

Register Entry Pursuant to a Court Order Subsequently Set Aside

Antoine v Barclays Bank UK PLC [2018] EWCA Civ 2846

Whether an entry in the land register can be upset is a question that hinges upon the availability of the powers of alteration under the Land Registration Act 2002. The scope of these alteration powers is crucial for registered land because they determine when security of registered title may have to give way to more important values, such as the need to give relief against the effects of fraud or error. Despite that pivotal function, their scope is not always clear and any elucidation by the court is welcome. *Antoine v Barclays Bank UK PLC* adds clarity to one aspect of the alteration powers in factual circumstances that are not so common. The Court of Appeal held that a register entry made pursuant to a court order subsequently set aside is not a ‘mistake’ for the purpose of the correction head of the alteration powers. The decision brings coherence to the case law, and it successfully maintains the integrity of the recondite statutory provisions about alteration of the register, while highlighting the limits of the land register’s reliability.

***Antoine*: the Vesting Order and the Set Aside Order**

Antoine v Barclays Bank UK PLC deals with the registration consequences of a register entry made pursuant to a vesting order that was subsequently set aside. The initial vesting order came about like this. In 1987, Mr Joseph, the registered proprietor, allegedly gave a security over the land in favour of Mr Taylor to secure a loan. Some years later, Taylor commenced proceedings claiming relief for non-payment of the underlying loan, either by repayment or an order for the transfer of the relevant registered titles into his name. He put forward three documents as the basis for claiming his title to the security. Joseph could not be found and an order was made for substituted service on him by way of advertisements in London, St Lucia and Grenada.

Joseph did not enter appearance and judgment in default was given. Joseph was ordered to pay the outstanding sum secured by a specified date, failing which Taylor would be entitled to all the interest of Joseph in the property, and to have a transfer thereof, and to become registered proprietor. After the specified date passed, Taylor lodged the court order with the land registry in support of his application to replace Joseph as registered proprietor. The land registry, having sent a notice to Joseph at the property and received no response, entered Taylor as new proprietor in 2007. Taylor then granted a registered charge to Barclays Bank in 2008.

Those entries were the source of the problem. It transpired that Joseph had in fact died in 1996. His son, Mr Antoine, represented the estate as administrator. After the entry of Taylor as proprietor and Barclays Bank as chargee, Antoine successfully applied to be joined to the proceedings commenced by Taylor which had earlier resulted in the judgment in default. The Master ordered that Taylor’s claim be continued against Antoine, and he set aside the earlier judgment in default by which Taylor had become registered (without prejudice to Barclays Bank). On the basis of that order setting aside the vesting order, the land registrar altered the land register by removing Taylor as proprietor and entering Antoine in his place. Taylor died and his claim was not pursued, but two problems continued: first, a unilateral notice on the

register still supported a pending land action in favour of Taylor and, secondly, the charge in favour of Barclays Bank remained. Antoine was obviously dismayed at the prospect of this charge continuing against the land he had recovered and sought its removal. Whether the court had power to do so depended on which particular head of alteration under the land registration legislation should apply.

Statutory Matrix - The Heads of Alteration

Alteration is divided into three parts. But, unlike Caesar's Gaul, the boundaries between these three parts are not sharply demarcated by clear landmarks, and this gives rise to problems in identifying the proper scope of each part. Of the three parts, one comprises the correcting of a mistake, one brings the register up to date, and one gives effect to a right excepted from the effect of registration:

- '2. (1) The court may make an order for alteration of the register for the purpose of-
- (a) correcting a mistake,
 - (b) bringing the register up to date, or
 - (c) giving effect to any estate, right or interest excepted from the effect of registration.'

The head of alteration was crucial to Antoine's claim. If the entry of Taylor pursuant to the vesting order had not amounted to a 'mistake' within the Act, then no correction power would be available. On that interpretation, one presumes that the basis for the alteration giving effect to the order setting aside could only have been 'bringing the register up to date', a head of alteration which is probably not available against a right which is protected by the priority rules, such as Barclays Bank's charge in this case, and which is certainly not accompanied by an entitlement to indemnity for the continued existence of the charge. On the other hand, if the entry of Taylor pursuant to the vesting order upon judgment in default had been a 'mistake', then the correction head of alteration would have been available to reinstate Antoine and (arguably) to remove the charge,² or to permit the statutory indemnity claim if correction were refused.³ Unsurprisingly, Antoine claimed that the entry of Taylor pursuant to the vesting order was a mistake which permitted correction as against Barclays Bank.

