Neutral Citation Number: [2020] EWHC 1177 (Ch)

Case No: CR-2018-000282

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: Friday 15 May 2020

Before :

MR JUSTICE SNOWDEN

- -

Between :

SERENA REES	**Appellant/ Claimant**
- and -	
82 PORTLAND PLACE INVESTMENTS LLP **82 PORTLAND PLACE (FREEHOLD) LIMITED**	**Respondents/ Defendants**

- -

Christopher Heather QC (instructed by **David Conway & Co**) for the **Appellant**
Philip Rainey QC (instructed by **Cripps Pemberton Greenish**) for the **Respondents**

Hearing date: 22 May 2019

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Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10 a.m. on Friday 15 May 2020.

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MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :

1. This is an appeal by Serena Rees ("Ms Rees") against the order made by HHJ Gerald in the Central London County Court on 4 October 2018 whereby he dismissed her claim to have the register in respect of her long leasehold property at Flat K at 82 Portland Place, London ("Flat K") rectified pursuant to Schedule 4 of the Land Registration Act 2002 ("Schedule 4" and "the 2002 Act"). Ms. Rees' claim sought to correct the consequences of a mistaken failure by the Land Registry to enter a unilateral notice against the freehold title of Flat K to protect her claim to a 90 year lease extension under section 42 of the Leasehold Reform, Housing and Urban Development Act 1993 ("section 42" and "the 1993 Act").

2. The Court's jurisdiction to make an order for alteration of the register by way of rectification is contained in Schedule 4 to the 2002 Act. The relevant paragraphs are as follows:

> "1. In this Schedule, references to rectification, in relation to alteration of the register, are to alteration which—
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> (a) involves the correction of a mistake, and
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> (b) prejudicially affects the title of a registered proprietor.
>
> 2.(1) The court may make an order for alteration of the register for the purpose of—
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> (a) correcting a mistake,
>
> (b) bringing the register up to date, or
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> (c) giving effect to any estate, right or interest excepted from the effect of registration.
>
> (2) An order under this paragraph has effect when served on the registrar to impose a duty on him to give effect to it.
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> 3.(1) This paragraph applies to the power under paragraph 2, so far as relating to rectification.
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> (2) If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless—
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> (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or
>
> (b) it would for any other reason be unjust for the alteration not to be made.

> (3) If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so.
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> (4) In sub-paragraph (2), the reference to the title of the proprietor of a registered estate in land includes his title to any registered estate which subsists for the benefit of the estate in land.
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> …
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> 8. The powers under this Schedule to alter the register, so far as relating to rectification, extend to changing for the future the priority of any interest affecting the registered estate or charge concerned."

Background

3. Ms. Rees took an assignment of the lease of Flat K on 1 September 2011 together with the benefit of a section 42 notice which had been given by her predecessors on 5 August 2011. The premium proposed in the section 42 notice was £1.8 million.

4. At the date the section 42 notice was given, the freehold of the building containing Flat K ("the Building") was held by Howard De Walden Estates Limited ("HDWE") as part of Title Number 357186. The Building was also subject to a headlease dated 28 November 1924 for a term of 99 years, the 12 year residue of the term of which was owned by 82 Portland Place Limited ("PPL"). Accordingly, when the section 42 notice was served, because of the limited duration of the remaining term of the headlease, HDWE was the competent landlord within the meaning of the 1993 Act and not PPL.

5. At the time the section 42 notice was served, a process of collective enfranchisement to acquire the Building from HDWE was already in progress. This had commenced by a notice under section 13 of the 1993 Act dated 11 September 2009, and it had the effect of suspending the operation of Ms. Rees' section 42 notice until completion of the collective enfranchisement process: see section 54 of the 1993 Act.

6. After Ms. Rees acquired Flat K, to protect the section 42 notice, her former solicitors (DKLM) applied on 19 September 2011 for registration of two separate unilateral notices (UN1) against the registered titles of the freehold reversion and the headlease. The Land Registry registered the unilateral notice against the headlease with effect from 19 September 2011 but rejected the application to enter a unilateral notice against the freehold title, on the grounds that the collective enfranchisement process prevented it from being registered. Explaining the rejection, an official at the Land Registry sent a letter dated 26 October 2011 to Ms. Rees' then solicitors which stated,

> "I have also referred the matter to my lawyer who has considered Section 54 of the above Act and it appears that, as the effect of your client's notice has been suspended during the currency of the Section 13 notice served by the collective enfranchises, your application for a Unilateral Notice in the register is similarly prohibited.

> In the absence of any contrary argument we propose to return your papers to you on 4 November 2011."

7. It is common ground between the parties that this was wrong and the Land Registry made an error in rejecting the application to register a unilateral notice against the freehold title. Section 54 of the 1993 Act suspended the operation of the section 42 notice but did not preclude registration of a unilateral notice to protect it. Ms. Rees did not, however, pursue the point or commence proceedings for judicial review to challenge the decision of the Land Registry.

8. The collective enfranchisement process was completed on 7 March 2017 when the freehold reversion and the headlease of the Building were transferred from HDWE and PPL respectively to the Second Defendant as nominee purchaser. This had the effect of ending the suspension of the section 42 notice pursuant to section 54(4) of the 1993 Act. Also on 7 March 2017, the Second Defendant granted the First Defendant a concurrent superior lease of Flat K for a term of 999 years without payment of a premium and at a nominal rent.

9. The Second Defendant applied to the Land Registry on 4 April 2017 to be registered as proprietor of the freehold title to the Building and of the headlease, and for merger of the headlease into the freehold reversion. The merger took place on, or after, 4 April 2017 and the title of the headlease was closed.

