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7 March 2000

Secretary General, Legislative Council
(Attn.: Clerk to the Legislative Council Panel
on Planning, Lands & Works
Mrs Mary Tang)
Legislative Council Secretariat
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Central
Hong Kong

Lands Titles Bill
Follow up to Panel Meeting on 18 November 1999

At the meeting of the Legislative Council Panel on Planning, Lands and Works held on 18 November 1999, Members requested the Administration to provide case law in common law jurisdictions regarding the power of the court to order rectification of the land register where a failure to do so would be unjust.

The Land Registrar has conducted a search for powers in common law jurisdictions to provide for such rectification. Only in England and Wales is there such a power. Section 82(3)(c) of the Land Registration Act 1925 of England and Wales provides as follows –

"(3) The register shall not be rectified, except for the purpose of giving effect to an overriding interest or an order of the court, so as to affect the title of proprietor who is in possession –

(a) unless the proprietor has caused or substantially contributed to the error or omission by fraud or lack of proper care; or

(b) [Repealed]

(c) unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against him."

The Land Registrar has located two English cases which include decisions on the meaning of the word "unjust" in Section 82(3)(c) of the Land Registration Act. These cases, *Claridge v Tingey* [1967] 1 WLR 134-142 and *Epps and another v Esso Petroleum Co. Ltd.* [1973] 1 WLR 1071-1083, are attached at Annexes 1 and 2, respectively.

Commentary

The provision is valuable in providing an avenue for such a rectification if the court holds it would be unjust not to do so. As stated in our Panel paper, we are prepared to include within the Land Titles Bill a provision for the Court to order rectification of the land register where the Court is satisfied that a failure to do so would be unjust.

Yours sincerely,

(Geoffrey Woodhead)
for Secretary for Planning and Lands

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C

[CHANCERY DIVISION]

D

1966
July 11

PENNYCUICK J.

* CLARIDGE *v.* TINGEY
In re SEA VIEW GARDENS, WARDEN

[1965 C. No. 3840]

Land Registration—Register—Rectification—First proprietor—Mistake on registration—Registered proprietor in possession—Proprietor contributing to mistake—Discretion of court—Factors to be considered—Land Registration Act, 1925 (15 *Geo.* 5, *c.* 21), *s.* 82.

E

By a conveyance dated October 6, 1934, W. Ltd. conveyed to H., two adjoining plots of land, which were part of an estate owned by W. Ltd. On August 24, 1936, H. conveyed one of those plots to M., from whom the plaintiff derived her title. Land registration was not compulsory in the area in 1936 and so the title to the plaintiff's plot was not registered. The conveyance of 1934 was not indorsed on the conveyance to W. Ltd., and on December 2, 1964, W. Ltd. purported to transfer the plaintiff's plot with other land to the defendant. The defendant applied to H.M. Land Registry to have the transfer registered and in due course he was entered in the proprietorship register as the first proprietor with absolute title of the land comprised in the transfer, including the plot in question. On March 14, 1965, the plaintiff discovered that building work was in progress on the plot. On the plaintiff's summons issued on August 9, 1965, seeking, inter alia, an order for the rectification of the proprietorship register of the title of the plot pursuant to section 82 of the Land Registration Act, 1925[1]:—

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[1] Land Registration Act, 1925, s. 82: "(1) The Register may be rectified pursuant to an order of the court or by the registrar, subject to an appeal to the court, in any of the following cases, but subject to the provisions of this section—(*a*) Subject to any express provisions of this Act to the contrary, where a court of competent jurisdiction has decided that any person is entitled to any estate right or interest in or to any registered land or charge, and as a consequence of such decision such court is of opinion that a rectification of the register is required, and makes an order to that effect; ... (*g*) Where a legal estate has been registered in the name of a person

Held, (1) that on its true construction section 82 (1) was discretionary, and that the discretion should be exercised by making an order for rectification of a mistake in the register if the registered proprietor had caused or substantially contributed, although innocently, to that mistake (post, p. 141F–G); and that where a registered proprietor lodged with the Land Registry a document which contained a misdescription of the property he caused or substantially contributed to the mistake within the meaning of section 82 (3) (*a*) (post, pp. 140H—141A).

Chowood Ltd. v. *Lyall* [1930] 1 Ch. 426; *In re 139 Deptford High Street, Ex parte British Transport Commission* [1951] Ch. 884; [1951] 1 T.L.R. 1045; [1951] 1 All E.R. 950 followed.

(2) That where the true owner, having learnt that the registered proprietor was doing work on the land, stood by and allowed him to complete the work before intervening with an application for rectification it would not be "just" within the meaning of section 82 (3) (*c*) to order rectification of the register (post, pp. 141H—142A).

ADJOURNED SUMMONS.

By a conveyance dated October 6, 1934, Warden Bay Estates Ltd., which owned a piece and parcel of land in Warden, Isle of Sheppey, conveyed two adjoining plots of land to Harold John Heygate, one of them being 40 ft. by 120 ft. in Seaview Gardens, Warden ("the disputed plot"). By a conveyance dated August 24, 1936, Harold John Heygate conveyed the disputed plot to May Violet May, from whom Beatrice Molly Claridge, of Struttons Avenue, Northfleet, Kent ("the plaintiff"), derived her title. Land registration was not compulsory in the area in 1936, and no application for registration was made.

By a transfer dated December 2, 1964, Warden Bay Estates Ltd. purported to transfer the disputed plot with other land to John David Tingey, of Seaview Gardens, Warden Bay, Isle of Sheppey ("the defendant"). As the disputed plot was unregistered at the time of transfer and the defendant was ignorant of the plaintiff's title to it, he applied to have all of the land comprised in the transfer dated December 2, 1964, registered, and his name was entered in the proprietorship register as the first proprietor with absolute title at the Land Registry under title number K236590.

At the beginning of December, 1964, the defendant began the erection of a building, in part on the disputed plot (on which no

who if the land had not been registered would not have been the estate owner; and (*b*) In any other case where, by reason of any error or omission in the register, or by reason of any entry made under a mistake, it may be deemed just to rectify the register. (2) The register may be rectified under this section, notwithstanding that the rectification may affect any estates, rights, charges, or interests acquired or protected by registration, or by any entry on the register, or otherwise. (3) The register shall not be rectified, except for the purpose of giving effect to an overriding interest, so as to affect the title of the proprietor who is in possession —(*a*) unless such proprietor is a party or privy or has caused or substantially contributed, by his act, neglect or default, to the fraud, mistake or omission in consequence of which such rectification is sought; . . . or (*c*) unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against him . . ."

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building had hitherto been erected) and in part on the other land comprised in the transfer dated December 2, 1964. At the end of January, 1965, he began laying the brickwork of the new house which was intended for his personal occupation.

On March 14, 1965, the plaintiff visited the disputed plot for the first time since 1959, and saw the building work on the disputed plot. She thereupon consulted solicitors and some correspondence followed which was not put in evidence. By a letter dated May 22, 1965, the defendant's solicitors wrote to the plaintiff's solicitors as follows:

> "... We thank you for your letter of May 20. ... We have in our possession the original of the conveyance of [September 4, 1924] on which appear a number of indorsements, but the earliest indorsement is of a conveyance of [November 12, 1938] to a person called Margaret Wheeler. At this time we were not acting for the vendor company and clearly we could not be expected to have any knowledge of the conveyance of 1934, and so far as the company is concerned, it had clear title to the piece of land which your client now claims. This was conveyed ... to [the defendant] ... and he has been registered with absolute title. ... We feel sure you will agree with us that the real culprits are the solicitors who acted for Heygate in failing to secure a suitable indorsement. ..."