No Mistake, No Correction

Antoine commenced proceedings against Barclays Bank, Taylor's widow, and the Chief Land Registrar. He argued that the security documents allegedly signed by his father were void on the basis of forgery, and that various consequences followed. First, the unilateral notice should be removed as the claim was resolved. Second, the entry of Taylor pursuant to the vesting order had been a mistake. Third, the charge to Barclays Bank was the result of that mistake and should be deleted under the

¹ LRA 2002, Sched. 4, para.2(1). The registrar possesses similar powers to alter, with the additional power to remove superfluous entries: LRA 2002, Sched. 4, para. 5(1).

² See *Knights Construction (March) Ltd v Roberto Mac Ltd* [2011] E.W.Land R.A. 2009/1459, *Proudlove v Wood* [2011] P.L.S.C.S. 206, *MacLeod v Gold Harp Properties Ltd* [2014] EWCA Civ 1084, [2015] 1 W.L.R. 1249, and others.

³ LRA 2002, Sched. 8, para. 1(1)(a), (b).

correction power. At trial in the High Court, it was found that the security documents in favour of Taylor were indeed forgeries (suspicion was directed at a rogue agent rather than Taylor himself). But the court held that the entry pursuant to the vesting order was no mistake, and consequently there was no power to delete the charge.⁴ Antoine appealed on the ground that the vesting order should have been regarded as a nullity so that the entries founded on it were correctable as mistakes.

The Court of Appeal upheld the High Court's decision. The vesting order had to be obeyed in spite of its susceptibility to being set aside and in spite of the fact that it was indeed set aside. It was a valid disposition by operation of law at the time it was made, and the registrar had been under a duty to register it (this latter point was conceded on appeal⁵). The registrar would still have to comply with it even if the registrar knew the truth about the underlying forgeries. There had been no mistake in entering Taylor pursuant to it, nor in subsequently entering Barclays Bank as chargee.

The Court of Appeal tidied up a couple of helpful points along the way. First, the court settled doubts over the decision in *Firman v Ellis*⁶ by resolving that even if a party was entitled to have a court order set aside as of right, and even if such an order was 'void' in the sense that the court would have no alternative but to do so, a court order (at least if from a court of unlimited jurisdiction⁷) must be obeyed until it is set aside.⁸ Second, the Law of Property Act 1925, section 9 - which declares that a vesting order operates to convey an estate in like manner as a conveyance executed by the owner - does not imply that a vesting order obtained by forged documents would be void in the same way as a forged conveyance.⁹ But the central interest for property lawyers is the court's reasoning why a register entry pursuant to a court order subsequently set aside is not a mistake and what that tells us about the judicial approach towards interpreting the statutory concept of mistake.

The Approach to Mistake

On the question of setting aside a court order which had already been the basis for a registered entry, the Court of Appeal did not have the benefit of precedents upon which it could draw,¹⁰ nor had the particular issue been raised in Law Commission papers preceding the Act. Instead, the judgment reveals the court approaching the interpretation of mistake by extrapolating from judicially-developed principles in the prior case law. This can only be good for the prospects of stability and coherence in the evolution of this area of law.

The court made a number of important decisions on mistake. (i) It followed the distinction made in recent case law¹¹ that a mistake is generated by registration of a void transaction, whereas a mistake is not generated by registration of a voidable transaction, not even once it has been set aside. (ii) It accepted that there was a comparison to be made between voidable transactions and court orders liable to be set

⁴ *Antoine v Barclays Bank plc* [2018] EWHC 395 (Ch), [2018] 4 W.L.R. 67.

⁵ At [25].

⁶ *Firman v Ellis* [1978] 1 Q.B. 886.

⁷ The First-tier Tribunal has limited jurisdiction, therefore the argument that a particular order of its is ultra vires and void, unlike an order of the High Court, could conceivably remain a ground for mistake in a consequential register entry, despite *Antoine*.

⁸ *Antoine v Barclays Bank UK PLC* [2018] EWCA Civ 2846 at [34-37] and [49].

⁹ At [46] and [52].

¹⁰ Unlike the decision in *NRAM Ltd v Evans* [2018] 1 W.L.R. 639 where the court was able to draw on *Norwich & Peterborough Building Society v Steed* [1993] Ch. 116.

