Michaelmas Term
[2022] UKPC 46
Privy Council Appeal No 0088 of 2019

JUDGMENT

Philip Brelsford and 3 others (Appellants) *v* Providence Estate Ltd and another (Respondents)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Montserrat)

before

LORD KITCHIN

LORD HAMBLEN

LORD BURROWS

LORD STEPHENS

LADY ROSE

JUDGMENT GIVEN ON
1 December 2022

Heard on 18 July 2022

Appellant
Sylvester Carrott
Chivone Gerald
(Instructed by Axiom DWFM (London))

Respondent
Daniel Feetham KC
Rowan Pennington-Benton
(Instructed by Madison Legal (London))

LORD KITCHIN AND LADY ROSE (with whom Lord Hamblen, Lord Burrows and Lord Stephens agree):

1. Introduction

1. It has been appreciated for very many years that a clear and effective land registration system is extremely beneficial in that, through a register which is open for public inspection, reliable information can be obtained as to the ownership of land and whether rights are held by one person over land owned by another. A registration system in this way provides security to homeowners and those wishing to buy or invest in land, and it allows the property market to operate effectively by reducing the complexity, cost and uncertainty which otherwise are so often features of property transactions and conveyances.

2. The Law Commission of England and Wales recognised these benefits in their 2016 Consultation Paper No 227 about the system of land registration that operates in England and Wales entitled "Updating the Land Registration Act 2002" (the "2016 Consultation Paper"). They explained, in chapter 2, that any system of land registration is underpinned by some basic principles: first, that the register should be an accurate reflection of the property rights in relation to a piece of land; secondly, that the register does not contain details of the beneficial ownership of land; and thirdly, that the register operates more or less as a guarantee of title.

3. One system of land registration was developed by Sir Robert Torrens and introduced by him in South Australia in the nineteenth century. This system and many developments and variations of it are now known as "Torrens systems". The central feature of a Torrens system is that registration confers title on the registered proprietor. As Lord Phillips explained, giving the judgment of the Board in *Quinto v Santiago Castillo Ltd* [2009] UKPC 15; (2009) 74 WIR 217, at para 4, a merit of such a system is that a purchaser from the registered proprietor generally does not have to look further than the register for reassurance that the vendor has good title. In some of these systems, once a title to land is registered it is indefeasible. In others, anyone purchasing land *bona fide* from a registered proprietor, once they are registered, will obtain an indefeasible title to that land.

4. It is recognised that a Torrens system of land registration can work an injustice in some cases, however, and particularly so if the registration of the title is brought about by fraud or mistake. Hence, as the Board emphasised in *Santiago Castillo*, again at para 4, it is for this reason that many such systems make provision for rectification

of the register. But the nature of those provisions varies from system to system and the effect of each will depend on its own terms.

5. This appeal is concerned with the provisions of the Registered Land Act, Cap 8:01, the Revised Laws of Montserrat 2008 ("the RLA 2008"), and their application to a series of transactions which took place in 2007 and 2008 and by which the appellants claim to have purchased and acquired title to various parcels of land in the parish of St Peter's in Montserrat. The parties have referred only to terms of the RLA 2008 and the Board will do the same. It is accepted that the RLA 2008 provides for a Torrens system of land registration, and that prior to the events giving rise to these proceedings, the parcels of land in issue in these proceedings were owned by the first respondent, Providence Estate Limited ("PEL"), and PEL appeared on the register as proprietor.

6. The purported sale of the parcels of land to the appellants did not take place with the authority or consent of PEL, however. Instead, and as the Board will elaborate in due course, Mr Warren Cassell, purporting to act as a director of PEL and as its attorney, caused PEL to enter into the various transactions and arranged for the disposition of the relevant parcels of land to the appellants; and in each case the transactions culminated in the registration of the appellants as proprietors of the parcels of land under the RLA 2008. Further, the purchase moneys have never been paid to PEL. Instead, at Mr Cassell's instigation, they were paid to a company owned and controlled by him called Cassell and Lewis Inc.

7. In these proceedings the appellants sought declarations that they were the absolute owners of the land and that they had been duly and properly registered as proprietors of that land. PEL and Mr Owen Rooney, the second respondent and a director of PEL at the relevant times, resisted the claim and sought rectification of the register.

8. The resolution of these claims and counterclaims depends upon the provisions of the Torrens system of land registration as it applies in Montserrat; whether and in what circumstances the register can be rectified; or whether there is any other basis upon which PEL can recover the parcels of land or at least their value. The Board will address these questions in a moment. But before doing so it is necessary to summarise the essential aspects of the rather complex background to these proceedings, the relevant provisions and also to say something about the history of the proceedings themselves.

2. The factual background

9. PEL was incorporated in Montserrat in September 1989. It was a close company and wholly owned by two American developers, Mr Walter Wood as to 60%, and Mr Rooney as to 40%. Mr Wood and Mr Rooney were also its sole directors. At some point before 1995, PEL acquired various parcels of land in the parish of St Peter's in Montserrat, including the parcels of land the subject of these proceedings. PEL did not at that time develop the land and, as the judge found, in September 2001 it was struck off the register for failing to file its corporate returns, although that did not preclude the possibility of an application being made to restore it to the register at a later time.

10. By early 2007, at the latest, Mr Cassell had become interested in developing land in Montserrat and became aware of the land owned by PEL. Towards the end of July 2007, Mr Cassell reached an agreement with Mr Wood to purchase his shares in PEL, and on 30 July 2007 Mr Wood purported to transfer those shares to Mr Cassell or, more accurately, to Cassell & Lewis Inc. The share transfer recorded that the consideration for the transfer was EC$810,000.