10. The Second Defendant was then registered as proprietor of the freehold title to the Building with effect from 4 April 2017 and was given a new title number NGL968594. The First Defendant was registered as the proprietor of the concurrent superior lease with effect from 6 April 2017 and was given title number NGL968688.

11. At this time, and in accordance with what it claimed to be its normal practice on merger, the Land Registry transferred ("migrated" or "carried over") the unilateral notice previously registered against the headlease to the Second Defendant's freehold title number NGL968594. The Land Registry initially dated it 4 April 2017 but later altered the date to 19 September 2011 following correspondence with Ms. Rees' solicitors. The Land Registry also migrated the unilateral notice which had been registered against the headlease to the First Defendant's new leasehold title number NGL968688 and dated it 6 April 2017.

12. The Defendants contended that the effect of the transfer for value of the freehold reversion from HDWE to the Second Defendant was that Ms. Rees' existing section 42 notice did not bind, and was not enforceable against, the Second Defendant; and was not binding and not enforceable against the First Defendant as successor to the Second Defendant. Without prejudice to that contention, on 9 May 2017 the First Defendant as the new competent landlord within the meaning of the 1993 Act by virtue of its superior lease, served a notice pursuant to section 54(8) of the 1993 Act to the effect that the suspension imposed by the collective enfranchisement process had come to an end; and served a counter-notice under section 45(3)(a) of the 1993 Act. The counter-notice proposed a premium of £3,590,750.

13. Ms. Rees then served a second section 42 notice on 31 October 2017, without prejudice to her contention that the first notice was valid and enforceable, proposing a premium

of £3.7 million, to which the First Defendant responded by a counternotice proposing £5.64 million.

The Claim

14. Following the exchange of notices, Ms. Rees issued a claim on 13 March 2018 in the Central London County Court against the Defendants seeking, inter alia: (i) a declaration that the Defendants were bound by the original section 42 notice; and (ii) an order rectifying the register in relation to title numbers NGL968594 and/or NGL968688 pursuant to Schedule 4 of the 2002 Act so as to correct the mistaken failure by the Land Registry to enter a unilateral notice against title number 357186 in September 2011 and the consequences of that mistake. The Defendants counterclaimed for declarations that they were not bound by the original section 42 notice, and also sought an order altering the register in relation to title numbers NGL968594 and/or NGL968688 so as to remove the unilateral notices that had been migrated to those title numbers from the title to the headlease.

15. The trial of the claim took place before HHJ Gerald in the County Court at Central London and resulted in a detailed and lengthy judgment given on 4 October 2018.

16. The judge identified that there were essentially two questions which he had to determine: (i) whether the unilateral notice which had been registered should have been carried over by the Land Registry from the original headlease to the freehold estate acquired by the Second Defendant, and if so, with what result; and (ii) whether there had been a mistake of law by the Land Registry in failing to register the unilateral notice against the freehold title which the Court should now rectify by exercising its powers under Schedule 4 of the 2002 Act.

17. In his preliminary analysis on the first question, HHJ Gerald referred to the relevant legislation, including in particular section 97(1) of the 1993 Act and section 29 of the 2002 Act. Those sections provide (in relevant part) as follows,

18. Section 97(1) of the 1993 Act

> "…any right of a tenant arising from a notice given under section 13 or 42 shall not be an overriding interest within the meaning of the Land Registration Act [2002]; but a notice given under section 13 or 42 shall be registrable under the Land Charges Act 1972, or may be the subject of a notice or caution under the Land Registration Act [2002], as if it were an estate contract."

19. Section 29 of the 2002 Act

> "(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.

> (2) For the purposes of subsection (1), the priority of an interest is protected—
>
> (a) in any case, if the interest—
>
> (i) is … the subject of a notice in the register.."

20. HHJ Gerald then explained how the failure to register a unilateral notice on the freehold title in respect of the original section 42 notice meant that Ms. Rees' rights arising from that notice were not protected against the Second Defendant as purchaser of the freehold for valuable consideration, who therefore took the title free of the section 42 notice. In that regard, the judge referred to and relied on the decision of the Court of Appeal in Wiggins v Regent Wealth Ltd [2015] 1 WLR 1188 ("Wiggins"). Wiggins was a case involving a notice under section 13 of the 1993 Act, but Gloster LJ explained, at paragraph 88,

> "The clear intention of section 97 was to make both section 13 and section 42 rights registrable as if they were estate contracts with a view to enabling the purchaser to take free if those rights were not registered. It is clear from the fact that section 97 treats both section 13 and section 42 notices in an identical manner (i.e. that they do not create overriding interests but are registrable as estate contracts), that the section is intended to have the same effect in both cases…."

21. HHJ Gerald also held that on subsequent merger of the headlease into the freehold, the Land Registry should not have carried forward the unilateral notice registered against the headlease to the freehold title. The judge reasoned that registration of a unilateral notice does not create any rights, and neither does it operate so as to improve or enlarge any pre-existing rights in respect of someone who was not the competent landlord into something enforceable against the competent landlord. The judge therefore ordered that the register be altered so as to remove the unilateral notices on the First Defendant's leasehold title number NGL968688 and on the Second Defendant's freehold title number NGL968594.