¹¹ *NRAM Ltd v Evans* [2018] 1 W.L.R. 639.

aside. (iii) It confirmed that the question whether an entry is a mistake must be answered on the facts as they stood at the time of entry, disregarding the fact that the transfer or court order might have been later set aside. (iv) It decided that mistake does not turn upon the subjective knowledge of the registrar or the extent of the registrar's ability to make enquiries or to obtain relevant documents. On each of these points, the court's approach cannot be faulted. The combined effect is an approach to mistake which is consistent with the statutory scheme and which is consistent with the Law Commission's limited indications as to how the provisions were expected to operate.¹²

While those individual decisions reach the right outcomes, it is worth delving into the court's reasoning. A significant part of the judgment dwells on its decision that whether an entry is mistaken must be answered as the facts stood at the time of the entry, rather than with the benefit of hindsight after the instrument supporting the entry has been set aside.¹³ This rule is undoubtedly correct for reasons considered below, but two caveats need to be raised. First, this rule is not supported by the particular justification offered in the judgment. The Court of Appeal explains that the rule is necessary in order to fulfil the legislative policy that the register should be a complete and accurate statement of title at any given time.¹⁴ But that policy is not at stake here. There is a better explanation for the rule which is developed below. Secondly, the rule is of limited value because it does not identify what a mistake is. Take the case of a voidable transfer that has been registered. We test whether it is a mistake at the time of its entry. At that time was its entry a mistake? Certainly the register seems incomplete then as it did not record the voidable transfer's susceptibility to rescission. But whether that is a mistake still depends on what you mean by mistake; specifying the time for asking the question does not tell us how to answer it. Fortunately, however, the Court of Appeal goes on to propose a test that does supply further content to the test for mistake, although it was not the focus of detailed discussion in the case itself.

The proposed test is a formula taken from two leading practice works: there is a mistake when, amongst other things, the registrar-

‘makes an entry in the register that he would not have made;... makes an entry in the register that he would not have made in the form in which it was made; or... deletes an entry which he would not have deleted; had he known the true state of affairs at the time of the entry or deletion.’¹⁵

The test was subsequently referred to by the Law Commission when noting that a degree of consensus appeared to be emerging as to the boundaries of mistake,¹⁶ and the Law Commission later regarded it as reflecting the tenor of recent case law.¹⁷ The test provides a handy rule of thumb, but it is submitted that caveats must be raised over its use. First, it is not easy to apply to regimes where the registrar performs no

¹² E.g. Law Commission, *Land Registration for the Twenty-First Century* (2001, Report No. 271) paras. 10.7 and 10.10.

¹³ At [18], [27-30], [39], [45], [47], [50].

¹⁴ At [39].

¹⁵ At [29], citing C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property* 8th ed. (Sweet & Maxwell, 2012), para. 7-133; D. Cavill *et al*, *Ruoff & Roper: Registered Conveyancing* (Sweet & Maxwell, Looseleaf), para. 46-009.

¹⁶ Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (2016, Consultation Paper No. 227) paras. 13.79-80

¹⁷ Law Commission, *Updating the Land Registration Act 2002* (2018, Report No. 380) paras. 13.15-16.

scrutiny function. Were conveyancers permitted to make certain changes directly to the register, as has been mooted in registry reform suggestions, talk of what a hypothetical registrar might do is quite impractical. Secondly, while the judgment emphasises that the test does not depend on the subjective knowledge of the registrar nor impose any duty on the registrar,¹⁸ it remains the case that the test does not explain what would be done by the hypothetical registrar who is blessed with omniscience. We are told that the hypothetical registrar would obey court orders despite knowing that they had been obtained by reliance on forgeries;¹⁹ but there are further questions here of a very challenging nature over the hypothetical registrar's conduct, particularly in the sphere of omissions, the registrar's failure to act, and the scope of positive obligations in public law when exercising discretionary powers. In these cases, one would need to construct a whole set of hypothetical standards for action by the hypothetical registrar. This is a prime contender for avoiding the multiplication of hypothetical entities and the brisk application of Occam's razor would suggest abandoning that approach and instead directly stating the principle by which it is determined what conditions will precipitate a mistake.

Can that challenge be met? Academic efforts have been made in that direction.²⁰ It is suggested that the answer can be deduced from the structure of the Act. The Act liberally confers title by the act of registration, but which is offset by the correction power. The terms in which the power is expressed are not defined. All of the alteration powers contain *hapax legomena* that cannot be related to terms existing elsewhere in the legislation. Their content cannot be filled by reference to other parts of the Act and must be taken from elsewhere. But we do know that the correction power, in the subset known as rectification,²¹ is capable of prejudicially affecting the title of a registered proprietor, and therefore performs the function of deciding whether an entry which shifts property rights should or should not have been made. The defining criteria for the availability of rectification should therefore be sought in rules found outside the Act which determine when a change in property rights has been effectuated. The source for the answer must be such rules of law that determine what events effectuate changes to property entitlements as were in place for unregistered land prior to the Act, except insofar as they have been amended or displaced by the Act itself. That is not to require the correction power to replicate the outcomes of those rules as to vesting of interests, but only to incorporate into the grounds of rectification the same criteria as to what events are valid to effectuate changes in property entitlements.