11. Mr Cassell also took steps to try to restore PEL to the register and made an application for that purpose on 9 August 2007. In that application Mr Cassell described himself as the only director of PEL. In fact, however, he had no basis to make that application or to describe himself in that way. The directors of PEL were Mr Wood and Mr Rooney.

12. On 4 September 2007 Mr Cassell purported to make another application to restore PEL to the register, and on this occasion the application was made in the High Court. Mr Cassell made and filed an affidavit in support of the application in which he explained that Mr Wood was the founder, the chief executive officer and a former director of PEL; that Mr Wood had transferred all of his shares in PEL to Cassell & Lewis Inc, and that he, Mr Cassell, was the sole director and beneficial owner of Cassell & Lewis Inc and an intended director of PEL. He continued that he had now realised that PEL had to be reinstated to the register to deal with its business affairs and the property which it owned. The affidavit did not mention Mr Rooney; nor did it disclose that Mr Rooney was a director of PEL and that he was a substantial shareholder.

13. The application to restore PEL was apparently supported by an affidavit made by Mr Wood and filed on 21 September 2007 in which he explained that he was a director, founder and former shareholder of PEL; that he had sold his shares and interests to Cassell & Lewis Inc; that Mr Cassell was the sole beneficiary and owner of Cassell & Lewis Inc; that PEL had been struck off the register for failure to file its annual

returns; and that he supported and authorised the application to restore PEL to the register in order to complete his transfer of shares and to allow Mr Cassell to be appointed as director of PEL in his place, and to allow Mr Cassell to proceed with the business of the company. It was implicit in this evidence that Mr Cassell was not at that point a director of PEL. Again, the affidavit made no mention of Mr Rooney.

14. PEL was restored to the register by order of the High Court made on 21 September 2007. A few days later, on 24 September 2007, what purported to be a notice of change of directors from Mr Rooney and Mr Wood to Mr Cassell was filed. It recorded that Mr Rooney and Mr Wood ceased to be directors on 21 September 2007, and that Mr Cassell was appointed as a director on that day. The trial judge, Bristol J (Ag), noted that this filing was not in the prescribed form and was not signed by a director or authorised officer of PEL.

15. Then, in early December 2007, Mr Cassell filed what purported to be a resolution of members dated 21 September 2007. This document recorded that only two persons were present, namely Mr Cassell, as "Shareholder", and Meridith Lynch, as "Interim Secretary"; that Mr Rooney had refused to return to Montserrat and had not made any contact with the members of the company for several years and that the requirement of notice of the meeting had been waived. The document, signed by Ms Lynch recorded that it was resolved that Mr Rooney and Mr Wood be removed as directors of the company effective on 21 September 2007 and that Mr Cassell was appointed as a director "with immediate effect" as from 1 July 2007.

16. The Court of Appeal observed and the Board agrees that it was implicit in the findings of the judge that Mr Rooney did not participate in the meeting at which this resolution was said to have been passed, and that he was not aware of the application to restore PEL to the register. The Court of Appeal also noted that the resolution purportedly appointing Mr Cassell as a director with effect from 1 July 2007, supposedly did so as from a date when PEL had not been restored to the register.

17. Nevertheless, despite these deficiencies, as from 21 September 2007, at the latest, Mr Cassell proceeded as if he were the sole director of PEL, as became clear from his activities in purporting to sell the various parcels of land the subject of these proceedings to the appellants.

18. The appellants fall into four groups. The first comprises Kenneth Allen, Yvonne Daly-Weekes and Kathleen Allen Ferdinand. A fourth member of this group, Kharl Markham, died on 3 September 2021. It is not clear on what basis Mr Markham's estate is proceeding with this appeal. They wished to buy parcel 59. They dealt with Mr

Cassell who purported to represent and be acting on behalf of PEL. These appellants entered into an oral agreement to buy the land in 2007 and executed the relevant transfer document in September 2007, before PEL had been restored to the register; and Mr Cassell signed the relevant documents, purportedly on behalf of PEL, on 8 October 2007. These appellants were registered as proprietors on or about 31 October 2007.

19. The second group comprises Joel and Ingrid Osborne. They wished to buy parcel 56. They dealt with Mr Cassell who again held himself out as having authority to act on behalf of PEL. Indeed, they felt that since Mr Cassell was apparently a lawyer and appeared openly to be conducting the affairs of PEL, there was no reason to doubt that he was acting with the authority of PEL. They entered into an agreement to purchase parcel 56 in August 2007, again before PEL had been restored to the register, and they were registered as proprietors of the land on 31 October 2007.

20. The third group comprises Alyn Krause and Gail Cimon-Krause. They wished to buy parcel 14. They were represented by a lawyer, Mr David Brandt, and again they dealt with Mr Cassell who held himself out as having authority to act on behalf of PEL. They signed an agreement to purchase this parcel of land on 9 November 2007 and the transfer document on 11 January 2008. Alyn Krause gave evidence that they were registered as proprietors on 25 January 2008.

21. Finally, there is Mr Brelsford. He wished to buy parcel 15. He dealt with Mr Cassell who held himself out as having authority to act on behalf of PEL in connection with the sale to him of this parcel, just as he had in relation to the other parcels. He signed an agreement to buy this parcel of land on 7 January 2008 and he gave evidence that he was registered as proprietor on 19 February 2008.

22. It has been alleged that the appellants purchased their respective parcels of land at a significant undervalue. But there is no finding that this was in fact the case, and the Board will therefore attach no weight to the allegation in resolving the various issues arising in this appeal.