22. In respect of the second issue, HHJ Gerald refused to grant rectification on the basis that although there had been a mistake within the meaning of Schedule 4 when the Land Registry refused to register the unilateral notice against the freehold title in 2011, under paragraph 3(2) of Schedule 4 it would not be unjust for the alteration of the register not to be made. In essence, the judge held that a failure to register, leading to the registration system operating as it is intended to operate to insulate a purchaser from an unregistered interest, does not of itself mean that it would be unjust not to order rectification. He said that was so even if the financial consequences for the parties were very large. His key reasoning on the point was as follows:

> "77. In my judgment, what comes out of the authorities and what is consistent with the natural construction and interpretation of the Land Registration Act 2002 is for there to be "any other reason making it unjust for the alteration not to be made", the other reason making it unjust must relate to something more than the function and operation in consequences

> of the failure to register. The very purpose of the system of registration is, to use the word from Wiggins, to immunise a subsequent purchaser for a valuable consideration from anything which has not been registered.
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> 78. If one were to adopt the position that the consequences of the simple or mere consequences of a failure to register, notwithstanding the extremely large amount of money concerned in this case, would of itself be unjust, that to my mind would undermine the very purpose of the legislation and system of registration itself. Furthermore, even if, which it is reasonable to infer, the Second Defendant well understood that a section 42 notice had not been registered against the competent landlord, the fact that it has actual notice, which I am inferring, does not in any way affect the consequences of non-registration as Lady Justice Gloster made clear in Re Wiggins at paragraph 87 lines E-F and has been clear since as long ago as the Midland Bank Trust Co Ltd v Green [1981] AC 513.
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> …
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> 81. If one thinks a little further about this, and putting what I have already said in a slightly different way, there is nothing unjust in a Claimant having the consequences of a failure to register because that is what Parliament intended and it is the very purpose of the legislation. In certain circumstances, that can result in loss of the interest in question. In this case, certainly initially, it did not result in that loss, as is evident by the fact that the Claimant served a second section 42 notice which, so far as I am aware, is accepted to have been valid.
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> 82. The fact is that when in the normal situation a right is lost by non-registration, it will usually have a value which, again, is a function or consequence of the legislation itself. So the fact that there is a very large financial consequence potentially to the Claimant is not of itself sufficient. Furthermore, had Parliament intended that the mere consequence of non-registration could be relieved by rectification, without more, paragraph 3 would have been drafted in a completely different way."

The Appeal

23. The Claimant sought to appeal the order of HHJ Gerald on five grounds. On 24 January 2019, Fancourt J refused permission to appeal on all but one ground. He rejected the arguments to the effect that the Land Registry's transfer (migration) of a valid unilateral notice affecting the headlease could have had the effect of binding the purchaser of the freehold to grant a new lease extending beyond the term of the headlease. He also held that the Land Registry's transfer of the notice to the freehold title could only have taken effect once the Second Defendant was registered as freehold proprietor, and the merger could not have had any effect until after that had been achieved, by which point the Second Defendant had priority.

24. Fancourt J did, however, grant permission to appeal on the fifth ground, namely that HHJ Gerald had been wrong to find that it was not unjust for an alteration of the register not to be made within the meaning of paragraph 3(2)(b) of Schedule 4. The principle ground relied upon was that HHJ Gerald erred in law in finding that a likely increase of about £1.8 million in the premium that Ms. Rees would have to pay for the grant of a new lease under the second section 42 notice compared to the first did not make it unjust for an alteration to the register not to be made.

25. By the time of the hearing before me, the parties were agreed that there had been a mistake which fell within the scope of paragraph 1(a) of Schedule 4. There was also no dispute that if an order were made for the register to be altered to add a unilateral notice to the freehold title and to order that the Second Defendant was bound by the original section 42 notice as a consequence, this would prejudicially affect the title of the Second Defendant within the meaning of paragraph 1(b) of Schedule 4. The reason is obvious: at present the Second Defendant is not bound by the original section 42 notice and if nothing more is done will be entitled to claim a much higher price for the grant of a new lease as a result of the process commenced by the second, and later, section 42 notice.

26. However, by a respondents' notice, the Defendants raised the issue of whether it was open to the court to make an order for rectification of the register under Schedule 4 which would have the effect of retrospectively "reviving" Ms. Rees' original section 42 notice. The Defendants contended that could not be done, because the original section 42 notice had ceased to have effect for all purposes when the transfer of the freehold to the Second Defendant was registered.

27. The logical sequence in which to address the two live issues is first to deal with the question raised by the respondents' notice of whether the court has power, in addition to altering the register, to make a consequential order that the Second Defendant should be bound by the section 42 notice. I will then deal with the second question of whether HHJ Gerald was wrong to conclude that it would not be unjust not to make such an order.

The power to make a consequential order

28. For the Defendants, Mr. Rainey QC contended that the court had no power under Schedule 4 to make an order which went beyond simply altering the register to put a unilateral notice onto it. He contended that the court had no power to make a further or consequential order that the Second Defendant was bound by the section 42 notice, thereby (as he put it) "reviving" the section 42 notice which had ceased to exist as a result of the operation of section 29 when the freehold title was transferred to the Second Defendant.

29. The leading authority on the extent of the court's powers to order rectification under Schedule 4 is the decision of the Court of Appeal in MacLeod v Gold Harp [2015] 1 WLR 1249 (CA) ("Gold Harp"). In Gold Harp, the claimants held leases of two top floor flats, the titles to which were closed at the Land Registry on the basis of information provided by the freeholder that they had been forfeited. The freeholder then granted a new lease of the whole of the top floor to a third party, and the new lease was registered and entered on the leases schedule relating to the freehold title. The new lease was subsequently assigned to the second defendant.

30. The claimants succeeded in a claim for wrongful forfeiture and then brought a claim for rectification of the register. The trial judge (HHJ Gerald) granted the claim and ordered that the register be rectified by (1) reinstating and reopening the claimants' two leasehold titles as if neither had ever been closed and (2) altering the freehold title so as to enter the claimants' leasehold titles in the schedule of notices of leases, both to rank in priority to the new lease.

31. The second defendant appealed, contending that paragraph 8 of Schedule 4 meant that the court's powers to alter the register extended to changing "for the future" the priority of any interest affecting the registered estate concerned, but that rectification of the register could not operate retrospectively so as to treat the claimants' leases as if they had appeared on the register at the date of creation of the second lease.