The defendant did not know of any adverse claim to the disputed plot until the middle of March, 1965, when he received two letters from the plaintiff's solicitors, one dated March 16, 1965, and the other on March 23, which was addressed to the "Builder, House under construction." At that time the building had progressed as far as the window-frames and the brickwork was about six inches above the level of the window-frames. The defendant continued to build up to the level of the roof and he was then compelled to stop through shortage of money, because the plaintiff's claim had made it impossible for him to obtain a mortgage on the land. He did not cease building until then because he, apparently, thought that the plaintiff's solicitors were only claiming the land, and they had not requested him to stop building operations or to leave the site.

On August 9, 1965, the plaintiff issued a summons seeking a declaration that she was beneficially entitled to the disputed plot for an estate in fee simple; and an order that the proprietorship register of the title of the disputed plot should be rectified by cancelling the registration of the defendant.

F. B. Alcock for the plaintiff.
P. J. Millett for the defendant.

In addition to the cases referred to in the judgment, the following case was cited in argument: *Northern Counties of England Fire Insurance Co.* v. *Whipp*.[3]

[3] (1884) 26 Ch.D. 482, C.A.

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PENNYCUICK J. stated the facts, observed that there was no evidence as to what took place after the plaintiff visited the disputed plot on March 14, 1965, and that at some time the defendant had built up to roof level and then had, at an unspecified date, stopped building because he had run out of money, and continued:

Neither party has thought fit to put in evidence any of the correspondence between the solicitors, apart from the one letter of May 22, 1965. There is now no dispute as to the identity of the disputed plot. It is common ground that the disputed plot was indeed conveyed by Warden Bay Estates Ltd. to Heygate with its adjoining plot, and by Heygate to the plaintiff, and that the disputed plot was also transferred at a later date by Warden Bay Estates Ltd. to the defendant. This is, therefore, a most unfortunate case in which the same plot of land, through no fault of their own, has been conveyed to two perfectly innocent purchasers. The effect of the registration of the defendant as the proprietor of the disputed plot was, for the first time, to vest in him under section 5 of the Land Registration Act, 1925, an estate in fee simple in the land. Up to the moment of registration, the fee simple estate had been in the plaintiff and so transfer to the defendant had itself no effective operation.

I now turn to section 82, under which the present application is made. I will read the relevant passages from that section. [His Lordship read the section, and continued:] That section has been considered by the court in, apparently, two cases only, namely, *Chowood Ltd.* v. *Lyall*,[1] before Luxmoore J.; and in the Court of Appeal[2]; and *In re 139, Deptford High Street, Ex parte British Transport Commission*,[3] by Wynn-Parry J.

I will read certain passages from those cases. First, in the *Chowood* case, before Luxmoore J., the headnote reads[4]:

> "A purchaser of freehold land caused himself to be registered as first proprietor thereof with an absolute title under the Land Transfer Acts, 1875 and 1897. By the conveyance to him, certain strips of woodland were included, to which the vendors had no title, and which the purchaser also had registered:—*Held*, that the court, having decided that some other person was properly entitled to the fee simple of the strips in question, immediately before the registration, and that the registration had been done without the assent of the rightful owner, has power under the Land Registration Act, 1925, s. 82 (1) (*g*) (*h*), (3) (*a*) (*c*), to direct rectification of the register by the omission from the registered plan of the portion of the land erroneously registered. . . ."

The judge, after citation of the passages and after finding the facts and citing the passage from the Act and dealing with certain other points, says[5]:

> "Now apply this to the present case. The plaintiff company has by its own act, that is, by the registration of a

[1] [1930] 1 Ch. 426.
[2] [1930] 2 Ch. 156, C.A.
[3] [1951] Ch. 884; [1951] 1 T.L.R. 1045; [1951] 1 All E.R. 950.
[4] [1930] 1 Ch. 426.
[5] Ibid. 438.

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conveyance, which by itself is inoperative to pass the pieces of land in dispute, caused the mistake; that is, the inclusion of the pieces of land in dispute in the registered title, and it is in consequence of that mistake that the defendant, Mrs. Lyall, seeks rectification. Again, I think that sub-paragraph (*c*) is also material; that is the sub-paragraph which says: 'unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against the registered proprietor.' If, as I have held to be the case, Mrs. Lyall was in fact entitled to the fee simple of the two pieces of land in dispute immediately before the registration, and the registration has in fact taken place, as I hold it has, without her assent or knowledge, and she has, against her will and in ignorance of what has happened, been deprived of that fee simple, it would, in my view, be manifestly unjust not to rectify the register, and the case falls within sub-paragraph (*c*) as well as within sub-paragraph (*a*). . . ."

The judge accordingly proceeded to rectify the register.

The Court of Appeal took the same view as Luxmoore J. as to the application of section 82 (1) (*g*) and (*h*). Lawrence L.J., however, pointed out, in the course of argument,[6] that in that case the registered proprietor was not in possession of the land in question, so that subsection (3) had no application. I will read a passage from Lawrence L.J. upon subsection (1)[7]:

> "The other point was that the case has not been brought within section 82, because the registration of the plaintiffs' title was not a mistake within the meaning of subsection (1) (*h*) of that section. I disagree with that contention. I see no reason to limit the word 'mistake' in that section to any particular kind of mistake. The court must determine in every case whether there has been a mistake in the registration of the title, and if so, whether justice requires that the register should be rectified. Here I think there has been an obvious mistake by the erroneous inclusion in the plan filed in the register of this and of the two other strips of land which did not belong to their vendors. The evidence is clear that the predecessors in title of the plaintiffs had in fact no title and did not claim to have any title to the strip in question, and obviously therefore never intended to convey it to the plaintiffs. I have no reason to doubt that the plaintiffs thought that they were purchasing the land delineated on the plan, but in getting their title registered in the Land Registry they were acting on the mistakes which had been made in that plan, and the entry made in the Registry in derogation of the right of the true owner who was in possession was an entry made by mistake within the meaning of the section. I further agree with the learned judge that in the circumstances of the present case the rectification might also be made under clauses (*a*) and (*g*) of subsection (1). . . ."

So the effect of that case is that the judge and the Court of Appeal alike came to the conclusion that subsection (1) applied. Luxmoore J. considered that the case was within the exceptions contained in subsection (3). The Court of Appeal, however, pointed out that as the registered proprietor was not in possession subsection (3) did not come into play, so the observations of

[6] [1930] 2 Ch. 156, 162. [7] Ibid. 168.

Luxmoore J. on that point, although, of course, they carry weight, strictly were not necessary to his decision.

The other case is *In re 139, Deptford High Street*,[8] before Wynn-Parry J. The headnote of that case runs as follows:

> "A purchaser of freehold land was registered at the Land Registry as first proprietor with an absolute title. In the conveyance to the purchaser the land was conveyed by description to which no plan was annexed, and both vendor and purchaser mistakenly believed that the property conveyed included in its description a small area of land which in fact was owned by the British Transport Commission. For the purposes of registration the purchaser furnished the Land Registry with the conveyance to himself. The plan annexed to the land certificate which was subsequently issued to him showed plainly that the plot of land owned by the British Transport Commission formed part of the land in respect of which registration had been granted. On an application by the British Transport Commission for rectification of the register:—*Held*, that the applicants were entitled to rectification since the purchaser had substantially contributed to the mistake in registration within the meaning of section 82 (3) (*a*) of the Land Registration Act, 1925, by putting forward, albeit innocently, a misleading description of the property for the purposes of registration. . . ."