That proposed approach maintains the link between registered land and the relevant legal rules which have evolved in unregistered land to address all manner of fundamental issues relating to property entitlements, such as consent and dispositive intention, capacity, formality compliance, certainty, the permitted menu of property interests, rules for acquisition by operation of law, and so on. The proposed approach also has explanatory force for much of the case law without reference to hypothetical

¹⁸ At [42].

¹⁹ At [51].

²⁰ E.g. A. Nair, 'Morality and the Mirror' in Bright (ed.), *Modern Studies in Property Law* (Hart, 2011), p.268; E. Lees, 'Title by Registration' (2013) 76 M.L.R. 924; A. Goymour, 'Mistaken Registrations of Land: Exploding the Myth of Title by Registration' [2013] C.L.J. 617; S. Gardner, 'The Land Registration Act 2002 - The Show on the Road' (2014) 77 M.L.R. 763; S. Cooper, 'Regulating Fallibility in Registered Land Titles' [2013] C.L.J. 341; S. Cooper, 'Correction of the Register and Mistake by Omission' [2018] Conv. 225.

²¹ LRA 2002, Sched. 4, para. 2(1). The registrar possesses similar powers to alter, with the additional power to remove superfluous entries: LRA 2002, Sched. 4, para. 5(1).

registrars. It explains why the entry of a void transaction is a correctable mistake, but not the entry of a voidable transaction.²² It explains why the entry of a squatter as proprietor is a correctable mistake, even though the true owner failed to object to the squatter's application, if the squatter had not actually taken the requisite possession for the requisite period.²³ The proposed approach is consistent with *Antoine* and supplies a fuller justification for its outcome.

Relation with other Cases

Antoine may knit together the statutory alteration powers in the proper fashion, but its relations with other judicial decisions must be considered. Three such relationships will be addressed.

First, how does *Antoine* relate to the case of a register entry pursuant to an order that is reversed on appeal rather than set aside? We have seen that *Antoine* indicates the lower court's order should be regarded as a valid mandate for entering the winning party as proprietor, so one might have thought that its reversal on appeal would therefore be in the same category as an order setting it aside. But in *Totton and Eling Town Council v Caunter*²⁴ (not cited in *Antoine*), the High Court held that a register entry pursuant to the order of the Adjudicator to HM Land Registry, which was subsequently reversed on appeal, should be altered specifically under the correction head, and it did indeed order correction, implicitly admitting the presence of a mistake.²⁵ This appears to conflict with the decision in *Antoine* which holds that that the presence of mistake must be tested at the time of the entry of the controverted judicial order and cannot arise simply because the order is subsequently overturned. The two cases could only be reconciled by distinguishing *Totton* on an ambitious argument that the Adjudicator's order was entirely void for exceeding the Adjudicator's limited statutory jurisdiction and the register entry was a mistake on that basis; apart from that possible exception, *Totton* must be wrong on the broader point.

Second, how does *Antoine* relate to the case of a register entry pursuant to an order that is subsequently declared to be not binding on beneficiaries taking under the proprietor who was removed by the order? The issue arose in *Re De Leeuw*²⁶ (not cited in *Antoine*), where an executor became registered proprietor and fraudulently mortgaged the property. The lender brought proceedings against the executor and obtained a foreclosure order, on the strength of which the lender was entered in the register as proprietor of the property. The beneficiaries successfully claimed that their interests had not been represented in the foreclosure (the executor having entered appearance but not having contested), and the court declared that they were therefore not bound by the foreclosure and altered the register by entering the beneficiaries' newly-appointed trustee as proprietor in place of the lender. That decision should continue to stand after *Antoine*. It concerned alteration under the former statutory provisions²⁷ which were in a rather primitive form and which, unlike the contemporary legislation, did not differentiate between correcting mistakes and bringing the register up to date. But the fact pattern fits perfectly within the modern

²² *NRAM Ltd v Evans* [2018] 1 W.L.R. 639.

²³ *Baxter v Mannion* [2011] EWCA Civ 120, [2011] 2 All E.R. 574.

²⁴ *Totton and Eling Town Council v Caunter* [2008] EWHC 3630.

²⁵ *Totton* at [43].

²⁶ *Re De Leeuw* [1922] Ch. 540.

²⁷ Land Transfer Act 1875, ss. 95, 96.

concept of bringing the register up to date. After *Antoine*, therefore, any beneficiaries whose interests are not represented in litigation against their trustees should escape the doctrine of estoppel *per rem judicatam* by having the adverse order against their trustee declared not binding on them,²⁸ and the register should be altered, not by correcting it, but by bringing it up to date.