32. The case was argued on the basis that it was a case concerning the interplay between section 29 and paragraph 8 of Schedule 4. Underhill LJ conducted an extensive review of the authorities, including Freer v Unwins [1976] Ch 288 which had been thought to decide that rectification under the 1925 Land Registration Act could not have retrospective effect, and a more recent decision of Mr. Michael Mark in Knights Construction (March) Limited v Roberto Mac Limited [2011] 2 EGLR 123, which he plainly found persuasive. After also referring to leading textbooks, Underhill LJ stated his conclusions as follows,

> "92. It is useful to start by spelling out the essentials of the situation in which paragraph 8, whatever its effect, is intended to apply. It is a situation in which at the point of rectification there are two competing derivative interests—A and B. Interest A has been mistakenly omitted or removed from the register, but that mistake is to be corrected by its reinstatement. Subject to the effect of the rectification, interest B would have priority: otherwise the question of changing priorities would not arise. It is important to appreciate that the only reason why that would be so is because interest B was created before (obviously) the restoration of interest A to the register but after the date of its mistaken omission or removal.
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> 93. The primary effect of paragraph 8 is to confirm that the power of the court or Registrar in that situation is not limited to restoring interest A to the register but "extends" to changing what would otherwise be the priority as between it and interest B—in other words, to giving it the priority which it should have had but for the mistake. The words "for the future" no doubt qualify that power—the question being in what way—but that is the context in which they fall to be interpreted.
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> 94. The appellant's case has to be, and is, that the effect of the words "for the future" is that if interest B has been registered after the mistake but before the rectification, and thus would otherwise enjoy priority, that priority cannot be altered: an alteration to a priority which already exists cannot be described as an alteration "for the future". But if that is right then their effect is to prevent the court from changing priorities in the very

> situation which paragraph 8 is intended to address. There is no problem of competing priorities once the rectification has been achieved. The only priorities that could be changed relate, necessarily, to interests which have already been created.
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> 95. It is worth recalling that Schedule 4 is concerned with "correcting" mistakes in the register, and it is established by the decisions to which I have referred that the power to do so extends to correcting the consequences of such mistakes. It should be noted that that power is in some circumstances a duty: see paragraph 3(3). The appellant's construction would mean that in all cases where derivative interests have been created during the period of mistaken deregistration that correction would be less than complete and that in some cases, such as the present, it would be valueless.
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> 96. Quite apart from those points, the appellant's construction does not correspond to the words actually used in the statute. What paragraph 8 permits (for the future) is "changing the priority" of an interest. What an interest having priority means is that the owner can exercise the rights which he enjoys by virtue of that interest to the exclusion of any inconsistent rights of the owner of the competing interest. The concept of priority thus bites at the moment that those rights are sought to be enjoyed. Once that is appreciated the effect of the words "for the future" seems to me straightforward. They mean that the beneficiary of the change in priority—that is, the person whose interest has been restored to the register—can exercise his rights as owner of that interest, to the exclusion of the rights of the owner of the competing interest, as from the moment that the order is made, but that he cannot be treated as having been entitled to do so up to that point. The distinction can be illustrated by the facts of this case. The effect of the judge's order is that thenceforward the claimants were entitled to exercise their rights as leaseholders—primarily, that is, their rights to occupy the roof space—to the exclusion of Gold Harp. But until that point they had no such right: they could not, for example, claim mesne profits from Gold Harp or its predecessors in respect of any occupation (though in fact there was none) up to that date."

33. I consider that Gold Harp it is clear authority for the proposition that when deciding to grant rectification by an alteration of the register, the court has power to make ancillary orders to correct the consequences of the mistake, and if necessary can do so by changing priorities as between the respective interests of the applicant and respondent in a manner that gives the applicant's interest the priority which it should have had, but for the mistake.

34. Mr. Rainey sought to distinguish Gold Harp on the basis that it concerned leases which, as between the parties, had continued to be valid at all times, so that the effect of the consequential order made was limited to altering priorities between interests in land that had continued in existence. He sought to contrast that with what he contended was

the effect of the operation of section 29 of the 2002 Act upon a section 42 notice – viz. to extinguish the notice for all purposes.

35. Mr. Rainey's argument in that regard was based upon the decision of the Court of Appeal in Curzon v Wolstenholme [2018] P&CR 9 ("Curzon"). In Curzon, an enfranchisement notice given by tenants of six flats in a building under section 13 of the 1993 Act was unprotected by a unilateral notice. Realising this, the freeholder of the block of flats transferred his interest to his wife for £1 and then she made a gift of it back to him. The Court of Appeal held that the transfer of the freehold from husband to wife meant that the wife took the interest free of the unprotected section 13 notice, and that the notice did not continue in existence and did not bind the husband again when the freehold was transferred back to him.

36. Giving the only substantive judgment in the Court of Appeal, Asplin J identified sections 13, 19 and 97 of the 1993 Act as being central to the appeal. She drew particular attention to section 13(11) which provides in general terms that a section 13 notice continues in force until a binding contract is entered into pursuant to the notice, or the notice is withdrawn or ceases to have effect under the 1993 Act. She also noted that section 97(1) provides a means by which the statutory rights under the initial notice can be protected by a unilateral notice, and that under sections 19(2) and (3), where such a notice has been registered and the freeholder disposes of his interest, all parties are deemed to be put into the position as if the acquirer of the interest had been the relevant landlord before the initial section 13 notice was given and that the acquirer had taken all the steps which the former landlord had taken.

37. At paragraph 27 of her judgment, Asplin J recorded the following,

> "27. There is no dispute that although section 19(2)(3) does not spell out the consequences of a transfer of the freehold reversion in circumstances in which the initial notice is not noted in the land register, unless the circumstances are such that the statutory fiction in section 19(3) applies, the transferee of the freehold reversion will not be bound."

