown;

(d) Upon the Crown's disclaimer, CEL's title escheated and, upon the making of the Moncaster order, the freehold title, subject to BB's charge, which had previously been CEL's, was thereby vested in Mrs Dhillon.

40. For the reasons set out below, I consider that the analysis put forward by Mr Polli QC and Mr Trompeter is correct. There is nothing in *Scmlla* which supports the proposition that an escheat can create a freehold title where none existed before, much less expunge an existing charge. Furthermore, in the present case, a consideration of the relevant sequence of events clearly demonstrates the nature and limits of Mrs Dhillon's title.

41. The starting point is Section 181 of the Insolvency Act 1986, which applies where the liquidator has disclaimed property and a person who claims an interest in that property has made an application to the court. S.181 (3) provides:

> "Subject as follows, the court may on the application make an order, on such terms as it thinks fit, for the vesting of the disclaimed property in, or for its delivery to –
>
> a) A person entitled to it or a trustee for such a person, or
>
> b) A person subject to such a liability as is mentioned in sub-section 2 (b) or a trustee for such a person."

It was under that provision that the application was made to Master Moncaster. It remains unclear precisely how or why Mrs Dhillon was entitled to make the application or obtain the order in the first place but, like the judge, I consider that it is much too late to worry about that now. The order must stand.

42. CEL's freehold title had the Title Number LN 151025. Master Moncaster ordered that the land specified in the schedule to the order, which was expressly identified as Title Number LN 151025, "do vest in the claimant Simer Kaur Dhillon for all the estate and interest which immediately prior to its dissolution was vested in Crayford Estates Ltd".

43. Accordingly, Master Moncaster vested the equity of redemption, which had originally been that of CEL, with Mrs Dhillon. As Mr Polli QC rightly said, no one is seeking to take that equity of redemption away from her. But the Moncaster order did not create a new freehold: it merely vested CEL's title in the property in Mrs Dhillon. Both CEL's title, and Mrs Dhillon's title, were subject to the registered charge. As the judge made clear in *Scmlla* at 808 B – C, the escheat could have no effect on BB's registered charge.

44. As discussed in Section 6 below, the judge analysed the circumstances of this case on the basis that, as it was summarised during the argument on appeal, Mrs Dhillon received CEL's title, subject to BB's charge. I consider that that was the correct starting point.

## 6. PARAGRAPH 3(3) OF SCHEDULE 4: EXCEPTIONAL CIRCUMSTANCES

### 6.1 The Law

45. Section 65 of the 2002 Act introduces Schedule 4 "which makes provision about alteration of the Register". Schedule 4 provides as follows:

> "**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.
>
> (4)In sub-paragraph (2), the reference to the title of the proprietor of a registered estate in land includes his title to any registered estate which subsists for the benefit of the estate in land."

46. The best guide to the test of "exceptional circumstances" remains the decision of Morgan J in *Paton and Anor v Todd* [2012] EWHC 1248 (Ch); [2012] 31 EG 48. The adjudicator had concluded that there were exceptional circumstances which justified the non-rectification of the Register. The appeal against that decision was allowed on the facts and remitted to the adjudicator to consider the practical effect for each party

of both altering and not altering the Register. In addressing the relevant test, Morgan J said:

