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Court of Appeal rules that a lender can re-register a charge it had previously cancelled in error to bring the Land Register up to date

*Paul & Susannah Evans v. NRAM PLC
Chief Land Registrar intervening
[2017] EWCA Civ 1013*

Article by David Bowden

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Executive speed read summary

A lender did not check its systems properly and in error cancelled its charge with HM Land Registry. When the error came to light it applied for rectification which was granted by HHJ Milwyn Jarman QC. The borrowers were granted permission to appeal on 2 points. Firstly whether there had been a 'mistake' within the ambit of the Land Registration Act 2002 here or not. Secondly whether the lender had incorrectly registered account data with credit reference agencies such that damages were due to the borrowers under section 13 of the Data Protection Act 1998. The borrowers sought to join the Chief Land Registrar into proceedings to claim indemnity and it was permitted to intervene and make submissions on the LRA 2002. The Court of Appeal has on the whole dismissed the appeal. Lord Justice Kitchin rules that whilst there was not a 'mistake' here within schedule 4 paragraph 2 (2) (a) of the LRA, nevertheless the lender was entitled to bring the Land Register 'up to date' under paragraph 2 of schedule 4 to the LRA 2002 by re-registering its charge which it had previously cancelled in error. Kitchin LJ says that the point about 'mistake' has not been 'free from controversy'. Kitchin LJ dismissed the claim under the DPA ruling that the lender had not supplied any incorrect data to the 3 credit reference agencies. Kitchin LJ orders some consequential changes to be made to the ruling below from Judge Jarman to reflect his judgment and to this very narrow extent indeed the appeal is allowed but the overall outcome is in the lender's favour. As the Court of Appeals rules there is no 'mistake' this means that any claim by the Evans for indemnity against the Chief Land Registrar falls away.

Paul Morgan Evans and Susannah Jane Evans v. NRAM PLC and the Chief Land Registrar
[2017] EWCA Civ 1013 19 July
Court of Appeal, Civil Division (Lords Justices Kitchin, David Richards and Henderson)

What are the facts of the case?

In November 2004 Mr & Mrs Evans borrowed £197,000 from Northern Rock to buy their family home in Neath. This loan was secured by a legal mortgage over the property and registered at HM Land Registry. They were also given a further loan of £21,400 by the lender but this was not secured by mortgage but was regulated by the Consumer Credit Act 1974 ('CCA'). The product was the 'Together' mortgage.

In November 2005 the borrowing was re-structured. The lender treated £213,128 as secured and £22,311 as unsecured but CCA regulated. No new mortgage deed was signed. The borrowers were allowed to have the mortgage on an interest only basis which reduced their monthly payments. The lender gave the borrowing a new account number in November 2005.

In August 2014 solicitors for the borrowers wrote to the lender saying they were advised the mortgage was still registered with HMLR even though the 2004 mortgage had been redeemed. Without checking properly (or at all), the lender issued form e-DS1 to HMLR. This then discharged its security meaning that all the outstanding borrowing was now unsecured.

Under which route did the Evans proceed for personal insolvency?

Mr Evans entered into an IVA on 6 March 2007. NRAM's unsecured loan was included in this (but not the secured loan). Mr Evans defaulted on his IVA, it was terminated and he was made bankrupt on 1 October 2007. Mr Evans was discharged from his bankruptcy 1 year later in October 2008.

Mrs Evans proposed an IVA which the lender rejected at a creditor's meeting. The lender obtained a county court judgment against Mrs Evans for the sum due under its unsecured loan. The lender obtained a charging order on 20 February 2007 over Mrs Evans' interest in the property and protected this by registering a restriction in relation to the charging order at HMLR. Mrs Evans was declared bankrupt in on 31 January 2007. Again Mrs Evans was released from her bankruptcy a year later.

In August 2007 Mr & Mrs Evans executed assignments of their beneficial interests in their home to their respective mothers for £1. The Official Receiver examined this, decided that due to the arrears there was no equity in the property and astonishingly concluded that this was not a transaction at an undervalue under sections 339 or 423 of the Insolvency Act 1986.

In relation to the unsecured loan, following Mr Evans' release from his bankruptcy the lender was not able to recover anything else. As to Mrs Evans, even following her release from bankruptcy the lender could rely on its charging order were there any equity in the property.

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In relation to the mortgage, this was not included in the IVA. On the basis that the lender retained a valid charge, then the lender could rely on its charge and seek to enforce it by obtaining possession and selling the property. The borrowers would remain liable to the lender under the terms of the mortgage for any shortfall and this would not be affected by the insolvency (be it IVA or bankruptcy).

What relief did the lender seek in the court case?

The lender then brought a court claim seeking these declarations:

- The mortgage was still subsisting as security for the 2004 loan,
- The HMLR discharge of mortgage be set aside, and
- The Register at HMLR to be rectified.

What did the HHJ Milwyn Jarman QC below rule?