38. Asplin J then went on to accept the submission of counsel for the landlord that it was implicit in the statutory scheme that the initial notice ceased to have any effect in such circumstances and could not be revived if the reversion was re-transferred at a later date. The core of Asplin J's reasoning was contained in paragraph 41 of her judgment,

> "41. If one considers the statutory regime as a whole, it is clear that in the simplest of cases, the relevant parties to the enfranchisement process are the "participating tenants" who act through the "nominee purchaser" and the "reversioner". Once the freehold reversion has been transferred to a third party, the original reversioner who received the initial notice, by definition, ceases to be "the reversioner" within the meaning of section 9 and can no longer be the relevant party with whom to engage in the enfranchisement process or against whom to make an application. He is no longer the owner of the freehold reversion and would be unable to convey the freehold under the terms of the 1993 Act were a vesting order made. It seems to me that the

> proper analysis upon the true construction of the statutory regime can be no different if the reversion is subsequently re-transferred to the original recipient of the initial notice."

39. Asplin J buttressed her conclusion on the construction of the statute by reference to a number of impracticable consequences ("verging on the absurd") that would arise if an initial notice continued in existence but was merely unenforceable awaiting a possible re-transfer following a transfer to a third party against which it was unprotected.

40. Curzon was an extreme case on the facts, but the outcome is entirely understandable where the consequence of a transfer on an unprotected section 13 notice is that the deeming provisions of section 19(3) are not brought into play. As Asplin J pointed out, on a straightforward reading of the 1993 Act, in such a case the statutory description of the "reversioner" on whom the section 13 notice was served no longer matches the new person in whom the freehold of the property is vested.

41. But Curzon was not a case in which there had been any mistake made in relation to the protection of the section 13 notice. It was not, for example, a case in which the Land Registry had made a mistake in not registering a unilateral notice which was supposed to protect a section 13 notice, with the result that the deeming provisions of section 19(3) failed to operate as they should have done when the freehold was transferred.

42. Having regard to the policy behind the power to order rectification under Schedule 4, as explained by Underhill LJ in Gold Harp, I find it impossible to see why the court should be powerless to grant meaningful relief in such a case. Underhill LJ clearly expressed concern (at paragraph 95) that the correction of the register which the court would be minded to order in an appropriate case should not be rendered incomplete and valueless by an inability also to deal with the consequences of the mistake. Similar sentiments were also expressed by Mann J in Sainsbury's Supermarkets v Olympia Homes Ltd [2006] 1 P&CR 17 at paragraph 96.

43. Accordingly, in the example that I have given based upon the facts of Curzon but involving a mistake in registration of a unilateral notice, I consider that the court would have the power to order an alteration of the register and to make a further order deeming section 19(3) to have operated. In that way the remedy of rectification would have some value and (adapting Underhill LJ's words) it would give the section 13 notice the priority over the interest of the freeholder which it should have had, but for the mistake on the register.

44. But if that is the case in relation to section 13 notices, I see no reason whatever to reach any different conclusion in relation to section 42 notices. Under section 43 of the 1993 Act, section 42 notices have effect "to the like extent as rights and obligations arising under a contract for leasing freely entered into between the landlord and the tenant". As a form of statutory contract, I see no reason why such notices should be any less suitable for protection by an effective rectification remedy than any actual contract relating to land.

45. For completeness I should also record that I do not consider that this conclusion is affected by a passing remark of Kitchen LJ in NRAM v Evans [2018] 1 WLR 639. In that case, the Court of Appeal decided that the issue was not one of rectification, but of bringing the register up-to-date, and so the question of the scope of the court's power

to change priorities as a result of ordering rectification under Schedule 4 did not arise. In explaining the disposal of the appeal at paragraphs 64 -65, Kitchen LJ said,

> "64. The consequences of these findings are, in my judgment, as follows. First, the judge fell into error in paras 34 and 35 of his judgment in so far as he found that the alteration to the register sought by NRAM would constitute a rectification of the register within the meaning of paragraph 1 of Schedule 4. Following the rescission of the e-DS1, NRAM was and remains entitled to be re-registered as proprietor of the 2004 charge and for the register to be altered to bring it up to date.
>
> 65. Secondly, the judge's order must be varied in so far as it directs that the register be altered by re-registration of the 2004 charge "as if it had never been removed and with the priority originally held". At the hearing of the appeal, Miss Sandells made clear that NRAM did not seek to sustain this part of the order and would consent to its deletion. In my judgment she was right to do so because the judge was purporting to exercise the power conferred by paragraph 8 of Schedule 4 but, as we have seen, this is limited to cases of rectification. Further and in any event, it is a power to change for the future the priority of any interest affecting the estate and not in some way to backdate the alteration or, in the words of the judge's order, to re-register the charge "as if it had never been removed."

46. Kitchen LJ's remarks in the last sentence of paragraph 65 were clearly obiter, and, with respect, I do not see how they can easily be reconciled with the reasoning in Gold Harp. In my judgment, I should plainly follow the decision in Gold Harp.

47. I therefore reject Mr. Rainey's contention that the court would have no jurisdiction to make consequential orders to give effect to an alteration of the register to put the parties into the position that they would have been in had the unilateral notice been registered against the freehold title in September 2011.

Would it be unjust for the alteration not to be made?

48. I turn to the issue upon which Fancourt J gave permission to appeal. This relates to the application of paragraphs 2 and 3 of Schedule 4, the relevant parts of which provide,

> "2.(1) The court may make an order for alteration of the register for the purpose of—
>
> (a) correcting a mistake,…
>
> 3.(1) This paragraph applies to the power under paragraph 2, so far as relating to rectification.
>
> (2) If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph

> 2 without the proprietor's consent in relation to land in his possession unless—
>
> > (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or
> >
> > (b) it would for any other reason be unjust for the alteration not to be made.
>
> (3) If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so."