> "66. Whilst the statement in the Law Commission report can be taken as accurate for most purposes, it may in some cases be necessary to analyse the position a little more closely. There is no doubt that section 82(1) of the 1925 Act conferred on the court a residual discretion as to rectification. That position is indeed repeated in para. 5 of schedule 4 to the 2002 Act where, in a case of alteration which is not rectification, the registrar has a discretion to alter the register; the statutory wording is: "the registrar *may* alter the register" (my emphasis). However, in a case of rectification which falls within para. 6(3) of schedule 4 to the 2002 Act, the court must adopt a more structured approach. First of all, the paragraph imposes a duty to rectify the register. Secondly, that duty does not apply in a case where there are exceptional circumstances which justify not rectifying the register. Thus, in a case within para. 6(3), the court must ask itself two questions: (1) are there exceptional circumstances in this case? and (2) do those exceptional circumstances justify not making the alteration? The first of these questions requires one to know what is meant by "exceptional circumstances" and then to establish whether such circumstances exist as a matter of fact. Thus the process involved in the application of para. 6(3) of schedule 4 to the 2002 Act is not identical to the exercise of the discretion involved in section 82(1) of the 1925 Act.
>
> 67. "Exceptional" is an ordinary, familiar English adjective. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual or special, or uncommon; to be exceptional a circumstance need not be unique or unprecedented, or very rare but it cannot be one that is regularly, or routinely, or normally encountered: see *R v Kelly* [2000] 1 QB 198 at 208 C-D (a decision from a very different context but nonetheless helpful as to the ordinary meaning of "exceptional circumstances"). Further, the search is not for exceptional circumstances in the abstract but those which have a bearing on the ultimate question whether such circumstances justify not rectifying the register."

47. The result in *Paton v Todd* reflects that two-stage test. Morgan J agreed with the adjudicator that the fact that the applicants did not own the relevant land was an exceptional circumstance. However, he found that, in the absence of evidence as to the effect of rectification on either party, it could not be concluded in the defendant's favour that the exceptional circumstance justified the decision not to rectify the Register. Hence the matter was remitted. Unsurprisingly, perhaps, Mr Polli QC relied on the fact that the claimants' lack of ownership of the relevant land had been regarded in *Paton v Todd* as an exceptional circumstance, because he said that precisely the same was true of Mrs Dhillon in the present case.

## 6.2 The Judgment

48. I have set out at paragraph 23 above the relevant parts of the judge's judgment in which he concluded that there were exceptional circumstances which justified the non-rectification of the Register. As this court indicated in *Nasrullah*, the judge's decision on this issue was an evaluative judgment with which this court would be unlikely to interfere, unless there was a clear error of principle. For that reason, at Sections 6.3 -

6.7 inclusive below, I analyse the five particular criticisms of the judge's approach made in the grounds of appeal. I set out my own summary, by reference to the two-stage test in *Paton v Todd,* in Section 6.8.

## 6.3 Criticism 1: Elision of Paragraphs 3(2) and 3(3)

49. The first criticism made on behalf of Mrs Dhillon is that the judge wrongly elided the test in paragraph 3(2) of Schedule 4 ("unjust for the alteration not to be made") with the test in paragraph 3(3) ("unless there are exceptional circumstances which justify its not doing so"). The argument was that it was common ground that paragraph 3(2) did not apply (because BB was not in possession) and that the judge's error invalidated his consideration of the 'exceptional circumstances' test. I disagree.

50. It is plain that the judge did, on occasion, refer to both tests. It is equally clear that only the "exceptional circumstances" test was applicable. But this had no effect on the judge's reasoning, or the result. He never at any time focused only on the incorrect test; he applied both. He therefore applied the correct test to the circumstances here. In particular, at [55], [64] and [67] the judge applied the correct test of exceptional circumstances and no criticism of his approach can be sustained.

51. Furthermore, I consider that this is in any event a criticism of form rather than of substance. The current academic view is that the "unjust" test is a higher hurdle than the "exceptional circumstances" test[2]: since the judge found that both were met in this case, the slip (if that is what it was) could not have been to the detriment of Mrs Dhillon.

## 6.4 Criticism 2: Inconsistent with Prior Decisions

52. Secondly, Mr Warwick QC submitted that the judge's decision was inconsistent with a number of previous authorities. On analysis, I conclude that this submission has not been made out. I deal briefly with the five authorities relied on.

53. *Strachey v Ramage* [2008] EWCA Civ 384 was not a case concerned with rectification and Rimer LJ's comment at paragraph 47 was simply a brief reference to the paragraph 3(3) test and contains no statement of principle at all. I have already referred to *Paton v Todd* above: it was a case where there were exceptional circumstances and the question was whether the evidence justified the non-rectification of the Register. It was therefore ultimately a decision on its own facts.