In a judgment dated 29 May 2015 delivered at the end of a 2 day trial, Judge Jarman granted the lender the relief it sought – **[2015] EWHC 1543 (Ch)**. Judge Jarman was not satisfied with the answers to the questions Mr Evans gave in cross-examination as to the circumstances in which the August 2014 letter came to be written. The lender did not allege fraud but Judge Jarman said Mr Evans' evidence '*about how this came about remains unsatisfactory*' and was '*evasive, muddled, unclear and satisfactory*'.

What were the grounds of appeal?

There were only 2 grounds of appeal on which permission to appeal was granted by Sir Timothy Lloyd:

- What does '*substantially contributed to*' mean in Schedule 4 para 3(2)(a) of the Land Registration Act 2002?
- What damages (if any) are due under section 13 of the Data Protection Act 1998?

What is the basis of the appeal in relation to the Data Protection Act 1998?

The Evans say that the lender continues to report their account to the 3 credit reference agencies ('CRAs') and that the arrears and payment history on both the secured and unsecured loan is shown on their credit files. In relation to the unsecured loan, the Evans say that following the release from their bankruptcy there is nothing more legally due to the lender. The Evans say that their credit files should reflect this but they do not. The Evans rely on the 4th data protection principle that '*personal data shall be accurate and, where necessary, kept up to date*'. If there is any breach of the data quality principle (and this is not clear because full evidence on this was not before Judge Jarman), then this engages s13 of the DPA which provides that an '*individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage*.'

What did the Law Commission say about 'mistake' when it looked at land registration?

The Law Commission of England and Wales produced consultation paper in 2016 '*Updating the Land Registration Act 2002*' (Paper 227) in which in relation to '*mistake*' it said that '*a degree of consensus appeared to be emerging as to its boundaries*'.

What does the Land Registration Act 2002 say?

Schedule 4 paragraph 2 (2) (a) of the LRA permits a court to order that the HMLR register be amended to correct a '*mistake*'. However, paragraph 3(2) of schedule 4 says that no such order can be made where a lender has by '*lack of proper care caused or substantially contributed to the mistake*'. Paragraph 3(3) of schedule 4 also says that if in any proceedings the court has power to make an order '*it must do so, unless there are exceptional circumstances which justify it not doing so*'. There is no definition of '*mistake*' in the LRA but paragraph 11 of schedule 8 provides that it '*includes mistaken omissions*'.

More importantly for the purposes of this appeal paragraph 2(1)(b) of schedule 4 says that a court '*may make an order for the alteration of the register*' for the purpose of '*bringing the register up to date*'. Schedule 8 also provides an entitlement to an indemnity from the Chief Land Registrar where a person has suffered loss by reason of a '*mistake whose correction would involve a correction of the register*'.

What do the text books say about 'mistake' in registered conveyancing?

Megarry & Wade in the 8th edition of the work '*The Law of Real Property*' say:

'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.'

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Megarry & Wade also state that *'there is no mistake where the registrar registers a transfer that is voidable but has not been avoided at the date of registration'*. Megarry & Wade state that a distinction must be drawn between a void and a voidable disposition. If the former an entry in the register should not have been made and the Land Registry would not have made it had the true facts been made at the time. If the latter, a change made to the register to reflect a transaction which is merely voidable is correct at the time it is made.

However the current editors of *'Emmet and Farrand on Title'* are more caustic about this distinction. They say:

'The implications of this legalistic distinction for registered proprietors and purchasers as well as conveyances, 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 for HM Land Registry..). ... On the other hand if a registered proprietor loses his land through a void disposition – because of forgery, non est factum, lack of title – there will be a mistake to correct so that rectification and/or indemnity should be claimable by him'.

What authorities are referred to the judgment?

These authorities are referred to by Lord Justice Kitchin in his judgment:

Norwich and Peterborough Building Society v. Steed [1993] Ch 116 (Court of Appeal - Purchas, Butler-Sloss and Scott LJJ)

Although a court had a discretion to order rectification of the register on the grounds set out in section 82(1)(a) - (h) of the LRA 1925, this section did not contain a general power allowing the court to order rectification of the register in any case in which it thought it just and equitable to do so. Since the defendant no longer alleged fraud and his claim of non est factum had failed, his claim did not come within s.82(1). The court had no discretion under the section to order rectification of the register of charges

Baxter v. Mannion [2011] EWCA Civ 120 (Court of Appeal - Mummery, Jacob & Tomlinson LJJ)

A registration obtained (whether fraudulently or not) by a person not entitled to apply for it was a mistake and putting the register back in the condition it had been prior to the application was the 'correction of a mistake' within the meaning of paragraphs 1 and 5(a) of Schedule 4 of the LRA 2002. Where a person who had not been in adverse possession of the land for the requisite period had procured his registration as proprietor under paragraph 4 of Schedule 6 HMLC on the application of the person who had previously been registered as proprietor, could rectify the register notwithstanding that there had been no official or procedural error in the course of the examination of the application.