49. Mr. Heather QC, for Ms. Rees, submitted that in paragraph 77 and 78 of his judgment to which I have referred above, HHJ Gerald placed an "impermissible gloss" on the test in paragraph 3(2)(b) by deciding that there must be something more than a mere failure to register for it to be unjust for alteration not to be made. Mr. Heather submitted that the test in paragraph 3(2)(b) is simply whether it is unjust not to rectify; and that this involves a weighing of all of the facts and should not start from the position that non-registration alone is not enough.

50. The structure of paragraphs 2 and 3 of Schedule 4 is that where the power exists to alter the register so as prejudicially to affect the title of a registered proprietor, the court must do so unless there are "exceptional circumstances" which justify it not doing so: see paragraph 3(3). But a special level of protection exists for proprietors in possession of land, against whom rectification can only be ordered if one of the requirements in paragraph 3(2) is met.

51. In its 2018 Report on Updating the Land Registration Act 2002 (Law Comm 380), the Law Commission summarised the twin presumptions that underlie these provisions as to the rectification of the register,

> "13.44 First, there is a presumption under paragraph 3(3) that if the register can be rectified it should be rectified. This presumption reflects the general principle that mistakes in the register should be corrected. (It may also reflect a principle that a person who has been deprived of an interest in land through a mistake should be put back in the position he or she would have been in had the mistake not occurred.)
>
> 13.45 The general presumption in favour of rectification is subject to the specific presumption in paragraph 3(2) that rectification is not to be ordered against a proprietor in possession of the relevant land. This second presumption embodies a principle that a person's interest in land should be protected if he or she is in possession of the relevant land."

52. The Law Commission then explained its view of the rationale for the protection of proprietors in possession as follows,

> "13.50 In our view, schedule 4 should give more robust protection to those who are in possession of land than it gives to those who have lost an interest in land through a mistake in the register. The reason is straightforward. If the court or the registrar refuses to rectify the register, a disappointed applicant may seek an indemnity. But someone who is in possession of land is likely to be making use of the land, living on it or relying upon it. If the register is rectified so that they lose their interest in the land, they are more likely to suffer prejudice that cannot adequately be compensated by the payment of an indemnity."

53. The instant case does not, however, fit easily into this analysis and, if anything, is counter-intuitive. The uninitiated might be forgiven for assuming that, as between the parties, it was Ms. Rees, as tenant, who was in possession of Flat K. However, it is clear that this is not so, because section 131 of the 2002 Act provides,

> "(1) For the purposes of this Act, land is in the possession of the proprietor of a registered estate in land if it is physically in his possession, or in that of a person who is entitled to be registered as the proprietor of the registered estate.
>
> (2) In the case of the following relationships, land which is (or is treated as being) in the possession of the second-mentioned person is to be treated for the purposes of subsection (1) as in the possession of the first-mentioned person—
>
> (a) landlord and tenant;"

54. Against that background, it was common ground that the Second Defendant, as registered proprietor of the freehold, is in possession and is entitled to the extra protection given by paragraph 3(2) in relation to a claim for rectification of its title.

55. As such, I consider that HHJ Gerald was plainly correct to point out that Ms. Rees is not presumptively entitled to rectification simply because there has been a mistake in relation to the register (as she would have been if paragraph 3(3) had applied). Ms. Rees is only entitled to rectification if she can discharge the extra burden of showing that the case falls within either sub-paragraph (a) or (b) of paragraph 3(2).

56. Paragraph 3(2)(a) provides several specific examples of circumstances that justify rectification – i.e. that the registered proprietor against whom rectification is to be ordered "has by fraud or lack of proper care caused or substantially contributed to the mistake". In such a case involving misconduct or some fault on the part of the registered proprietor, it is relatively easy to understand why rectification should be ordered notwithstanding that the registered proprietor is in possession.

57. But it is also implicit from paragraph 3(2)(a) that if the registered proprietor in possession has been without fault in relation to the making of the mistake, then something more that the fact that a mistake has been made is required to justify rectification being ordered. That "something more" is to be found in paragraph 3(2)(b) which contains the general provision permitting rectification only if it would "for any other reason be unjust" for the alteration not to be made.

58. In its 2018 Report, the Law Commission commented on this test in the following way,

> "We consider that the requirement in paragraph 3(2)(b) to show that it would be unjust to refuse rectification imposes a more demanding test than the requirement in paragraph 3(3) to show that there are exceptional circumstances. We endorse the following account of the tests in paragraph 3(2) and (3) given by Professor Martin Dixon:
>
> In order to rectify against an innocent proprietor in possession, usually by taking something from them, it must be "unjust not to rectify": not exceptional, but positively unjust not to rectify. So it is a high hurdle in order to do something which would not otherwise be done. The "exceptional circumstance" provision is not only weaker, it operates conversely: it is a reason not to [do] something which would otherwise be done. The two concepts express different policies at different levels of intensity."

I agree with that analysis of the language and structure of Schedule 4.

59. Mr. Heather submitted that a combination of four factors ought to have led HHJ Gerald to conclude that it was unjust not to rectify in favour of Ms. Rees. His four factors were as follows,

i) A "serious and deliberate mistake" by the Land Registry in refusing to register the unilateral notice in 2011.

ii) Actual knowledge on the part of the Second Defendant that the section 42 notice was unprotected.

iii) Substantial detriment to Ms. Rees in the form of a likely £1.8 million increase in the premium for a new lease.

iv) A corresponding windfall to the First Defendant as the new competent landlord, having taken the new concurrent lease for a nil premium and at a nominal rent.