I must read a few passages from that case[9]:

> "This property included the land in dispute and the property immediately adjoining it to the north. The evidence established that in 1948 access to the disputed land could only be gained through the property immediately to the north of it, which was known as No. 139, Deptford High Street. The vendors to the respondent and the respondent himself proceeded upon the mistaken belief, bona fide held, that the description, 139, Deptford High Street, included the disputed land."

The first contention on behalf of the applicants was that[10]

> "The respondent has substantially contributed to the mistake by lodging with the Land Registry a document which contained a misdescription of the property in respect of which registration was sought: see *Chowood Ltd.* v. *Lyall*.[11]"

Then the judge said[12]:

> "It is clear that, having regard to the facts of this case, and to the language of section 82 (2), I should have jurisdiction to effect the rectification which the applicants seek, but for section 82 (3), which narrows the jurisdiction of the court to effect rectification. . . . Indeed, as will be seen from the structure of section 82 (3), in a case where the proprietor is in possession, as he is in the present case, the jurisdiction to rectify is strictly limited. On the other hand, it appears to me that if any one of the conditions contained in section 82 (3) (*a*) (*b*) and (*c*) respectively is fulfilled, then the court ought to exercise the jurisdiction to rectify. . . . The question is whether or not the respondent can be said to have substantially contributed to that mistake."

[8] [1951] Ch. 884.
[9] Ibid. 885.
[10] Ibid. 886.
[11] [1930] 2 Ch. 156.
[12] [1951] Ch. 884, 888, 889.

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He then goes on to deal with *Chowood Ltd.* v. *Lyall.*[13] He said later [14]:

> "It appears to me to be reasonably clear from that passage that the Court of Appeal was considering a case where the conveyance to the purchasers who had effected registration was by reference to a plan. On that basis, the contribution which the company made to the mistake was putting forward the conveyance with that plan, because it was that act which evidently induced registration of the plaintiffs with an absolute title in respect of the strips of woodland in question."

He then goes on to point out that the present case was different because there was no plan annexed to the conveyance, and continued [15]:

> "Counsel for the respondent, on the one hand, contends that in doing that and nothing more the respondent did something which cannot in any sense be said to have contributed to the mistake, the mistake being that of the Land Registry in including the disputed land in the registration. It is submitted by the applicants, on the other hand, that the respondent must be said to have contributed to the mistake. In order to decide between these conflicting contentions, it is necessary to determine what on the true construction of the language of the parcels was included in them. To resolve that question, which is purely a question of construction, it is necessary to look at the attendant circumstances so far as, in accordance with the well-established rules, they can be taken into consideration. On doing so I find that at the date of the contract and conveyance to the respondent the only access to the disputed land was through the immediately adjoining premises, which quite plainly were known as 139, High Street, Deptford, and I hold, therefore, that as a matter of construction, this conveyance intended to include, and did include, the disputed land in the description 139, High Street, Deptford. On that view it is contended by counsel for the applicants that by putting forward that description the respondent contributed to the mistake, because the necessary consequence of putting forward the application in that form must have been that the Land Registry officials would make the usual inquiries and, if necessary, a survey of the premises, and they would, therefore, be led to fall into the same mistake as had been made by the respondent and his vendor. It is not an easy point to resolve, but it appears to me that the determining factor is the circumstance that, so far as the physical aspect of the matter is concerned, the disputed land must have appeared to anyone looking at the properties in question to form part of 139, High Street, Deptford. It was, apparently, so obvious that the vendors to the respondent fell into the mistake, the respondent himself fell into the mistake, and the Land Registry fell into the mistake. Accordingly, it appears to me, notwithstanding the arguments both practical and theoretical of counsel for the respondent, to follow, necessarily, that the respondent must be held to have contributed to the mistake within the meaning of section 82 (3) (*a*)."

Those are the only authorities on this point. Mr. Alcock, for the plaintiff, says that the mistake, for the purposes of section

[13] [1930] 2 Ch. 156.
[14] [1951] Ch. 884, 890.
[15] Ibid. 891.

82 (3) (*a*), is the mistake of the registrar. The registered proprietor is a party to the mistake and has caused or has substantially contributed to it when he puts forward a transfer which contains incorrect particulars of the land comprised in it. It seems to me that that is what Luxmoore J.[16] and Wynn-Parry J.[17] held, and it seems to me that I am bound by those decisions in this court.

Mr. Millett, for the defendant, agrees that the mistake in section 82 (3) (*a*) is the fault of the registrar, but he said that the registered proprietor is not a party or privy to that mistake, nor does he cause or substantially contribute to it merely by putting forward a conveyance or transfer which incorrectly describes the land. In order that he may come within the meaning of the subsection it must be shown that he has previously, in some way, been a party to or contributed to the inclusion of the incorrect particulars. He relies on the circumstances that in the *Deptford* case[18] the registered proprietor and the vendor had alike on the occasion of the conveyance to the registered proprietor been misled as to the ownership of the disputed land. That appears to be so on the facts, but it seems to me that, on a proper reading of the judgment, that is not the ground for the decision. Wynn-Parry J. bases his reasoning, quite clearly, on the view that where a registered proprietor lodges with the Land Registry a document which contains a misdescription of the property, then he has caused or substantially contributed to the mistake. That concludes the present case as regards the law.

I have now to deal with what I have found to be a much more difficult question in this case, that is, the matter of discretion. It will be remembered that section 82 (1) is, in terms, discretionary: "The register may be rectified . . ." and sub-paragraph (*h*) refers to ". . . any other case where . . . it may be deemed just to rectify the register." Again, one finds, in subsection (3) (*c*), the expression ". . . would be unjust not to rectify the register . . ."

It appears to be the policy of the Act, as explained by Luxmoore J.[19] and by Wynn-Parry J.,[20] in the passages which I have quoted, that his discretion should be exercised by making an order for rectification in the ordinary case where the registered proprietor, although innocently, has caused or substantially contributed to the mistake. That seems reasonable when one bears in mind that, apart from the registration, the registered proprietor, as in the present case, had no interest in the property, and the effect of his registration is to displace the true owner with a valid prior title. On the other hand, it seems to me that there must certainly be circumstances in which it would not be just to make an order for rectification. I am not referring now to a mere matter of hardship. What I have in mind is the type of case in which the true owner, having learnt that the registered proprietor is doing work upon the land, stands by and allows him to do the work before he intervenes with an application for rectification. In an extreme case of that kind, it is, I think,

[16] [1930] 1 Ch. 426.
[17] [1951] Ch. 884.
[18] Ibid.
[19] [1930] 1 Ch. 426.
[20] [1951] Ch. 884.

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abundantly clear that it would not be just to make an order for rectification.