54. *Walker v Burton* [2013] EWCA Civ 1228 was referred to in the judge's judgment in the present case. However, it is common ground that it did not concern exceptional circumstances and is therefore of no direct relevance to the issues on appeal. *MacLeod,* referred to above, was a case in which, on the facts, it was found that there were no exceptional circumstances. And in *Antoine,* there was no claim for rectification and the issue was concerned with whether or not what had happened could be classified as a mistake.

[2] At first blush, it is surprising that a relatively recent statute should have been drafted using such fine distinctions. That may explain why, less than 20 years on, the Law Commission have recommended major changes.

55. Accordingly, for these reasons, I am entirely satisfied that the judge's conclusions were not inconsistent with any of these prior authorities. On the contrary, I consider that the judge properly applied the two-stage test derived from *Paton v Todd*.

## 6.5 Criticism 3: Inconsistent with the Law Commission's Recommendations

56. Both in his written submissions and orally Mr Warwick QC relied heavily on certain passages in the Law Commission Consultation Paper of 31 March 2016 ('Updating the Land Registration Act 2002'), and their subsequent recommendations in a Report of the same name dated 19 July 2018 (Law Com No 380), to argue that the judge's conclusions were inconsistent with those documents. In my view, for the reasons briefly outlined below, this is a curious ground of appeal which, if anything, only goes to support the correctness of the judge's approach to the law as it presently stands.

57. The first and most obvious point to make is that both the Consultation Paper and the recommendations concern proposed changes to the existing law. The judge, like this court, has to apply the existing law, which is inevitably different to the Law Commission's proposed amendments to that law.

58. Secondly, the various examples used in the Law Commission Paper and Report to make good some of their general conclusions, particularly in respect of fraud, do not fit the facts of this case. Unsurprisingly perhaps, the Law Commission's principal concern is to protect someone who has been deprived of a title which they had properly acquired. That is emphatically not this case: Mrs Dhillon has not been (and will not be) deprived of her own property if the Register is not rectified.

59. Thirdly, it appears that the Law Commission's recommendations are not themselves free from controversy. On one view, they appear to recommend doing away with the whole concept of "exceptional circumstances" because they regard it as a device by which the rightful proprietor can be put to the expense and inconvenience of a contested hearing by an undeserving defendant. But the facts of this case show that that might be thought to be something of a one-eyed view. Moreover, I consider that the suggestion at paragraph 13.105 of the Report, that a party in the position of BB "should be indifferent as to whether the charge remains in the Register, given that [BB] will be indemnified if the charge is removed", must be open to doubt. It assumes that the right to an indemnity in these circumstances is undisputed, which seems optimistic and is not the case here. More significantly, when applied to the facts of this case, it would mean that the Law Commission would endorse Mrs Dhillon's right to acquire the freehold of the property unencumbered (without ever having paid a penny piece for it), and that BB should not worry themselves about that result, because they will be indemnified for their loss by the tax-paying public. Such a conclusion might be said to raise eyebrows, not least amongst that same tax-paying public.

60. Accordingly, if and to the extent that the judge's conclusions were inconsistent with the recommendations of the Law Commission, that is simply the result of the judge's application of the law as it presently stands (and in particular the 'exceptional circumstances' test), not the potentially different law which may eventuate in the future. There is nothing in this ground of appeal.

## 6.6 Criticism 4: The References to CEL

61. Mr Warwick QC submitted that the judge went wrong because he found that Mrs Dhillon could be in no better position than CEL would have been in had they not been dissolved. For the reasons explained in Section 5 above, I reject that criticism: the judge was plainly right to adopt that approach. It was CEL's title that was vested in Mrs Dhillon. CEL's title was subject to the BB charge; so too was Mrs Dhillon's.

### 6.7 Criticism 5: Inappropriate Focus on Mrs Dhillon

62. Finally, Mr Warwick QC complained that the judge was wrong, when considering exceptional circumstances, to focus on the position of Mrs Dhillon. He said that the focus should have been on BB and the amount of the charge. He said that, but for the fraud, Mrs Dhillon could have bought the property for £167,000 but that, because of the fraud, the debt was now over £600,000.