I shall consider the relevance of those factors separately.

Mistake by the Land Registry

60. There is no dispute that the refusal of the Land Registry to accept Ms. Rees' unilateral notice in 2011 was wrong. But although the relevant lawyer at the Land Registry may have got the law wrong, there is no basis for a conclusion that this was anything more than a genuine mistake. But mistake is the basic and essential requirement for a claim for rectification under paragraph 2. As such, in my view nothing is added – and certainly nothing that can be brought into the equation as between Ms. Rees and the Defendants under sub-paragraph 3(2)(b) - by the assertion that the Land Registry's error was "serious and deliberate".

Knowledge

61. In paragraph 78 of his judgment, HHJ Gerald concluded that the Second Defendant had actual knowledge when it acquired the freehold title of the fact that the original section 42 notice had been given but had not been protected by a unilateral notice. That was not disputed, but the evidence was that the Defendants did not know of the reasons for the absence of a unilateral notice until very much later. The Defendants' solicitor's witness statement explained,

> "8. Neither of the Defendants was a party to the correspondence between [Ms. Rees' former solicitors] and the Land Registry. The first sight that the Defendants had of this correspondence was when it was disclosed (upon my request) under cover of a letter … dated 14 December 2017.
>
> …
>
> 24. As I have said, the failure of the application for a unilateral notice was not in any way the fault of the Defendants. It was not known why the section. 42 notice was not protected by registration against the Old Freehold title until after the 2011 correspondence was disclosed."

62. At paragraphs 77-80, HHJ Gerald concluded that these facts could not make it unjust not to rectify. As I have set out above, HHJ Gerald stated,

> "…The very purpose of the system of registration is, to use the word from Wiggins [at paragraph 89], to immunise a subsequent purchaser for a valuable consideration from anything which has not been registered.
>
> …. even if, which it is reasonable to infer, the Second Defendant well understood that a section 42 notice had not been registered against the competent landlord, the fact that it has actual notice, which I am inferring, does not in any way affect the consequences of non-registration as Lady Justice Gloster made clear in Re Wiggins at paragraph 87 lines E-F and has been clear since as long ago as Midland Bank Trust Co Ltd v Green [1981] AC 513."

63. The reference to paragraph 87 of Wiggins was to Gloster LJ's comments,

> "In my judgment, as the new leases were registrable dispositions, and were granted for valuable consideration, the failure to register the initial notice against the superior interests meant that the companies as lessees under the new leases took free from the claim of Mr Wiggins and the other participating tenants. The fact that the companies had actual notice in their different capacities as relevant landlords under the old leases was clearly irrelevant. In the absence of registration a disponee takes free of an

> unregistered interest, irrespective of his actual notice: see Midland Bank Trust Co Ltd v Green [1981] AC 513."

64. Mr. Heather argued that this was too extreme an approach, and that in disregarding the Defendants' knowledge of the section 42 notice and the fact that it had not been protected by a unilateral notice, HHJ Gerald placed excessive reliance on the sanctity of the register. Mr. Heather contended that there was a distinction between the normal operation of the registration system, and a case in which rectification was in issue. He accepted that Wiggins was authority for the proposition that knowledge was irrelevant to the former, but submitted that knowledge could be relevant to the latter. In that respect he relied on the following dictum of Underhill LJ in Gold Harp at paragraph 98,

> "… as all the Law Commission reports acknowledge, the Act was not intended to provide for absolute indefeasibility. Schedule 4 explicitly recognises that the rectification has the potential to prejudice the interests of third parties who have relied in good faith on the register. The carefully structured provisions of paragraphs 2 and 3 (and their equivalents in the case of rectification by the Registrar), with the special protection given to a proprietor in possession, allow a fair balance between the competing interests to be struck in any particular case; and Schedule 8 gives the loser the right to an indemnity."

65. In light of that observation by Underhill LJ, I consider that HHJ Gerald was probably not right to make the unqualified statement in paragraph 77 of his judgment that "the very purpose" of the registration system is to "immunise" a purchaser for valuable consideration from "anything" which has not been registered: rectification clearly provides a limited exception to absolute immunity. I also consider that HHJ Gerald may not have been right if he meant to suggest that a proprietor's knowledge of an unprotected interest, no matter how extensive, could never be relevant to any rectification case.

66. However, I do not need to decide this point because I am clear that it should not make any difference on the facts of the instant case. This case is not, for example, remotely similar to the situation which arose in Gold Harp, in which the trial judge held that the registered proprietor was not independent of the former landlord, who had himself procured the erroneous closure of the original tenants' titles by "sharp practice": see paragraph 26 of Underhill LJ's judgment. In contrast, the Defendants in no way caused or contributed to the mistaken omission of Ms. Rees' unilateral notice from the register, and they knew no more than the simple facts that a section 42 notice existed and had not been protected by a unilateral notice. In particular, the Defendants had no knowledge of the reason for that state of affairs, or that it had resulted from a mistake at the Land Registry.

67. In such a situation, if mere knowledge of the existence of an unprotected interest could expose a prospective purchaser to a material risk of a rectification claim if it was subsequently to turn out that there had been a mistake falling within Schedule 4, then in practical terms, any purchaser would face an unenviable dilemma. They would either have to decide to proceed anyway and run the risk, or seek to negotiate some form of indemnity or price reduction from the vendor (who may have no better idea of why the interest was unprotected), or make inquiries of the third party as to why the interest had

not been protected (which would be unlikely to commend itself commercially to vendor or purchaser). For such reasons, to give such a low level of knowledge any weight in the determination under paragraph 3(2)(b) would introduce risks and complications for transacting parties which would undermine the reliability of the register and the core purpose of the registration system, which is to make conveyancing faster, easier and cheaper: see e.g. the Law Commission's 2018 report at paragraphs 2.1 and 2.2.