The real difficulty in this case seems to me to lie in the complete inadequacy of the material which both parties have placed before the court as to what happened after the plaintiff saw the work being done when she visited Warden on March 14, 1965. There was, evidently, a considerable correspondence between her solicitors on the one hand and either the defendant or the solicitors acting for him on the other hand. Although three or four such letters passing between them are mentioned in the affidavits, only the letter of May 22, 1965, has been exhibited. Again, there is no evidence as to whether or not the plaintiff was aware of the nature and progress of the building operations after March 14. At that date, the evidence more or less peters out and nothing further is known until the issue of the summons on August 9, 1965. Again, one does not know when the defendant stopped his building operations. It seems to me that I have not proper material on which to exercise the discretion and I am most unwilling to do so without having proper material.

It seems to me that having decided the matter of law, if I am invited to do so by either counsel, and subject to what may be said by either counsel, it would now be right for me to adjourn this summons, with liberty to both parties to put in further evidence.

Summons adjourned.

Solicitors: *Theodore Goddard & Co. for Church, Bruce, Hawkes & Brasington, Gravesend; Wontner & Sons for Winch, Greensted & Winch, Sittingbourne.*

A. R.

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[CHANCERY DIVISION]

D

* EPPS AND ANOTHER *v.* ESSO PETROLEUM CO. LTD.

1973 Feb. 7, 8, 9; 26 Templeman J.

Land Registration—Register—Rectification—Double conveyancing —Strip of land between two premises conveyed to both owners —Registration of both titles—Parking of car on disputed land—Whether evidence of "actual occupation" constituting overriding interest—Whether refusal of rectification unjust—Land Registration Act 1925 (15 & 16 *Geo.* 5, *c.* 21), *s.* 82 (1) (3) (*c*) [1]

E

In 1955 the personal representatives of C, the absolute owner of a dwelling house and an adjoining commercial garage, conveyed the dwelling house to E in fee simple. The conveyance included not only a 28 foot frontage but also an 11 foot strip of frontage 80 feet deep. E and her successors in title covenanted to erect a wall across the northern boundary so as to delineate the boundary between the dwelling house and the garage but that covenant was never complied with. In 1956 C's personal representatives demised the garage to J for a term of eight years and the lease purported to include the 11 foot strip of frontage conveyed to E by the 1955 conveyance. In 1959 C's personal representatives conveyed the garage to B in fee simple subject to J's lease. The conveyance repeated the mistake made in the 1956 lease resulting in a double conveyance of the strip of frontage and B was registered in the Land Registry as the first registered proprietor of the garage including the strip of frontage. In 1964 B conveyed the garage and the strip of frontage to the defendants who became the second registered proprietors with absolute title.

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In 1968 J, as personal representative of E, conveyed the dwelling house in fee simple to the plaintiffs, the conveyance purporting to include the strip of frontage, and E became the first registered proprietor. By 1970 the double conveyance of the disputed strip of frontage became apparent to the parties.

On a summons by the plaintiffs for rectification of the

[Reported by MRS. L. GAYNOR STOTT, Barrister-at-Law]

[1] Land Registration Act 1925, s. 82 (3) (c): see post, p. 1077C–E.

register as against the defendants, by excluding the disputed strip of frontage from their title on the register, J's evidence was that he had often parked his car on the disputed strip:—

Held, that the parking of a car on an unidentified part of the disputed land for an undefined time was not occupation of anything and did not amount to "actual occupation" within the meaning of section 70 (1) (*g*) of the Act and, therefore, the plaintiffs did not have an overriding interest protected by actual occupation of the land so as to affect the title of the second registered proprietor because, at the material time, when the defendants completed the purchase of the garage and the disputed strip of frontage, neither the plaintiffs' vendor nor the plaintiffs themselves were in "actual occupation" of the disputed land; that the defendants were in possession of the land and section 82 (3) of the Land Registration Act 1925 applied, and, since rectification of the register was a discretionary remedy, it would not be unjust to refuse to rectify as against the defendants (post, pp. 1079E—1080A, D-G).

The following cases are referred to in the judgment:

Bridges v. *Mees* [1957] Ch. 475; [1957] 3 W.L.R. 215; [1957] 2 All E.R. 577.

Chowood Ltd. v. *Lyall (No. 2)* [1930] 2 Ch. 156, C.A.

Claridge v. *Tingey* [1967] 1 W.L.R. 134; [1966] 3 All E.R. 935.

Deptford High St., In re No. 139, Ex parte British Transport Commission [1951] Ch. 884; [1951] 1 All E.R. 950.

Hodgson v. *Marks* [1971] Ch. 892; [1971] 2 W.L.R. 1263; [1971] 2 All E.R. 684, C.A.

Leighton's Conveyance, In re [1936] 1 All E.R. 667.

The following additional cases were cited in argument:

Long (Fred) & Son Ltd. v. *Burgess* [1950] 1 K.B. 115; [1949] 2 All E.R. 484, C.A.

Williams Brothers Direct Supply Ltd. v. *Raftery* [1958] 1 Q.B. 159; [1957] 3 W.L.R. 931; [1957] 3 All E.R. 593, C.A.

ORIGINATING SUMMONS

In 1935 Alfred Clifford, the legal owner in fee simple of two adjoining properties in Gillingham, Kent, built a dwelling house known as 4 Darland Avenue with an eastern frontage to the avenue of 28 feet. The northern boundary ran four feet from the side wall of the house and on that boundary an eighty foot wall was built which separated the land and premises from the adjoining land and premises known as Darland Garage. Darland Garage occupied a corner site with the main frontage facing north and a return eastern frontage to Darland Avenue.

The owner died on August 27, 1943, and by a conveyance of July 1, 1955, his personal representatives conveyed to Edna Jones 4 Darland Avenue with land having a frontage of 39 feet to Darland Avenue which included not only the 28 foot frontage to 4 Darland Avenue but also the disputed strip of land with a frontage of 11 feet to the avenue and a depth of 80 feet. By the 1955 conveyance, Edna Jones and her successors in title covenanted to erect a wall of 5 ft. 9 ins. high across the northern boundary, but the covenant was not complied with.

By a lease dated July 31, 1956, Alfred Clifford's personal representatives demised Darland Garage to William Jones for a term of years expiring December 15, 1962, and by mistake the lease purported to include not only the site of Darland Garage but also the disputed strip of land.

By a conveyance dated February 18, 1959, Alfred Clifford's personal

A representatives conveyed Darland Garage in fee simple to Julian Ball, subject to the lease vested in Mr. Jones, and the mistake made in the 1956 lease was repeated in the 1959 conveyance and in a survey plan prepared by the Land Registry. On March 2, 1959, Julian Ball was registered in the Land Registry as the first registered proprietor of the garage with an absolute title. On February 28, 1964, Edna Jones died intestate and her property vested in the probate judge.

B By an agreement dated October 13, 1964, Esso Petroleum Co. Ltd., the defendants contracted to purchase Darland Garage including the disputed strip of land with vacant possession on completion. Section 110 of the Land Registration Act 1925 precluded the defendants from investigating title prior to registration and they were not able to discover the existence of the 1955 conveyance and on December 14, 1964, Darland C Garage and the disputed strip was transferred to the defendants and they became the second registered proprietors and legal owners in fee simple.

On September 22, 1965, letters of administration to the estate of Edna Jones were granted to William Jones and by an assent dated February 11, 1966, 4 Darland Avenue was vested in him. By a conveyance dated July 24, 1968, William Jones conveyed to the plaintiffs, Albert and Dorothy Epps, 4 Darland Avenue in fee simple which included the dis- D puted strip and they became the first registered proprietors.