23. The activities of Mr Cassell in purporting to have authority to sell PEL's land came to the attention of Mr Rooney in the summer of 2007, and those activities together with his conduct in the months which followed led in due course to Mr Cassell's prosecution in Montserrat for fraud and various other offences. Indeed, he and his company Cassell and Lewis Inc were convicted of counts of conspiracy to defraud, procuring the execution of valuable securities by deception and money

laundering. Their appeals to the Court of Appeal were dismissed except that relating to money laundering, where it seems the charge had been laid under the wrong statute.

24. Mr Cassell and Cassell & Lewis Inc then appealed to the Board against their other convictions. That appeal succeeded for reasons elaborated by Lord Hughes, giving the judgment of the Board: [2016] UKPC 19. Nevertheless, as Lord Hughes explained at para 3, the evidence of the Crown was largely unchallenged, and the essential facts, as recorded in that judgment, were not disputed. A number of those facts provide useful background to the present dispute and it is convenient to mention them at this point. The first is that the transfer of Mr Woods' shares to Cassell & Lewis Inc was contrary to the article 14(b) of the Articles of Association of PEL which provided that any other shareholders, materially here Mr Rooney, had a right of pre-emption. This was ignored by Mr Wood and Mr Cassell in purporting to transfer Mr Wood's shares to Cassell & Lewis Inc.

25. Secondly, Mr Rooney's lawyer contacted Mr Cassell in July 2007, explained that Mr Rooney had a 40% interest in PEL and was one of its directors, and asked why PEL's land was being offered for sale. He was told that Mr Wood had sold and transferred his shares to Mr Cassell, and there followed a series of offers by Mr Cassell to buy Mr Rooney's interest, none of which was accepted, a matter hardly consistent with the recital in the purported resolution sent by Mr Cassell to the registry in December 2007.

26. Thirdly, the transfers of the various parcels of land from PEL to buyers were all signed by Mr Cassell purporting to act as a director of PEL. It was Mr Rooney's case and it was accepted by the jury in the criminal proceedings in the assize court that he, Mr Rooney, had not been told of these particular sales and transfers, and he did not take part in them. In every case, the money was paid to Cassell & Lewis Inc.

27. Fourthly, when he discovered the sales Mr Rooney began legal proceedings in 2007 in Virginia, USA ("the Virginia proceedings") against Mr Cassell, Cassell & Lewis Inc and Mr Wood. As Lord Hughes explained, at para 13 of the judgment of the Board in the criminal proceedings, Mr Rooney sought a declaration that the transfer of Mr Wood's shares in PEL to Cassell & Lewis Inc was null and void for breach of the right of pre-emption and damages. The Virginia proceedings, although issued in 2007, were amended in 2008 to include details of further sales which had by that time taken place. The basis of Mr Rooney's complaint was, among other things, that he had been deprived of his right of pre-emption and had had no knowledge of or participation in the sales. The proceedings were served on Mr Cassell, at the latest, by the summer of 2008 and his response was to challenge the jurisdiction of the court. The proceedings nevertheless continued and on 3 October 2008 the Virginia court gave judgment for

Mr Rooney against Mr Cassell and Cassell and Lewis Inc, in each case in default of appearance or defence.

28. It is to be emphasised that at Mr Cassell's trial in the assize court, he did not dispute or offer any significant explanation for the core facts related by Lord Hughes and which the Board has summarised above. Mr Cassell's defence to the charges laid against him was that there had never been an agreement to defraud Mr Rooney; and he had never had an intention to do so. Nor had he made any false representation, and at no time had he deceived any government agency. Given the essential facts were not in dispute, the question at the criminal trial in the assize court was whether or not they established the commission of the offences with which Mr Cassell was charged. The reasons for the quashing of the conviction by the Board arose largely from the trial judge's directions to the jury and are not relevant to the issues raised by this appeal.

29. Reverting now to the activities of Mr Cassell in Montserrat, in 2008 the Attorney General intervened by requesting the Land Registry to defer registering any more transfers (or purported transfers) of parcels of land belonging to PEL. Mr Cassell began proceedings challenging that intervention, but as Lord Hughes related, they were overtaken by Mr Cassell's arrest in early November 2008.

30. The respondents have submitted further documents to the Board on this appeal which they say show that Mr Cassell has recently been found guilty of the offence of concealing the proceeds of criminal conduct contrary to section 33(1)(a) of the Proceeds of Crime Act, Cap 4.04. The relevance and accuracy of these further materials is contested by the appellants, however. In these circumstances, the Board intends to place no reliance upon them, and will say no more about them.

3. Land registration in Montserrat

31. The RLA 2008 provides a comprehensive system of registration of a person as owner of land in Montserrat, and for the noting of charges and incumbrances in or over land. Section 23 is of central importance and deals with the effect of registration with absolute title:

> **"Effect of registration with absolute title**
>
> 23. Subject to the provisions of section 27 of this Act [voluntary transfer] the registration of any person as the proprietor with absolute title of a parcel shall vest in that

person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other incumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 28 of this Act not to require noting on the register:

Provided that—

(i) nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee;

(ii) the registration of any person under this Act shall not confer on him any right to any minerals or to any mineral oils unless the same are expressly referred to in the register."

32. Registration of a person as proprietor of a parcel of land with absolute title therefore vests in that person ownership of the parcel free from all other interests and claims, subject to (i) other interests shown in the register, (ii) the operation of section 27 (which deals with voluntary transfer), (iii) those interests which are declared by section 28 as not to require noting on the register, and (iv) the proviso. The proviso, so far as relevant, preserves any obligation to which a proprietor may be subject as a trustee.