63. In my view, this criticism is misplaced. The judge, having concluded that Mrs Dhillon's title was no better and no worse than the title of CEL, was obliged to focus on Mrs Dhillon because the exceptional circumstances in the case arose from her position: her inability to afford to buy the property; the forgery of her signature not once but twice on the relevant transfers; the nature of her title following the dissolution of CEL; and the circumstances in which she came to be living in a valuable property without ever having paid anything for it.

64. By contrast, BB's position was unexceptionable. It had a legitimate charge. Since nobody had paid any capital or interest to reduce the mortgage, the debt had inevitably risen over the years (although so too had the value of the property). There was therefore nothing wrong with the judge's focus on Mrs Dhillon when considering the two-stage test: in my view, it was inevitable.

### 6.8 Summary: Exceptional Circumstances/Non-Rectification of the Register

65. For the reasons set out above, I reject each of the five criticisms made in the grounds of appeal concerning the judge's approach to the issue of exceptional circumstances and the non-rectification of the Register. However, for completeness, I set out a summary of why, by reference to the two-stage test set out in *Paton v Todd,* I consider that this was a case of exceptional circumstances which justified the non-rectification of the Register.

66. It seems to me that, taken in combination, there were a number of exceptional circumstances in this case.

67. Focusing on Mrs Dhillon herself, there is the fact that she had never been the freehold owner of the property (a factor in *Paton v Todd* which on its own was enough to constitute an exceptional circumstance in that case). Furthermore, she could never have afforded to buy the property. The best she could have done was buy it with a mortgage and then sell it, realising the equity that may have accrued because she could have bought the property at a discount because of the Right to Buy legislation.

68. Furthermore, Mrs Dhillon could never have been in a better position than CEL. That is because the title vested in her was the title which was vested in CEL, namely Title Number LN151025.

69. As noted above, Mrs Dhillon's claim for rectification had to rely on the void Transfer 1, namely the transfer from Hackney to her. This would have the extraordinary consequence that she was seeking to obtain the property free of charge by relying on a document which she did not see and did not sign, and which was the first stage of a fraud about which she had no knowledge. Again, that is plainly an exceptional circumstance.

70. Of course, I acknowledge that the loss or potential loss of a charge in favour of a lender in good faith is not uncommon because of the unfortunate proliferation of mortgage fraud. But that would not be an accurate summary of the story here. I agree with Mr Polli QC that it is wholly exceptional for such a loss to occur in circumstances where the occupier never owned the freehold of the property; paid nothing towards the property; could never have afforded to buy the property without immediately selling it; where the original conveyance to the occupier was void because it was procured by fraud; and that, if the Register was rectified, the occupier would become the owner of the unencumbered freehold as a result of that fraud.

71. In my view those are unusual and uncommon factors which are not routinely or normally encountered. There is no evidence to suggest that these circumstances are anything other than unique, or at least very rare. They are, on any view, 'exceptional'.

72. Having reached those conclusions as to exceptional circumstances, do they justify the non-rectification of the Register? In my view, they do.

73. First, rectification of the Register would create a windfall for Mrs Dhillon. It would give her the unencumbered freehold of a million-pound property she had never owned and could never have afforded. She would be put in a much better position than she ever would have been in if the fraud had not taken place. In addition, I would repeat the point made in Section 5 above that, regardless of whether or not the claim should fail for illegality, Mrs Dhillon's indirect attempt to rely on fraudulent Transfer 1 must at least be a relevant factor when considering whether the non-rectification of the Register is justified.

74. On the other hand, if the Register is not rectified then Mrs Dhillon would be in much the same position as she would have been in had she exercised her right to buy. In 2002, she would have had to have bought the property with a mortgage and then sold it, leaving her with an equity of redemption. That is the position now, with the additional factor (in her favour) that the equity of redemption in 2002 would have been worth nothing like the £350,000 odd which it is now estimated to be. Non-rectification therefore is amply justified: it is a just and proportionate outcome.