By 1970 the double conveyance of the disputed strip had become apparent and by an originating summons dated May 14, 1971, the plaintiffs sought rectification of the register as against the defendant by excluding the disputed strip of land from the defendant's title.

The facts are stated in the judgment.

E

T. L. G. Cullen for the plaintiffs.

C. A. Brodie for the defendant.

Cur. adv. vult.

February 26. TEMPLEMAN J. read the following judgment. This is an application under the Land Registration Act 1925 for rectification by F removing a strip of land 11 feet wide and 80 feet long from the register of the land and premises of the defendants, known as Darland Garage, Gillingham, Kent, and by adding that strip of land to the register of the adjoining land and premises of the plaintiffs, Mr. and Mrs. Epps, known as 4 Darland Avenue. The house, 4 Darland Avenue, was built in 1935 by Alfred Edmund Clifford on land with an eastern frontage to Darland G Avenue of 28 feet. The northern boundary of that land ran 4 feet from the side wall of the house, and on that northern boundary there was erected a brick wall which ran for 80 feet, and separated the land and premises of 4 Darland Avenue from the adjoining land and premises, Darland Garage, on the north. Darland Garage itself occupied a corner site, with a main frontage facing north, on to the thoroughfare, Watling Street, and a return eastern frontage to Darland Avenue. Mr. Clifford was the estate owner in H fee simple of both properties, 4 Darland Avenue, and Darland Garage, and he let those premises to Mr. William Stephen Jones. Mr. Clifford died on August 27, 1943. His will was proved by three members of his family, and by a conveyance dated July 1, 1955, his personal representatives conveyed to Mrs. Edna Lilliston Jones, the wife of Mr. Jones, land having a frontage of 39 feet to Darland Avenue and the house, 4 Darland Avenue, situate on part of that land. This conveyance included not only the 28 feet frontage of 4 Darland Avenue, bounded on the north by the brick wall which I have

mentioned, but also the strip of land now in dispute, having a frontage of 11 feet to Darland Avenue, and a depth of 80 feet. This disputed strip ran parallel to, and on the north side of the brick wall which originally divided 4 Darland Avenue from Darland Garage. Thus the disputed strip was on paper carved out of the Darland Garage land and added to the 4 Darland Avenue land, though this is by no means clear from the plan annexed to the conveyance. The addition of the disputed strip to 4 Darland Avenue was effected by the 1955 conveyance which I have mentioned, because Mrs. Jones wished to build a private garage for her car on the northern flank of the house. In the 1955 conveyance Mrs. Jones covenanted to erect and maintain a good and sufficient 9 inch wall, at least 5 ft. 9 ins. in height, along the northern boundary separating the disputed strip from Darland Garage, because, as Mr. Jones asserted and admitted, there was nothing to show where the 11 foot strip ended. Thus the obligation to carve out the disputed strip on the ground, so as to correspond to the carving out effected on paper, was imposed on Mrs. Jones and on her successors in title. All would have been well if Mrs. Jones had erected the private garage, as she contemplated, or the boundary wall, as she covenanted, but neither step was taken.

Mr. Jones gave evidence that a post and wire fence was erected along the boundary of the 11 foot strip between 4 Darland Avenue and Darland Garage, and that the fence was eventually destroyed by children playing on the disputed strip. Mr. Jones also gave evidence that from 1935 onwards he parked his car at night on the disputed strip, and sometimes during the day. There was endorsed on the probate of the will of Mr. Clifford a memorandum to the effect that by a conveyance dated July 1, 1955, the freehold land and premises, 4 Darland Avenue, were conveyed to Mrs. Jones in fee simple. This memorandum is uninformative and in retrospect misleading so far as the disputed strip of land is concerned, but gave notice of a 1955 conveyance of land which plainly adjoined Darland Garage. By a lease dated July 31, 1956, Mr. Clifford's personal representative leased Darland Garage to Mr. Jones for a term expiring December 25, 1962, and by mistake the lease purported to include in the demised premises, not only the site of Darland Garage but also the disputed strip and a part of the original site of 4 Darland Avenue. This mistake is not readily apparent from the plan annexed to the lease. By a conveyance dated February 18, 1959, Mr. Clifford's personal representatives conveyed Darland Garage to a Mr. Julian Iver Ball in fee simple, subject to the lease dated July 31, 1956, which was vested in Mr. Jones. The 1959 conveyance repeated the mistake made in the 1956 lease, and purported to include the disputed strip and part of the original site of 4 Darland Avenue. The plan on the 1959 conveyance is identical with the plan on the 1956 lease. The mistake made in the 1959 conveyance was not wholly perpetuated because a survey plan was prepared by the Land Registry and signed by Mr. Clifford's personal representatives and by Mr. Ball, identifying the land which they intended should be conveyed by the 1959 conveyance, and they requested the Land Registry to complete registration accordingly. This survey plan excluded any part of the original site of 4 Darland Avenue, but repeated the original mistake of including the disputed strip. That was wholly included in the survey plan, and on March 2, 1959, Mr. Ball was registered in the Land Registry as the first registered proprietor with title absolute, under title number K71926, of Darland Garage including the disputed strip.

By section 5 of the Land Registration Act 1925, this registration

A deprived Mrs. Jones of the legal estate in fee simple in the disputed strip and vested that estate in Mr. Ball, subject to such overriding interests, if any, as affected the disputed strip. Mr. Clifford's personal representatives had thus innocently perpetrated a double conveyance of the disputed strip, first to Mrs. Jones, subsequently to Mr. Ball, and the Land Registry had thus innocently registered as the proprietor of the disputed strip Mr. Ball who was not entitled to be so registered.

B I infer and find that when the disputed strip was conveyed to Mr. Ball and then surveyed and registered in his name there was no fence seperating the disputed strip from Darland Garage, and no indication of the existence of the disputed strip, but there was on the ground the original brick wall, which appeared to be the boundary between 4 Darland Avenue and Darland Garage. The position on the ground, the similarity C between the 1956 lease and the 1959 conveyance and the terms of the memorandum endorsed on the probate of the will of Mr. Clifford would not lead Mr. Ball or the Land Registry to ask any requisition or to call for the inspection of the 1955 conveyance to Mrs. Jones, which would or might have revealed the mistaken double conveyance made by Mr. Clifford's personal representatives.

On February 28, 1964, Mrs. Jones died intestate and her property D vested in the probate judge. Mr. Jones's lease of Darland Garage expired on December 25, 1962. He held over, he thinks, only for a few months, but the defendants submit and I find that he held over until the end of 1964, probably until December 1964. I base this finding on a report prepared by the defendants before they contracted to purchase Darland Garage, and on the terms of the contract into which the defendants E entered for the purchase of Darland Garage. The defendants were on the scene not later than August 1964, when, in accordance with their usual practice, they took and retained photographs of Darland Garage, which they were negotiating to purchase. Those photographs were not, of course, taken with a view to illuminating the position concerning the disputed strip, but it appears from those photographs that, on the ground, the apparent and obvious boundary between 4 Darland Avenue and F Darland Garage remained the original brick wall erected four feet from the flank wall of the house, 4 Darland Avenue. There is nothing to indicate the existence of the disputed strip.

By an agreement dated October 13, 1964, the defendants contracted to purchase Darland Garage with vacant possession on completion, and the description of Darland Garage included the disputed strip.