33. This scheme of land registration does, however, permit rectification of the register if the registration has been obtained, made or omitted by fraud or mistake. Section 140 of the RLA 2008 provides:

"**Rectification by Court**

140. (1) Subject to the provisions of subsection (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents or profits and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

34. There are therefore two main requirements which must be satisfied before the court orders rectification of the register. First, the registration must have been obtained, made or omitted by fraud or mistake and secondly, if the proprietor whose title would be affected by rectification falls within section 140(2), that proprietor must have had knowledge of the omission, fraud or mistake, or must have caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

35. Section 140 must be read with section 141 which provides for a right of indemnity by the Government in respect of damage by reason of any rectification of the register subject to important limitations which mirror, to a degree, the qualifications set out in section 140(2):

"**Right of indemnity**

141. (1) Subject to the provisions of this Act, and of any written law relating to the limitation of actions, any person suffering damage by reason of-

(a) any rectification of the register under this Act; or

(b) any mistake or omission in the register which cannot be rectified under this Act, other than a mistake or omission in a first registration; or

(c) any error in a certificate of official search issued by the Registrar or in a copy of or extract from the register or in a copy of or extract from any document or plan, certified under the provisions of this Act,

shall be entitled to be indemnified by the Government out of moneys provided by the Legislature.

(2) No indemnity shall be payable under this Act to any person who has himself caused or substantially contributed to the damage by his fraud or negligence, or who derives title (otherwise than under a registered disposition made *bona fide* for valuable consideration) from a person who so caused or substantially contributed to the damage."

36. For the sake of completeness and having regard to the approach taken by the Court of Appeal as described below, it is convenient at this point to mention two other sections of the RLA 2008 which are relevant to dealings by a trustee in breach of trust. First, the proviso to section 23 set out above is itself subject to the operation of section 38(2) which provides that where the proprietor of land is a trustee, he is, in dealing with the land, deemed to be the absolute proprietor of it, and no disposition by such a trustee to a *bone fide* purchaser for valuable consideration is defeasible by reason of the fact that the disposition amounted to a breach of trust. Secondly, as section 122(3) makes clear, for the purpose of any registered dealings by the trustee, no person dealing in good faith for valuable consideration shall be deemed to have notice of the trust, nor shall any breach of the trust create a right to an indemnity under the RLA 2008.

4. These proceedings

37. The appellants began these proceedings in 2012 after the conviction of Mr Cassell in the criminal assizes in Montserrat of the various charges levelled against him, including conspiracy to defraud, but before his convictions had been set side. Each of the four claims issued was drafted in similar terms. The claims set out the consideration paid and averred that on the dates of registering the transfer and

obtaining title, there were no incumbrances or restrictions of any kind registered pertaining to the land. Further they pleaded:

> "At all material times the claimant dealt with the first defendant [PEL] as a bona fide purchaser for value with no knowledge of any omission, fraud or mistake committed by the defendant, Warren Cassell, or Cassell & Lewis and the claimant did not contribute (substantially or otherwise) to any such omission, fraud or mistake."

38. They sought declarations that the appellants were the absolute owners of the particular parcels of land and that they were bona fide purchasers for value without notice of any fraud on the part of Warren Cassell or Cassell & Lewis.

39. The respondents, that is to say, PEL and Mr Rooney, resisted the claims and contended they were the victims of a fraud practised by Mr Cassell, and that he had never been a director of PEL and was not at any material time authorised to act on its behalf. The Defences and Counterclaims served by PEL and Mr Rooney in each claim alleged that the appellants were on notice, actual or constructive, that the purported deeds of transfer were fraudulent because the documents used in the transfers did not comply with the formalities required by the RLA 2008. They identified a number of defects such as that the deed of transfer was not sealed with the common seal of the corporation whereas section 107(2) of the RLA 2008 required that the seal should have been affixed in the presence of and attested to by the clerk, secretary or other permanent officer of the company or by a member of the board or governing body of the corporation. The respondents averred that the registration of title in the name of the appellants was made or obtained by fraud and that the appellants at all material times had knowledge, actual or constructive of the fraud, and/or contributed to it by their act, neglect or default. The counterclaims sought a declaration that the claimants were not bona fide purchasers of the land and also sought rectification of the land register to restore the status quo pertaining prior to the impugned land transfers so as to reflect the fact that PEL is the sole proprietor of the land. Further the respondents sought a declaration that the property "be held on constructive trust for the benefit" of PEL.

(a) The decision of the trial judge

40. The actions came on for trial before Bristol J (Ag) in the High Court of the Eastern Caribbean Supreme Court on 20 April 2016. The appellants were represented by counsel, and Mr Rooney appeared on his own behalf and on behalf of PEL. The

judge gave judgment on 28 April 2016. The judge described the evidence given by the appellants at trial to similar effect, namely that they, or attorneys acting on their behalf, dealt with Mr Cassell, at that time an attorney practising law in Montserrat, and that Mr Cassell held himself out as a director of PEL and as being a person authorised to act on behalf of that company; indeed, he was openly conducting the affairs of the company, and he signed the relevant transfer documents in that capacity. They never had any reason to doubt or question Mr Cassell's authority to act on behalf of PEL, or to sell the parcels of land on its behalf. Further, they were never made aware of any matters that gave them cause for concern or gave rise to any suspicion that Mr Cassell might not have been properly appointed to act on behalf of PEL.