Third, how does *Antoine*, a case of a registry entry pursuant to a court order founded on forged transfers, relate to the case of a register entry made directly pursuant to a forged transfer? There are many decisions confirming that, where a grant is forged and void, then any entry made directly in reliance on it a mistake. A good example is *Patel v Freddy's Ltd*.²⁹ The original registered proprietor was the victim of a fraudster who impersonated him and sold the land to Finegold who then sold on Freddy's Ltd. The entry of Finegold was a mistake, and rectification would in principle have been available as against him and also as against Freddy's Ltd. On the facts, rectification was refused, the new acquirer (Freddy's Ltd) kept the land, and the original owner was expected to be eligible for an indemnity claim. If that is the correct result for a forged conveyance, why, it might be asked, is it not also the result for a forged conveyance which induces a court order? The two cases, it could be argued, are similar in regard to both the nature of the wrongdoing and the effect on the victim. Yet the differences in outcome are stark. In *Antoine*, the new acquirer (Taylor, whose estate was represented by his widow) did not keep the land but rather was removed from the register without any entitlement to indemnity; while the original owner (Joseph, whose estate was represented by Antoine) recovered the land but only subject to the Barclays Bank mortgage, a loss for which no indemnity was available.

Compared to a register entry made in direct reliance on a forged conveyance, therefore, *Antoine* seems at first glance to run counter to the idea that entries in the land register are reliable. *Antoine* implies that all registered proprietors (like Joseph) need to be warned that their registration is not reliable, as their land might be extracted by a court order and damaged, mortgaged or sold on, before the court order can be undone. Equally, new acquirers who become registered proprietors under court orders (like Taylor) need to be warned that their registration is not reliable, as their land might be taken away without compensation³⁰ in the event of the court order being set aside, reversed on appeal, or declared not binding.

Those consequences might spur arguments that the land registration scheme should be reformed so as to eradicate the effects of *Antoine* and to enhance the reliability of the register. In fact equivalent reform arguments have already been made in relation to entries pursuant to voidable transfers liable to be set aside,³¹ if not entries pursuant to court orders liable to be reversed. There is certainly something to be said for some such reform if the policy of the reliability of the register is to be fortified - although it would come at the expense of the policy of fixing unsatisfactory

²⁸ See C.P.R., 19.7A(2).

²⁹ *Patel v Freddy's Ltd* [2017] EWHC 73 (Ch).

³⁰ Furthermore, Taylor and his estate were not entitled to recover the costs of development works which had been incurred while he had been registered proprietor: *Antoine v Barclays Bank plc* [2018] EWHC 395 (Ch), [2018] 4 W.L.R. 67 at [86] - 'I fail to see why Mrs Taylor should be entitled to compensation in circumstances where her husband (whether he realised it or not) had not obtained title to the Property by lawful means...' The point was not pursued on appeal.

³¹ J.T. Farrand, A.C. Clarke, 'Emmet & Farrand on Title' (Sweet & Maxwell, Looseleaf), para. 9.028; P.J. Clarke, 'Registered Land' [1993] All E.R. Rev. 242, 246; C. Davis, 'A Restrictive Approach to Rectification' [1992] Conv. 293, 297.

court orders.³² But reliability of the register is not the only consideration. The current limitations on reliability, as demonstrated in *Antoine*, come about because the ‘mistake’ test used in determining susceptibility to rectification is a test which imports the common law criteria concerning what events are valid to effectuate changes in property entitlements. This importation enabled a certain economy in the drafting of the correction provisions, and it continues to mean that the definition of mistake can rely on centuries of legal thought about how the balance should be set between owners and acquirers in countless different factual circumstances. Who would be willing to dismiss all of that principled learning and attempt to draft a comprehensive new code of grounds for correction?

Simon Cooper*

³² On which see C.W. Tainter, *Restitution of Property Transferred Under Void or Later Reversed Judgments* (1936) 9 *Mississippi Law Journal* 157; D. Gordon, ‘Effect of Reversal of Judgment on Act done between Pronouncement and Reversal’ (1958) 74 *LQR* 517; B. McFarlane, ‘The Recovery of Money Paid Under Judgments Later Reversed’ [2001] *Restitution Law Review* 1; S. Christensen and B. Duncan, ‘Is Indefeasibility of Title a Bar to Restitution after Reversal of a Judgment on Appeal?’ (2005) 11 *Australian Property Law Journal* 81.

* Professor, Aston Law School.