G By section 110 of the Land Registration Act 1925 the defendants were precluded from investigating title prior to first registration, and therefore had no opportunity of discovering the existence of the 1955 conveyance to Mrs. Jones. On December 14, 1964, Darland Garage, including the disputed strip, was transferred to the defendants, and on December 17, 1964, they became, as they are now, the registered proprietors, and by section 20 of the Land Registration Act 1925 became the legal estate H owners in fee simple, subject to the over-riding interests, if any, affecting the estate transferred. The defendants, no doubt, thought that they had obtained vacant possession of all that they had contracted to purchase with vacant possession.

On September 22, 1965, letters of administration to the estate of Mrs. Jones were granted to Mr. Jones, and by an assent dated January 11, 1966, he assented to 4 Darland Avenue vesting in his own favour. By a conveyance dated July 24, 1968, Mr. Jones conveyed to Mr. and Mrs.

Epps in fee simple 4 Darland Avenue, by a description which followed and referred to the original conveyance of July 1, 1955, and was therefore apt to include the disputed strip.

On August 1, 1968, the plaintiffs became the first registered proprietors of 4 Darland Avenue, with title absolute, under title number K311242. The filed plan prepared by the Land Registry, and accepted without demur by the plaintiffs or by their solicitors, excluded the disputed strip which was, of course, already included in the filed plan relating to Darland Garage, and was vested in the defendants. The plaintiffs realised that the conveyance to them of 4 Darland Avenue included the disputed strip, but that the position on the ground required clarification, because by a letter dated July 31, 1968, the plaintiff Mr. Epps wrote to the defendants informing them that he had purchased 4 Darland Avenue and saying:

> "As this is next to your Darland Filling Station, would it be possible for your representative to meet my builder at the site to agree on the building line before I commence building?"

It is plain from subsequent correspondence that the building line he had in mind was the boundary between the disputed strip and Darland Garage and the building he contemplated was a private garage. A meeting took place on the site, but the defendants' representatives had no filed plans, and by a letter dated August 15, 1968, the defendants wrote to Mr. Epps confirming their meeting, and stating that they had measured the land. It was agreed they said:

> "we should write to your solicitors when the plans attached to the deeds of your property could be compared with ours as soon as yours have been obtained from the Land Registry," and they asked for the name of the plaintiffs' solicitors, and said, "As soon as the area of land is agreed after scrutiny of the plan a representative of this company will call on you again to determine the precise boundary line between our respective properties, after which there will be no objection to your commencing construction of the building which you propose to erect adjoining your house. It is understood, in the light of our measurements, that your property extends from the existing wall at the side of your house to the boundary of this company's property, which is approximately a distance of 12 feet. But this measurement is subject to detailed verification on comparison of plans."

Of course, on the perfectly proper statement by Mr. Epps that his property had a frontage of 39 feet, that was correct, but the plans, of course, when ultimately seen, showed an entirely different position. The matter of the boundary was overlooked by the defendants' representatives until 1970, when they were proceeding with plans to develop Darland Garage, and the defendants wrote to Mr. Epps on May 1, 1970, having forgotten or overlooked the previous correspondence and meeting, asking Mr. Epps to remove a fence which he had in the meantime—I think some time in 1968—erected on the boundary between the disputed strip and Darland Garage. This letter asked Mr. Epps to remove the fence forthwith and to cease using the disputed strip, and threatened proceedings if that request were not complied with. The defendants then found out that the matter had been overlooked and sent an apology for that to Mr. Epps, and there was then an inspection of the plans by either side. Of course, from inspection of the plans it appeared that the disputed strip belonged to the defendants so far as registered title was concerned. There was

then some more misunderstanding, not unnaturally, in view of the mistakes which had been made, and for which neither of them were responsible, but by the end of 1970 it was clear on both sides that this was a case of double conveyancing, that the legal title was vested in the defendants, and that the plaintiffs could only continue to claim the disputed strip if they were successful in obtaining rectification of the register. Hence these proceedings.

Section 82 (1) of the Land Registration Act provides that the register may be rectified where, inter alia, as in the present case, a legal estate has been registered in the name of a person who, if the land had not been registered, would not have been the estate owner. That describes the defendants. Section 82 (3), limits the exercise of the power of rectification conferred by section 82 (1). The limitation is in these terms:

> "The register shall not be rectified, except for the purpose of giving effect to an overriding interest, so as to affect the title of the proprietor who is in possession—unless . . ."

and then it specifies three conditions, one of which must be satisfied, if rectification is to be granted. Condition (*a*) of section 82 (3), which does not apply in the present case, authorises rectification against a party who has caused or substantially contributed to the mistake which has been made on the register. Condition (*b*) of the subsection, which also does not apply, authorises rectification where the immediate disposition to the registered proprietor is void, or the disposition to any person through whom he claims otherwise than for valuable consideration was void. Condition (*c*) provides for rectification—and I quote:

> "*Unless for any other reason, in any particular case, it is considered* that it would be unjust not to rectify the register against . . ." [the registered proprietor.]

Mr. Cullen, for the plaintiffs, submitted that when Mrs. Jones was deprived of her legal estate in fee simple by the mistaken registration of Mr. Ball as proprietor, Mrs. Jones retained or acquired, and her successors in title, down to and including the plaintiffs, acquired an equitable interest in fee simple. The registered proprietor, first Mr. Ball and now the defendants, acquired the legal estate, subject to the equitable interest of Mrs. Jones and her successors. Effect should be given to that equitable interest by rectification. The limitation on the exercise of the power of rectification, which is to be found in section 82 (3), does not apply where rectification is required to give effect to an overriding interest. The equitable interest of Mrs. Jones and her successors in title is an overriding interest.

By section 70 (1) (*g*) overriding interests include the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where inquiry is made of such person and the rights are not disclosed. Mrs. Jones and her successors in title were in actual occupation, because Mr. Jones, and later the plaintiffs, parked a car on the disputed strip. Mr. Ball and the defendants acquired the disputed strip subject to the overriding interests of Mrs. Jones and her successors constituted by an equitable interest protected by actual occupation. The defendants never were in possession or, at any rate, ceased to be in possession when the plaintiffs erected their fence in 1968. Thus far Mr. Cullen.

In considering this case I propose to ignore the fence erected by the plaintiffs in 1968 after they had entered into amicable discussions with the defendants. Even if section 82 (3) referred to de facto possession as at

the date of the trial of these proceedings, I would have restored the position by ignoring the fence when considering the exercise of the general discretion conferred by section 82 (1). It does not seem to me that in order to secure the protection given by the statute the defendants were bound forcibly to re-enter and tear down the fence or to get an injunction pending trial.

The claim put forward by Mr. Cullen on behalf of the plaintiffs to an overriding interest depends on whether Mr. Jones was in actual occupation of the disputed strip when the defendants became the registered proprietor of the disputed strip in 1964. The contention put forward by Mr. Cullen that the defendants were not in possession depends on whether they went into possession of the disputed strip when they became the registered proprietor and remained in possession until after the plaintiffs completed their purchase in 1968. Mr. Brodie for the defendants took up a position at the opposite pole. He submitted that even if Mr. Jones was in actual occupation he occupied in his capacity as tenant of Mr. Ball. Alternatively, the occupation of Mr. Jones could not protect any equitable interest vested in the probate judge at the date when the defendants became the registered proprietors of the disputed strip in 1964.