41. The respondents contended at trial that the appellants and their legal advisers did not carry out appropriate and necessary due diligence checks on PEL or Mr Cassell, and that they failed to take any or any adequate steps to determine whether Mr Cassell was properly authorised to act on behalf of PEL. Some of the appellants who gave evidence were asked in cross-examination what steps they took to ensure that Mr Cassell was entitled to act on behalf of PEL. They answered that they had been represented by counsel in the transaction and that they had relied on their attorneys to make any necessary inquiries: see for example para 30 of Bristol J's judgment describing the evidence of Mr Allen and para 50(xii) as regards the evidence of Mr Brelsford.

42. The judge noted that it was common ground that "knowledge of a solicitor is knowledge of the client" so that notice to the solicitor of a matter as to which it is part of his duty to inform himself is actual notice to the client: see para 6. He noted further in respect of each claim that it was neither pleaded nor did it appear from the evidence that the appellants' lawyers had conducted any due diligence searches on PEL. Counsel for the appellants submitted that the court should infer that because counsel was retained on the transactions, this implied that due diligence searches on PEL had been carried out. The judge rejected that submission and made the following findings:

> "33. … There is no such inference as a matter of law and, in any event, the evidence does not support that inference. In fact, the Instrument of Transfer was executed by the Claimants while PEL was struck off and no lawyer worth his or her salt, being aware of that fact, could properly advise a client to deal with that company. Indeed, the fact that the transaction proceeded despite the glaring omissions and inconsistencies in the company's records (as referred to above), are indicative that no search was done as it is difficult to imagine a lawyer advising a client to proceed in light

> thereof. Surely, had this information been communicated to the Claimants, it is difficult to envisage that they would not have doubted or questioned [Mr Cassell's] authority to sell the land on behalf of PEL.
>
> …
>
> 36. I therefore find as a fact that the Claimants never, either by themselves or by their lawyers, carried out the necessary due diligence checks on PEL by having recourse to the company's records but relied on [Mr Cassell's] representations and acts as evidence that [Mr Cassell] was authorised to act on behalf of PEL"

43. The consequence of that finding in respect of each of the appellants was that they had constructive notice that PEL did not consent to the transactions:

> "71. In my opinion, prudent business practice dictates that when someone is purchasing from a company, inquiries must be made by way of conducting a search at the company's registry to ascertain the standing of the company, the officers authorised to transact the business of the company and the manner in which the authority of those officers is to be carried out.
>
> 72. I find therefore that, as a matter of law, in the circumstances of these cases, the several Claimants having not, as previously found, made any such inquiries, have constructive notice that PEL did not consent to any of the land purchases and, therefore, they take subject to PEL rights. This is sufficient to find in favour of PEL. …"

44. He went on to reject the appellants' reliance on the 'indoor management' rule in *Royal British Bank v Turquand* (1856) 6 El & Bl 327. He then ordered that the register be rectified under section 140 of the RLA 2008 by removing the appellants as the proprietors of the relevant parcels of land and substituting PEL as registered proprietor.

(b) The decision of the Court of Appeal

45. On appeal to the Court of Appeal, the appellants were again represented by counsel, and Mr Rooney once more appeared in person and on behalf of PEL. The appellants mounted a comprehensive attack on the findings of the judge. They also contended that the judge had no proper basis for ordering that the register be rectified in the manner sought by the respondents. The respondents, for their part, commended the findings of the judge but also sought to rely on various issues of company law concerning the status of PEL; the authority of the companies' registrar; and fraud. They also maintained the various other arguments they had developed before the judge.

46. The Court of Appeal considered the case law on the effect of registration on title and concluded at para 43 that the real issue in the case was whether there was any reason why the titles acquired by the appellants were defeasible or why the land registers should be corrected under the RLA 2008. The Court of Appeal noted that there had been no finding of fraud in the present case; the judge had found only that PEL had not consented to the sales or represented to the appellants that Mr Cassell was authorised to act on its behalf. The appellants had never conducted searches of PEL's public records but relied only on Mr Cassell's representations that he was authorised to act. This was sufficient to establish that the transactions were not the acts of PEL "but were in fact forgeries": para 45. But although the transactions were therefore void, this did not prevent the transfer of title to the appellants on registration. The Court of Appeal reasoned that under the RLA 2008 it is the registration of a person as proprietor which vests and divests title to the land in issue.

47. The Court, however, recognised that the indefeasibility of a registration and, consequently, title is not absolute as (i) the RLA 2008 makes provision for the circumstances in which a registration may be cancelled or corrected; and (ii) the proprietor remains subject to claims brought *in personam* against him. As to rectification, it was necessary to turn to section 140 of the RLA 2008, which permitted rectification where two conditions were satisfied, namely: (i) that the registration had been obtained, made or omitted by fraud or mistake and (ii) that the registered proprietor had knowledge of the omission, fraud or mistake or caused the omission, fraud or mistake or substantially contributed to it by his act, neglect or default. The Court of Appeal were not satisfied the requirements of section 140 RLA 2008 had been satisfied. There had been no finding of fraud on the part of the appellants. Nor had there been a finding of mistake.

48. That was not the end of the matter, for personal equities could nevertheless arise and these could affect the relationship between PEL and the appellant purchasers. In this case, the Court of Appeal continued, personal equities did arise because title had in each case been acquired as a result of a forgery; the appellants

had in each case failed to verify the authority of Mr Cassell to act on behalf of PEL and, in the circumstances, were not bona fide purchasers for value without notice; and that although they had acquired an indefeasible title to the parcels of land based on their registrations as proprietors, their ownership was subject to equities in favour of PEL. These equities were such as to confer on PEL the equitable right to sue the appellants for recovery of the parcels of land they had acquired, and the appellants held title to their respective parcels of land subject to this right. This equity in favour of PEL entitled it to apply to the court for an order compelling each proprietor to transfer title to PEL; and so, pursuant to the counterclaim, the appellants were required to execute an instrument transferring title to the relevant parcel to PEL.