Garwood v. Bank of Scotland Plc [2013] EWHC 415 (Ch) (High Court, Chancery, Norris J)

The definitions in the mortgage conditions identified the relevant advance by reference to the loan made on the property subject to the charge and not by reference to a transaction number. The mortgage debt was the sum offered in the offer letter referring to a flat. A reasonable person would understand that a mistake had been made by the person noting the administrative reference and understanding that this was mortgage of the flat to secure the monies advanced for the purpose of acquiring an interest in that flat. Whatever the 2004 charge was intended to achieve, it in fact achieved a charge registered against the whole of the land in the title (that is. against the whole of the freehold in the building). There had been a mistake. The buyer knew that it was discharging the 2004 charge as security for the June 2004 loan but did not know that it was releasing its only security for the July 2004 loan. To invoke the equitable jurisdiction to set aside a voluntary disposition for mistake, there had to be a mistake of sufficient gravity either as to the legal effect of the disposition or as to an existing fact which was basic to the transaction.

What did the Court of Appeal rule on whether there had been a 'mistake' within the ambit of schedule 4 to the LRA 2002 or not?

Lord Justice Kitchin gave the unanimous judgment of the court and ruled that there was not a 'mistake' here within the ambit of schedule 4. In reviewing the textbooks and prior authorities he was however forced to concede that he could not *'say that the point has been free from controversy'*. He said that the formulations in the text books *'focus[ed] on the position at the point in time that the entry or deletion is made'* adding that it seemed to him that this *'must be right'*. He went on to say that *'a distinction must be drawn between a void and a voidable disposition'* adding that a *'change made to the register to reflect a transaction which is merely voidable is correct at the time it is made'*.

He went on to rule that the distinction between void and voidable transactions was *'principled and correct'* and he drew on support for this for the Court of Appeal's previous decision in *Steed*. Going on Kitchin LJ ruled that in his judgment *'the registration of a voidable disposition such as that with which we are*

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concerned before it is rescinded is not a mistake for the purposes of schedule 4 to the LRA 2002'. He added that such a 'voidable disposition is valid until it is rescinded' and that the entry in the register of such a disposition 'cannot properly be characterized as a mistake'.

To reinforce the point he also said that it '*may be the case that the disposition was made by mistake*' but that did '*not render its entry on the register a mistake*' and that schedule 4 was only concerned with such entries.

What did the Court of Appeal rule on whether the Land Register could be brought up to date under paragraph 2 of schedule 4 to the LRA 2002?

Lord Justice Kitchin ruled that in his judgment it '*plainly*' could be brought up to date '*once the voidable disposition has been rescinded*'. He noted that not only had the court a '*power to make an order under paragraph 2*' but also that a court '*must do so*' unless there were '*exceptional circumstances which justify it not doing so*'. He was clear that in this case there were no such exceptional circumstances.

Kitchin LJ roundly rejected the submission made by the Evans that both NRAM and the Chief Land Register were attempting to '*change the way the case was put below in an impermissible way*'. He was strident in rejecting this saying that he was '*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*'.

Finally on this point Kitchin LJ rules that it was not necessary for NRAM to establish that '*the alteration did not affect the title of Mr & Mrs Evans to the property, that Mr & Mrs Evans by fraud or lack of proper care had caused or substantially contributed to the mistake of that it would for any reason have been unjust for the alteration not to be made*'.

What did Kitchin LJ rule were the 3 consequences of his judgment?

Kitchin ruled that in his judgment these consequences followed:

- Judge Jarman below fell into error in finding that the rectification of the Land Register would be within paragraph 1 of schedule 4. Instead he ruled that '*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*'.
- Judge Jarman's order below had to be varied to remove the words '*as if it had never been removed and with the priority originally held*', and
- The Evans' application for indemnity from the Chief Land Registrar '*must be dismissed*'.

What did the Court of Appeal rule on the claim under the Data Protection Act 1998?

Lord Justice Kitchin dismissed this claim noting that whilst he '*recognise[d] that incorrect data of the kind to which Mr & Mrs Evans can be damaging*' he observed that they '*were unable to draw to our attentions any instance of a credit report which contained incorrect data provided by Northern Rock or NRAM*'.

He accepted the lender's submission that Mrs Evans interest in the property was charged with payment of sums prior to her bankruptcy. Kitchin LJ ruled that whilst Mrs Evans '*ceased to be personally liable following her bankruptcy, these debts remained secured on the property and payable out of any proceeds of sale*'. For this reason Kitchin was satisfied that Judge Jarman below '*was entitled to find as he did that Mr & Mrs Evans had not established that the bank holds any incorrect personal data about them or that any such data have been supplied by the bank to credit agencies*'.

Will there be a final appeal to the Supreme Court of the United Kingdom?

At the handing down no reference was made to any party having made an application for a final appeal. The lender will be satisfied that the Land Register can be brought up to date by reinstatement of a registration of its cancelled charge. The Chief Land Registrar will likewise be happy that no issue of an indemnity arises on the facts of this case.

20 July 2017

David Bowden is a solicitor-advocate and runs [David Bowden Law](http://DavidBowdenLaw.com) which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.