I reject these submissions of Mr. Brodie. If Mr. Jones was in actual occupation when the defendants completed their purchase of the disputed strip then his occupation in the present circumstances sufficed to assert and protect any equitable interest of Mrs. Jones and her estate so as to constitute an overriding interest, and sufficed also to defeat the claim by the defendants to be in possession.

Mr. Brodie also submitted that where rectification is sought, not against the first registered proprietor, in this case Mr. Ball, but against the subsequent transferee for value, in this case the defendants, the subsequent transferee must be treated as a bona fide purchaser for value without notice, and he will not be compelled to suffer rectification save in exceptional circumstances. For this proposition he cited *In re Leighton's Conveyance* [1936] 1 All E.R. 667 where a transfer was procured from a registered proprietor by fraud, and the original registered proprietor was held to be bound by a charge executed by the fraudulent transferee in favour of an innocent mortgagee.

That case is, however, only an illustration of an estoppel operating in certain circumstances against a person who executes a document relied upon by an innocent third party, and does not assist me in the present case.

In my judgment, the fact that the defendants were not the original proprietors, but subsequent transferees, is only one element to be considered in the exercise of the discretion conferred by section 82 (1) and section 82 (3) (*c*) of the Land Registration Act 1925. In the confrontation envisaged by section 82 (1) and in particular by section 82 (1) (*g*), between, on the one hand, the registered proprietor, who is a victim of double conveyancing, and the first purchaser or his successors, deprived of the legal estate by registration, the court must first determine whether the registered proprietor is in possession. If the registered proprietor is not in possession then section 82 (3) does not apply, and the court will normally grant rectification: see *Chowood Ltd.* v. *Lyall (No. 2)* [1930] 2 Ch. 156. A fortiori if the registered proprietor is not in possession but the applicant has an overriding interest constituted by an equitable interest protected by actual occupation, the court will grant rectification: see *Bridges* v. *Mees* [1957] 1 Ch. 475, 486. However, the power of rectification given by section 82 (1) never ceases to

be discretionary, so that where section 82 (3) does not apply there may still be circumstances which defeat the claim for rectification.

If the registered proprietor is in possession, the applicant for rectification will not normally be in actual occupation, and one of the conditions specified in section 82 (3) must be satisfied if rectification is to be granted. If the registered proprietor is the first registered proprietor and has caused or contributed to the mistake in registration then section 82 (3) (*a*) applies and rectification will normally be granted: see *In re No. 139 Deptford High Street, Ex parte British Transport Commission* [1951] Ch. 884. But where the applicant has, for example, allowed the registered proprietor to build on the land, then, even though the conditions in section 82 (3) (*a*) have been satisfied, the court taking the hint from section 82 (3) (*c*) and exercising the discretion conferred by section 82 (1) may refuse to rectify: see *Claridge* v. *Tingey* [1967] 1 W.L.R. 134.

If the proprietor is not the first registered proprietor but is a subsequent transferee he will not normally be responsible for the mistake in registration in any way at all. So that the conditions specified in section 82 (3) (*a*) will not be satisfied, and to this limited extent a subsequent transferee is in a better position than the first registered proprietor. But whether the proprietor be the first registered proprietor or a subsequent transferee rectifications will still be granted under section 82 (3) (*c*) if for any reason in any particular case it is considered that it would be unjust not to rectify the register against the registered proprietor.

It follows that the crucial questions in the present case are, first, whether Mr. Jones was in actual occupation of the disputed strip when the defendants completed purchase in 1964; secondly, whether the defendants were in possession at the date when the plaintiffs completed their purchase of 4 Darland Avenue in 1968; and if those questions are decided in favour of the defendants, thirdly, whether it would be unjust not to rectify against them.

In *Hodgson* v. *Marks* [1971] Ch. 892, 931, Russell L.J. said, on actual occupation as an ingredient of an overriding interest, that he was prepared for the purpose of that case to assume, without necessarily accepting, that section 70 (1) (*g*) of the Land Registration Act 1925 is designed only to apply to a case in which the occupation is such in point of fact as would in the case of unregistered land affect a purchaser with constructive notice of the rights of the occupier. Then Russell L.J. said, at p. 932:

> "I do not think it desirable to attempt to lay down a code or catalogue of situations in which a person other than the vendor should be held to be in occupation of unregistered land for the purpose of constructive notice of his rights, or in actual occupation of registered land for the purposes of section 70 (1) (*g*). It must depend on the circumstances, and a wise purchaser or vendor will take no risks. Indeed, however wise he may be he may have no ready opportunity of finding out: but, nevertheless, the law will protect the occupier."

In my judgment Mr. Jones was not in actual occupation of the disputed strip when the defendants completed their purchase of Darland Garage and was not thereafter in actual occupation.

Mr. Jones gave evidence that every night he parked his car on the disputed strip, and sometimes the car was there during the day. Mr. Jones's recollection, not unnaturally, was not very reliable, and I find that he sometimes parked his car on the disputed strip, but how often and when no one can now determine with any certainty. But even if Mr. Jones regularly parked his car on the disputed strip I do not consider that this

constituted actual occupation of the disputed strip in the circumstances of the present case. I reach this conclusion for the following reasons: first, the parking of a car on a strip 11 feet wide by 80 feet long does not actually occupy the whole, or a substantial, or any defined part of that disputed strip for the whole or any defined time. Secondly, the parking of a car on an unidentified piece of land, apparently comprised in garage premises, is not an assertion of actual occupation of anything.

In addition to these two reasons there are circumstances which show that, not only was Mr. Jones not in actual occupation, but on the contrary that the defendants were. First, there is no evidence that Mr. Ball or the defendants were ever aware that Mr. Jones parked his car on the disputed strip. The fact that the defendants completed their purchase after stipulating for vacant possession is an indication that both Mr. Ball and the defendants considered that vacant possession was in fact given and taken on completion. Secondly, the brick wall 4 feet from the house, 4 Darland Avenue, was an assertion that the occupier of Darland Garage occupied land up to that wall, and was just as much in possession of the disputed strip as of any other part of the apparent Darland Garage premises. Thirdly, as appears from the defendants' photographs, there was no method of driving on to the strip from Darland Avenue without trespassing on to the garage premises unless the car in question was bounced up the kerb and steered between a stop sign and a tree. These difficulties could, no doubt, be overcome, but they added force to the apparent assertion by all the indications on the ground that the disputed strip was part and parcel of Darland Garage and was occupied and possessed therewith, and that the claim and title of 4 Darland Avenue ceased where the brick wall ceased. In the result Mr. Jones and the plaintiffs were, in my judgment, never at any material time in actual occupation of the disputed strip, and the defendants were at all material times in possession of the disputed strip. The defendants claimed that they occupied the disputed strip by depositing waste materials on the strip as part of the garage land. Precise evidence of this was, not unnaturally, impossible to obtain. I accept, however, that the defendants did treat the disputed strip just in the same way that they treated any other part of the garage land and premises.

In my judgment, therefore, section 82 (3) does apply because the Jones's and the plaintiffs had no overriding interest protected by actual occupation and because the defendants were in possession. There remains the question, under condition (*c*) of section 82 (3) whether it would be unjust not to rectify against the defendants.