5. The appeal to the Board

49. Upon this further appeal, the appellants contend that the Court of Appeal were right to hold that there was no basis for rectifying the register under section 140 of the RLA 2008 but fell into error in finding that they held their interest in their respective parcels of land subject to an equity in favour of PEL. The appellants argue there was no basis for finding such an equity in law or in fact, and that the Court of Appeal's approach unjustifiably drives a coach and horses through the Torrens system.

50. The respondents, on the other hand, contend in their cross-appeal that the judge was fully entitled to find that the register should be rectified, and that the Court of Appeal were wrong to hold otherwise and to set the judge's order aside. They also contend that the Court of Appeal were amply justified in finding that the facts of these cases gave right to an equitable right in PEL to compel the appellants to deal with the parcels of land in such a way as to prevent them from benefitting from their failures to make relevant enquiries; and that this amounted to an equitable right to require them to reconvey the parcels of land to PEL. The respondents argue in the yet further alternative that the circumstances were such that the appellants held the various parcels of land on constructive trust for PEL.

51. Although the respondents commend and support aspects of the reasoning and conclusion of the Court of Appeal, we consider the logically anterior question is whether the judge was right to order rectification of the register and that is the issue to which we now turn.

(a) Was the registration of the appellants obtained or made by mistake?

52. The Court of Appeal found, at para 45, that the transfers were entered into without PEL's consent or authority and, at para 47, that they were void. There can be no doubt about the correctness of these findings, and there has been no effective challenge to them. Despite his activities, Mr Cassell had not validly been appointed as a director of PEL at any relevant time; nor did PEL represent that he was a director or that he was authorised to act on its behalf in selling and transferring title to the land. It was Mr Cassell who claimed to have the necessary authority but he could not confer on himself an authority he did not otherwise have. The first question to address is whether the voidness of the transactions means that the registration of the appellants' title was made by "mistake" within the meaning of section 140 RLA 2008.

53. The term "mistake" is not defined in the RLA 2008, but it provides, with fraud, one of the two bases upon which the register may be rectified, subject to the requirements of section 140(2) being satisfied in a case where rectification would affect the title of a proprietor in possession.

54. The scope and meaning of the term "mistake" and the expression "obtained … by … mistake" in this and similar contexts have been considered in a number of authorities. Some of those authorities such as *Skelton v Skelton* (1986) 37 WIR 177, 181-182, *Portland v Joseph* 25 January 1993 Civ App No 2 1992 and *Webster v Fleming* [1995] ECSCJ No 32 indicated that rectification of the register is available only if the mistake in question occurred "in the process of registration". The meaning of this phrase was considered by the Board in *Louisien v Jacob* [2009] UKPC 3. That case concerned the provision for rectification contained in section 98 of the Land Registration Act 1984 (St Lucia) ("the LRA (St Lucia)") which is in essentially the same terms as section 140 RLA 2008. The LRA (St Lucia) was, together with the Land Adjudication Act 1984 (St Lucia) ("the LAA (St Lucia)"), enacted to give effect to the decision made in the early 1980s to adopt in St Lucia a Torrens system of registration of title. These two statutes were intended to operate as interlocking elements of the process of first registration of title. If there were competing claims, the adjudication officer, acting under the LAA (St Lucia), had to decide between them, leading to the production of an adjudication record which would then be passed to the registrar who would make the appropriate entry in the register so that registered title reflected the outcome of the adjudication.

55. In this context, the Board in *Louisien v Jacob* was concerned that rectification should not be used as an alternative remedy for a claimant who had omitted to use the avenues for review and appeal provided by the LAA or who had been unsuccessful in the adjudication process. Nevertheless, Lord Walker, giving the judgment of the Board, explained that the term "mistake" is not limited to mistakes having their origin in the actual registration process:

> "41. There is a line of jurisprudence on section 98 of the LRA and similar enactments in force in other Caribbean countries, indicating that rectification of the register is available only if the mistake in question (or, no doubt, the fraud, when fraud is in question) occurred in the process of registration. … Their Lordships consider that this principle is a correct and useful statement of the law, but would add two footnotes by way of explanation or amplification.
>
> 42. "A mistake in the process of registration" is a useful phrase, but it is judge-made, not statutory language, and its scope must depend on a careful evaluation of the facts of the particular case. Moreover the fact that there has been a mistake in the course of the adjudication process does not automatically exclude the possibility of the same mistake being carried forward, as it were, so that it becomes a mistake in the registration process."

56. The Board went on in *Louisien v Jacob* to explain, at para 43, that a "mistake" would include, for example, a mistake in the process of registration, such as a recording officer acting beyond his statutory authority by altering the record after its confirmation by the adjudication officer (as had happened in the earlier case of *Webster v Fleming*). Such a case would involve a serious mistake, probably amounting to a nullity, in the process of adjudication and, if carried forward to the registration process, would amount to a mistake and rectification would be available.

57. A number of decisions of the courts of England and Wales are also illuminating because they highlight the distinction between registration pursuant to transactions which are void and those pursuant to transactions which are voidable. The scheme embodied in the Land Registration Act 2002 ("the LRA 2002") is again one of qualified indefeasibility. Section 58(1) LRA 2002 provides that if, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration. However, this is subject to the provisions of Schedule 4 to the LRA 2002 which enable the register to be altered, among other things, for the purpose of correcting mistakes. Under this scheme, rectification is an alteration which involves the correction of a mistake that prejudicially affects the rights of a registered proprietor. Schedule 8 to the LRA 2002 provides for an indemnity by the registrar in the circumstances there set out, in a manner similar to the scheme embodied in section 141 of the RLA 2008, and it also provides that, for the purposes of the Schedule, references to a mistake in something

include anything mistakenly omitted from it as well as anything mistakenly included in it.