75. Accordingly, I consider that both stages of the relevant test have been made out in the present case. There are exceptional circumstances which justified the non-registration of the Register.

76. Throughout all of that analysis I have not forgotten that, save for the period when she was in Pakistan, Mrs Dhillon has been in occupation of the property. I accept too that that fact could have been ascertained by BB at the time of the mortgage (although it is difficult to see in practice what difference that would have made). But that cannot give rise to any sort of overriding interest; certainly, it cannot give rise to an interest that

somehow trumps all the other exceptional circumstances and justifies the rectification of the Register in Mrs Dhillon's favour.

## 7. THE RELEVANCE OF THE INDEMNITY

### 7.1 Overview

77. Schedule 8 of the 2002 Act contains detailed provisions concerned with indemnities if loss is suffered as a result of rectification. Paragraph 1 of Schedule 8 is in the following terms:

> *"**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,
>
> (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 duty under section 50.
>
> (2) For the purposes of sub-paragraph (1)(a)—
>
> (a) any person who suffers loss by reason of the change of title under section 62 is to be regarded as having suffered loss by reason of rectification of the register, and
>
> (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.
>
> (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."

78. Here, for the reasons that I have explained in Section 6 above, the exceptional circumstances justify the conclusion that the Register should not be rectified. The issue as to whether, if the Register were to be rectified, BB would be entitled to an indemnity from the CLR therefore does not arise on the facts of this case.

79. However, notwithstanding this, the possibility of an indemnity from the CLR to BB was taken up enthusiastically at and after the hearing by both Mrs Dhillon (on whose

behalf it was argued – for the first time - that the availability of an indemnity was a "critical factor" in considering the 'exceptional circumstances' test) and the CLR, who argued that there was no entitlement to an indemnity (in large part because of the unpleaded case noted above, that what Mrs Dhillon really wanted was to alter, not rectify, the Register).

## 7.2 Mrs Dhillon's New Case

80. Perhaps taking his lead from the Law Commission Report referred to at paragraphs 62-66 above, Mr Warwick QC argued that, not only was BB entitled to an indemnity on the facts of this case, but the fact that there was such an entitlement meant that this effectively precluded any finding of exceptional circumstances (or presumably could not justify the non-rectification of the Register). In his subsequent written submissions, he argued that the availability of an indemnity was a "critical alternatively a key factor" in this respect. In my view, this bold submission does not reflect the issues in this case, was not within Mrs Dhillon's grounds of appeal, and was in any event wrong in principle.

81. If Mrs Dhillon's advisers had ever considered that the availability of an indemnity was a "critical alternatively a key factor" in demonstrating that these were not exceptional circumstances (or were exceptional but did not justify the non-rectification of the Register), then they would have pleaded such a case. They did not. Moreover, although pages 2-9 of Mr Warwick QC's written submissions in reply argue that it is necessary for the court to consider BB's alternative remedies, and set out detailed submissions on this subject, I note that these points were not argued before the judge and, more significantly, form no part of the grounds of appeal. Thus, the issue of the availability of the indemnity as part of the paragraph 3(3) exercise simply does not arise for determination on this appeal.[3].[4]

82. Neither can Mrs Dhillon rely on any of the pleadings from BB or the CLR. On the contrary, BB has no counterclaim for an indemnity, even by way of a declaration, and there are no proceedings at all as between BB and the CLR. Again this matters: as can be seen from Schedule 8, the question of whether or not an indemnity may be payable, and the amount of any such indemnity, is not straightforward and would require a properly pleaded issue as between BB and the CLR.