In my judgment, justice in the present case lies wholly with the defendants and not with the plaintiffs. There was nothing on the register or on the ground on or before the date when the defendants became the registered proprietors of the disputed strip which put the defendants on inquiry. On the contrary, both the register and the appearance on the ground proclaimed title to and possession of the disputed strip, and the garage premises were one and indivisible. No reasonable requisition by the defendants from the vendor, Mr. Ball, would in the circumstances have disclosed the existence, let alone any claim to the disputed strip. The absence of any indication on the ground was due to the default of the plaintiffs' predecessor in title in not complying with her covenant to build a boundary wall which would mark out the disputed strip. On the other hand, the plaintiffs, even without hindsight, were taking a gamble. The title disclosed to them showed the obligation of Mrs. Jones to build a boundary wall. Inspection of the site disclosed that the only wall in

existence was the original wall 4 feet from the side of the house. It was possible that the frontage of 39 feet mentioned in the 1955 conveyance was a mistake; whether it was a mistake or not it was possible that the true 1955 boundary between 4 Darland Avenue and Darland Garage was the line of the original wall. If the true 1955 boundary was not the existing wall but a new wall to be constructed on the northern boundary of the disputed strip it was possible that because of the failure to build the wall or to mark out the disputed strip, title to the disputed strip had been lost by adverse possession, or, as in fact happened, by a natural mistake on registration.

The plaintiffs must have realised that there might be some difficulty over the boundary between 4 Darland Avenue and Darland Garage; hence Mr. Epps's letter dated July 31, 1968. The inquiries made in that letter after completion could have been made, and ought to have been made, before completion. The plaintiffs or their legal advisers, if properly instructed, ought to have required their vendor, Mr. Jones, to prove that the boundary between the disputed strip and Darland Garage was 11 feet from the brick wall, and was known to and acknowledged by the owner of Darland Garage to be that un-marked boundary and not the apparent boundary constituted by the brick wall 4 feet from the side wall of the house. The plaintiffs or their legal advisers, if properly instructed, ought to have realised that without further inquiries to their vendor, and inquiries by their vendor to the defendants, it had not been established that the vendor was in a position to give a good title or in a position to give possession of the disputed strip to the plaintiffs.

In my judgment, whereas the defendants bought the disputed strip, the plaintiffs bought a law suit, thanks to the default of their vendor in not taking steps to assert ownership and possession of the disputed strip, and thanks to the failure of the plaintiffs to make before completion the inquiries which they made immediately after completion.

Mr. Cullen put forward one additional circumstance which he argued, with some force, tilted the balance of justice in favour of rectification. That circumstance, he submitted, was that if the register is rectified the defendants can recover compensation based on the 1973 value of the disputed strip, but if the register is not rectified the plaintiffs cannot recover compensation. This argument is founded on section 83 of the Land Registration Act 1925 which deals with compensation. Section 83 (1) provides that, subject to the provisions of the Act to the contrary, any person suffering loss by reason of any rectification of the register under the Act shall be entitled to be indemnified. That will be the position of the defendants if I rectify. Section 83 (2) provides that where an error or omission has occurred in the register but the register is not rectified, any person suffering loss by reason of such error or omission shall, subject to the provisions of the Act, be entitled to be indemnified. That is the position of the plaintiffs, if I do not rectify.

By section 83 (6) where indemnity is paid in respect of the loss of an estate or interest in or charge on land the amount so paid shall not exceed (a), where the register is not rectified the value of the estate interest or charge at the time when the error or omission which caused the loss was made. In other words, if I do not rectify then the plaintiffs' indemnity is reduced to the value of the disputed strip as at 1959 when the error was made. Subsection (6) (*b*), on the other hand, says that where the register is rectified the indemnity is not to exceed the value if there had been no rectification of the estate, interest or charge immediately before the time

of rectification. This would apply to the defendants. So that the legislature provides 1959 values for the plaintiffs and 1973 values for the defendants. The matter does not end there, however, because by subsection (11) there is a further limitation on indemnity. Subsection (11) provides that a liability to pay indemnity under the Act shall be deemed a simple contract debt and for the purposes of the Limitation Act the cause of action shall be deemed to arise at the time when the claimant knows or, but for his own default, might have known of the existence of his claim. Whether or not that applies to the plaintiffs, it clearly does not affect the defendants; first, because they are not claimants; and, secondly, because they must have been in complete innocence of anything wrong until the plaintiffs came on the scene and raised the question of where the true boundary lay. Then there is a proviso:

> "Provided that, when a claim to indemnity arises in consequence of the registration of an estate in land with an absolute or good leasehold title, the claim shall be enforceable only if made within six years from the date of such registration, except in the following cases . . ."

and then it sets out cases involving infants or settled land, which plainly do not apply. Clearly, that proviso operates to deprive the plaintiffs of compensation, because their claim to indemnity is made more than six years from the date of the 1959 registration. Mr. Cullen submits that it does not apply to the defendants. First, he says that the proviso only applies to section 83 (2); and, secondly, he says that the claim to indemnity will only arise so far as the defendants are concerned in consequence of the registration which will follow upon any order for rectification.

Mr. Brodie, on the other hand, submits that the proviso applies to the defendants and that if it does not, the matter is obscure, and any decision I make on it will not be binding, and the defendants should not be left in the uncertainty of knowing whether that decision is right.

I can only peer through my own spectacles and, in my judgment, the proviso does not apply to the defendants. It is intended only to apply to a claimant who has the means and opportunity of finding out and asserting his claim, and therefore there is no reason why the six-year period should not operate. In the case of the defendants, however, who are in possession and who have got the title, I do not consider that the proviso applies; they will not suffer and their claim to indemnity will not arise unless and until an order for rectification is made. Accordingly, the foundation for Mr. Cullen's submission is established. This is a case, in my judgment, in which if an order for rectification is made the defendants will be entitled to indemnity on 1973 values, and if the claim for rectification is refused then they will keep the land, but the plaintiffs will not get compensation.

The question I have to determine is whether that is sufficient to upset the justice of the defendants' claim that there should not be rectification in the present instance. Is it sufficient—and this is the test— to make it unjust not to rectify the register against the defendants? Mr. Cullen pointed out that as far as the defendants are concerned the disputed strip formed, he calculated, 4 per cent. of the garage premises. He said it could not make a lot of difference to the defendants' garage; on the other hand, it was of importance to 4 Darland Avenue because it provided a private garage, an asset which is important in commuter territory.

In my judgment, however, this cannot be solved merely on the question of money. The defendants bought the land; they bought it to exploit for their commercial purposes; they did not buy it in order to sell a strip

for a 1973 value, which in real terms will not, in my judgment, adequately indemnify them. Although the strip is at the back of the garage, in the same way as it could be used as a private garage for 4 Darland Avenue, so it could be used by the defendants for commercial purposes, and in fact they say now they intend to use it in connection with a car wash; if they are deprived of it they will be in considerable difficulty, and will not have all the facilities which a modern garage requires. I think that may be putting it a bit high, but the fact of the matter is that this strip is worth more to the defendants than the pounds, shillings and pence which they will receive by indemnity, even on a 1973 basis.

Accordingly, in my judgment, that argument is not sufficient to overturn all the other arguments in favour of the defendants, and I decline to order rectification of the register.

Order accordingly.
Plaintiffs to pay defendants' costs.

Solicitors: *Vizards for Gulland & Gulland, Maidstone; Piesse & Sons.*