58. The term "mistake" is not defined in the LRA 2002 (save to the limited extent the Board has mentioned) but the Law Commission observed in the 2016 Consultation Paper, paras 13.79-13.80, that a degree of consensus appeared to be emerging as to its scope. In this connection the Law Commission referred to the commentary by the editors of *Megarry & Wade: The Law of Real Property*, 8th ed (2012) at para 7-133:

> "What constitutes a mistake is widely interpreted and is not confined to any particular kind of mistake. It is suggested therefore that there will be a mistake whenever the registrar would have done something different had he known the true facts at the time at which he made or deleted the relevant entry in the register, as by: (i) making an entry in the register that he would not have made or would not have made in the form in which it was made; (ii) deleting an entry which he would not have deleted; or (iii) failing to make an entry in the register which he would otherwise have made." (Footnotes omitted.)

59. The Law Commission also referred to the formulation adopted at that time by the editors of *Ruoff & Roper, Registered Conveyancing,* 2016 looseleaf ed, at para 46.009, which was in very similar terms. *Ruoff & Roper* went on to draw an important distinction between void and voidable transactions:

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

60. The Court of Appeal considered this issue in *NRAM Ltd v Evans* [2017] EWCA Civ 1013; [2018] 1 WLR 639 ("*NRAM*"). In that case a second mortgage was advanced by NRAM, formerly Northern Rock, and used to redeem an earlier mortgage which had

been secured by a registered charge on the property. Mr and Mrs Evans wrote to the bank asking that the charge be removed from the register, referring in their letter only to the discharged loan and not to the replacement loan. The bank applied to the Land Registry for the charge to be removed from the register on the basis that the earlier mortgage was redeemed, the bank having mistakenly failed to notice that the charge was securing the second mortgage. NRAM issued proceedings against Mr and Mrs Evans seeking an order that the register be rectified by reinstating their charge against the property. The bank acknowledged that they had been careless in not linking the two loan accounts in their records but argued that it would be unconscionable to leave the mistake uncorrected. Kitchin LJ (with whom David Richards and Henderson LJJ agreed) referred to the passages in *Megarry & Wade* and *Ruoff & Roper* and noted at para 50 that the learned editors:

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

61. The Court of Appeal in *NRAM* agreed that the focus must be on the position at the point in time that the entry or deletion is made; if a change in the register is correct at the time it is made it is very hard to see how it can be called a mistake. That meant that a distinction must be drawn between a void and a voidable disposition:

> "53. … On this analysis, an entry made in the register of an interest acquired under a void disposition should not have been made and the registrar would not have made it had the true facts been known at the time. By contrast, a change made to the register to reflect a transaction which is merely voidable is correct at the time it is made."

62. Having referred to academic and judicial comments taking a different view, the Court of Appeal in *NRAM* confirmed that the distinction between void and voidable transactions in this context is "principled and correct":

> "59. In my judgment, the registration of a voidable disposition such as that with which we are concerned before it is rescinded is not a mistake for the purposes of Schedule 4

> to the LRA 2002. Such a voidable disposition is valid until it is rescinded and the entry in the register of such a disposition before it is rescinded cannot properly be characterised as a mistake. It may be the case that the disposition was made by mistake but that does not render its entry on the register a mistake, and it is entries on the register with which Schedule 4 is concerned. Nor, so it seems to me, can such an entry become a mistake if the disposition is at some later date avoided. Were it otherwise, the policy of the LRA 2002 that the register should be a complete and accurate statement of the position at any given time would be undermined."

63. In *NRAM* the Court of Appeal went on to hold that the register could be altered once the voidable transaction had been rescinded pursuant to a separate power under the LRA 2002 enabling the court to order the register to be brought up to date, a power of which there is no obvious equivalent under the RLA 2008. It is not necessary to consider the implications of this further in the context of this appeal, however.

64. For completeness, the Board notes that in its final report, Law Commission Report 2018 *Updating the Land Registration Act 2002* (Law Comm No 380), the Law Commission observed (at para 13.16) that the passage in *Ruoff & Roper* reflected the tenor of recent case law.

65. The Board respectfully agrees and observes that the term "mistake" would extend to the registration of an interest acquired under a void disposition, or where the transfer was of land the vendor had already sold. So too, in *Baxter v Mannion* [2011] EWCA Civ 120; [2011] 1 WLR 1594, the Court of Appeal held that the registration of a squatter as proprietor, with absolute title, did not mean that the title was not susceptible to alteration when it subsequently became clear that the registration was a mistake because he had not in fact been in adverse possession of the property for the necessary length of time. *NRAM* has since been relied upon in the High Court in *Chandler v Lombardi* [2022] EWHC 22 (Ch) (Jason Beer QC sitting as a Deputy High Court Judge) where the transaction registered was void because it had not been authorised by the Court of Protection and where the court ordered rectification. The distinction between void and voidable transactions was also relied on by analogy in the decision of the Court of Appeal in *Antoine v Barclays Bank plc* [2019] 1 WLR 1958. In that case the registration of title followed on a court order which had been made by the court in default of appearance and had been obtained by using forged documents. This gave rise to the question whether rectification of the register involved "the correction of a mistake" within the meaning of paragraphs 1 to 3 of Schedule 4 to the Land Registration Act 2002. The Court of Appeal referred to the

conclusions in *NRAM* that one can only have regard to the point in time that the entry on the Register was made. Relying on an analogy with the distinction between void and voidable transactions, the Court of Appeal held that since a court order is valid until set aside it was akin to a voidable transaction and hence was not a mistake for this purpose.