83. For completeness, however, I should say that – even if it had arisen below or in the grounds of appeal - I consider Mrs Dhillon's belated reliance on the possible existence of an indemnity, where its existence is or may be in dispute, to be questionable in principle and certainly over-stated. It would be curious if a detailed investigation of the disputed contingent rights as between B (BB in the present case) and C (the CLR) had to be undertaken and decided before the primary rights as between A (Mrs Dhillon) and B were determined. On one view, the possible existence of the indemnity should be irrelevant to Mrs Dhillon: it is *res inter alios acta.*

84. In any event, it must be wrong to suggest that, even if it were found that BB was entitled to an indemnity, this would somehow mean that exceptional circumstances could not

[3] The same is true of another argument advanced at paragraphs 18-21 of the same submissions in reply concerned with BB's alleged rights of subrogation.
[4] The same is true of another argument advanced at paragraphs 18-21 of the same submissions in reply concerned with BB's alleged rights of subrogation.

arise, or the rectification of the Register was automatically justified. The possibility of an indemnity from the CLR to the mortgagee cannot short-circuit the court's full consideration of whether there are exceptional circumstances and whether they justified the non-rectification of the Register. That must be the case: otherwise, the detailed provisions in Schedule 4 would be self-defeating because, instead of the two-stage test outlined in *Paton v Todd*, all that would matter would be whether or not the person suffering the loss was entitled to an indemnity from the CLR. That is emphatically not the law.

85. In this connection, I note that there are a number of cases where there was at least a possibility of an indemnity but where the Register was not rectified. An early example was *Epps and Anr v Esso Petroleum Co Ltd* [1973] 1 WLR 1071. A more recent example is *Pinto v Lim* [2005] EWHC 630 (Ch), a decision of Blackburne J, in which he expressly said that the existence of an indemnity (which was not disputed in that case) could not be a decisive factor in considering rectification. In my view, those authorities make plain that it goes much too far to equate the existence of an indemnity with the automatic rectification of the Register, or to regard it as a decisive factor in any consideration of rectification.

86. Conversely, although Mr Warwick QC's written submissions in reply referred to a number of other authorities, such as *Knights Construction (March) Ltd v Roberto Mac Ltd* [2011] 2 E.G.L.R. 123, as well as *MacLeod* and *Antoine*, none of them supported the proposition that the existence of an indemnity was (in his words) "a critical or alternatively a key factor" in any consideration of paragraph 3(3) of Schedule 4.

87. Accordingly, having regard to those authorities, it seems to me that the very highest that it can be put is that the possibility of an indemnity is a factor which may, in certain cases, be relevant to the two-stage process in *Paton v Todd*. Beyond that, it is unnecessary to go.

## 7.3 The CLR's Case

88. I have already said at paragraphs 18-20 above that Mr Trompeter's submissions, to the effect that what Mrs Dhillon really wanted was an alteration to, rather than rectification of, the Register, fell outside the pleadings in this case and did not therefore arise for determination. But as his detailed oral submissions continued, it also became apparent that the issue as to whether in fact an indemnity was due involved an excursion into potentially complex areas of land law going back over a century, together with a number of authorities, such as *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] Ch 216, which are regarded in some quarters as controversial. It would plainly be inappropriate for this court to embark on a detailed analysis of that case law when the underlying issue is unpleaded and immaterial to the result of the appeal.

89. For these reasons, I say no more about the indemnity arguments in this case.

## 8. CONCLUSIONS

90. For the reasons set out in Sections 3 and 4 above, it is unnecessary to decide either of the jurisdictional points raised by Mr Polli QC for the purposes of this appeal. I am content to assume that the court has the necessary jurisdiction to rectify the Register in the circumstances of this case, and that the points as to illegality are relevant, not to

jurisdiction, but to a consideration of the test under paragraph 3(3) of Schedule 4 of the 2002 Act.

91. For the reasons set out in Sections 5 and 6 above, I conclude that the judge was right to find that the circumstances of this case were exceptional and justified the decision not to rectify the Register. The individual criticisms set out in the grounds of appeal are unsustainable.

92. For the reasons set out in Section 7 above, I do not consider that the possible availability of an indemnity arises on the pleadings, or as any part of Mrs Dhillon's appeal. The highest that it can be put in principle is that the existence of an indemnity may be a factor in the two-stage test in *Paton v Todd.* It has no relevance or application to the present case.

93. For those reasons, if my Lord and my Lady agree, I would dismiss this appeal.

**LADY JUSTICE ROSE:**

94. I agree.

**LORD JUSTICE PATTEN:**

95. I also agree.