66. In her judgment in *Antoine*, Asplin LJ referred to the confusion that might arise from the reference in *Megarry & Wade* and *Ruoff & Roper* to the knowledge of the registrar and whether the registrar would have relied on the transaction or order presented to him or her to make an entry in the register if he or she had known the facts. Asplin LJ pointed out that this supposed test could be easily misunderstood. The Board agrees that the references in the leading textbooks which posit the question what the registrar would have done had they known the facts are no longer helpful. The registrar's knowledge is now posited as relevant to the test in similar terms in para 6-133 of the current edition of *Megarry & Wade* (9th ed (2019)) and in the online looseleaf edition of *Ruoff & Roper* at para 46.009 (Release 115, June 2022). The Board considers, however that the question of whether there is a mistake is not dependent on the subjective knowledge of the registrar or the extent of his or her ability to make enquiries or examine documents. It is certainly not dependent on how strongly the registrar disapproves of the conduct on the part of the proprietor whose title is being impugned – obtaining a court order using forged documents is egregious conduct and yet was rightly held not to give rise to a "mistake" enabling the rectification of the register.

67. It is the opinion of the Board that application of these principles to the present appeal leads to the conclusion that the registration of the appellants as proprietors of the various parcels of land was indeed made by mistake. In each case the disposition of the land to the appellants was void and was not a disposition which was required to be completed by registration. The registrar was therefore mistaken in recording the effect of the dispositions on the register.

(b) Was this a mistake which the appellants caused or to which they substantially contributed?

68. The Board must now consider whether the second requirement for the remedy of rectification under section 140 RLA 2008 is met. For this purpose, the Board is prepared to assume in favour of the appellants first that they fall within section 140(2) because they are in possession of the various parcels of land in issue, or that they are in receipt of the rents or profits from these parcels of land; and secondly, that they were not at the time of registration aware of the mistake in consequence of which

rectification is sought in the sense that they did not have actual knowledge of Mr Cassell's wrongdoing.

69. The next question under section 140(2) of the RLA 2008 is whether in the case of the registration of the relevant appellants as proprietors of each parcel, the appellants caused the mistake or substantially contributed to it, and if so, whether they did so by their act, neglect or default.

70. In considering this question, the Board is of the view that the following principles are applicable. First, in the usual way, the burden of establishing these elements must lie on the parties making the relevant allegation, that is to say, in this appeal, the respondents.

71. Secondly, as a matter of ordinary interpretation, the subsection contemplates various ways in which a party may establish an entitlement to rectification. One is to show that the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought. Another is to show that the proprietor caused the omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

72. Accordingly, where, in the case of a registration obtained by mistake, the party seeking rectification seeks to rely upon this last limb of the subsection, it is enough that the proprietor "substantially contributed" to the relevant mistake; and here the expression "substantially contributed" must mean something more than *de minimis*, but less than the sole cause. Looked at in the round, the proprietor must have played a substantial role in bringing about the mistaken registration. Further, this must have involved doing something, or neglecting to do something, or failing to do something which can properly be described as a default.

73. It is the opinion of the Board that the findings of the judge are amply sufficient to satisfy these requirements. In this regard the judge observed and held:

> (i) It was neither pleaded nor did it appear in the evidence that the appellants' lawyers conducted any due diligence searches on PEL. (Judgment at paras 32, 42, 53 and 63.)
>
> (ii) The fact that the transactions proceeded despite the glaring omissions and inconsistencies in PEL's records was indicative that no search was done as it was difficult to imagine a lawyer advising a client to proceed in light of them.

(iii) The appellants never, either by themselves or by their lawyers, carried out the necessary due diligence checks on PEL by having recourse to the company's records but relied on Mr Cassell's representations and acts as evidence that he, Mr Cassell, was authorised to act on behalf of PEL. (Judgment at paras 36, 46, 57 and 67.)

74. The Court of Appeal recorded, at para 24, that there was no challenge to the findings of fact made by the judge and continued, at para 44:

> "The learned judge found…that (i) PEL had not consented to the sale of its properties to the appellants; (ii) PEL never independently represented to the appellants that Mr Cassell was authorized to act on its behalf or ratify his actions with respect to the sale of the parcels of land to the appellants; and (iii) the appellants had never conducted searches of PEL's public records but relied only on Mr Cassell's representations and acts as evidence that he was authorized to act on behalf of PEL."

75. In all these circumstances it is the Board's opinion that the acts and omissions of the appellants in failing to make proper inquiries were such as to amount to neglect and did in each case make a substantial contribution to the mistake in consequence of which rectification is sought.

6. Conclusion

76. On the findings of the judge and the Court of Appeal, the respondents have established that the registration of the appellants as the proprietors of the parcels of land in issue was obtained by mistake, and that in each case the appellants substantially contributed to that mistake by their act, neglect or default. Accordingly, the respondents are entitled to have the register rectified.

77. It is therefore not necessary, nor would it be appropriate, to consider whether, in other circumstances, an order of the kind made by the Court of Appeal would have been justified. In particular, there was no finding by the judge of fraud on the part of Mr Cassell and, as the Board has explained, Mr Cassell's conviction for fraud was set aside. The Board will humbly advise His Majesty that this appeal should be dismissed and the cross appeal should be allowed.