68. I therefore consider that on the facts of this case HHJ Gerald was in any event correct not to place any weight on the limited state of the Second Defendant's knowledge when determining whether the requirements of paragraph 3(2)(b) were met.

Detriment and windfall

69. As indicated above, the central argument on which Fancourt J gave permission to appeal was that HHJ Gerald was wrong to discount the additional £1.8 million premium that Ms. Rees would have to pay to acquire a new lease under the second section 42 notice rather than under the first section 42 notice.

70. At paragraph 81 of his judgment, HHJ Gerald pointed out that this was not a case in which Ms. Rees had entirely lost her right to acquire a new lease, because she had served a second section 42 notice which everyone accepted was valid. Although he did not say so in terms, that observation by HHJ Gerald appears to me to have been alluding to the observation by the Law Commission in paragraph 13.50 of its 2018 Report to which I have referred in paragraph 52 above. In that paragraph, the Law Commission suggested that someone who is actually in possession of land may be more deserving of "robust" protection, because if they lose their interest in land as a result of rectification, they are less likely to be able to be adequately compensated in money under the provisions in Schedule 8 of the 2002 Act. These considerations cannot apply to Ms. Rees, who is still able to acquire a new lease and remain *in situ*, and whose loss is therefore easily quantifiable in money terms.

71. At paragraph 82, HHJ Gerald also indicated that in what he described as "the normal situation", rights which are lost because they are not protected by registration of a notice usually have a value, which could be very large in some cases. He held that this possibility of loss was simply a function of the legislation, and that if Parliament had intended that there should be some value-based criteria for relieving the consequences of non-registration by rectification, paragraph 3 would have been drafted differently. In my judgment HHJ Gerald was entirely correct in both these observations. It is inherent in the land registration system that even in ordinary conveyancing transactions, interests of some value can be lost if they are not protected by notice; and paragraph 3 contains no suggestion of how value might be taken into account in any assessment of whether rectification should be granted.

72. Moreover, on the facts of this case, the absolute amount of Ms. Rees's loss caused by having to pay an increased premium for a new lease if rectification is not granted, will be mirrored by the amount that the Defendants will not receive if rectification is granted and Ms. Rees is able to acquire a new lease for a correspondingly lower premium. The absolute amount in issue by way of premium either way is therefore neutral.

73. As such I find it impossible to see how the size of this amount can be taken into account for the purposes of paragraph 3(2)(b). That can only be done if there is some other

frame of reference which does not depend simply on the monetary amounts involved. One such frame of reference which does appear from the cases is whether, if rectification was refused, the party against whom rectification is sought would retain a "windfall", and the applicant would have to pay an additional amount in comparison to that for which they had both bargained.

74. In that regard, HHJ Gerald referred, in paragraphs 83 and 84 of his judgment, to the decision of Mann J in Sainsbury's Supermarkets Ltd v Olympia Homes Ltd [2016] 1 P&CR 17. The facts of the case are complex, but in very simple terms it concerned a dispute as to whether Olympia, as the registered proprietor of the legal title to what was referred to as "the gas board site", was bound by an earlier option which required a previous owner of the land to make a small parcel of the land available to Sainsbury's to enable it to build a roundabout providing access to its new store in Matlock, Derbyshire. After legal title to the gas board site had been registered in the name of Olympia free from the option, Sainsbury's sought rectification either to delete that title altogether or to ensure that the title was subject to the option.

75. Mann J held, as a matter of interpretation of the various transactions, that Olympia had in fact merely acquired an equitable interest in the land and that it was therefore subject to the option which was an equitable interest which was earlier in time. The judge thus had to consider whether, and if so, how to order rectification of the register. He dismissed a submission that Olympia had caused or contributed to the mistake on the register, but decided that it would be unjust not to rectify the register against it under paragraph 3(2)(b).

76. The core of Mann J's reasoning appears from the following passage from his judgment at paragraph 95,

> "… It is quite clear from the evidence that at all material times, both before and after completion, Olympia believed that it was going to have to make land available for the roundabout without payment … The whole basis on which Olympia acquired the gas board site was that land would be taken from it for the purposes of the roundabout. Were the register not to be rectified then it would have acquired a windfall which would be potentially very significant indeed. The scope of that windfall in financial terms was not debated before me—its size might depend on whether compulsory purchase powers could and would be exercised as against it, or whether Olympia would be in a position to demand a ransom payment from Sainsbury's, but on any footing Olympia would be in a position which no-one ever contemplated they would be in, and which (as a matter of conveyancing) it ought not to have been in … I am quite satisfied that it would be unjust not to rectify the register so as to register the option."

77. HHJ Gerald summarised that authority, correctly in my view, as showing that rectification might be granted on the basis that it would be unjust not to do so, where the mistake had resulted in the registered proprietor getting a potential windfall by being able to demand a ransom payment from Sainsbury's which was never part of the bargain between the parties. The judge held, however, that this could not be said to have taken place in the instant case, because the issue of whether Ms. Rees was entitled to a new

lease, and if so, at what price, had formed no part of the determination of the amount payable by the Second Defendant to HDWE for the freehold. The judge pointed out that this was because the value paid by the Second Defendant to HDWE for the enfranchisement had been determined as at the date of service of the section 13 notice, and hence the Second Defendant had not got the freehold of the building at a discount to reflect the existence of a section 42 notice in respect of Flat K.

78. I cannot fault that analysis by the judge. Mr. Rainey also pointed out that the enfranchisement process and Ms. Rees' application for a new lease were two separate procedures, and even when the Second Defendant had acquired the freehold at the conclusion of the enfranchisement process, it did so in the expectation that it would take free of the unprotected section 42 notice.

79. Accordingly, I do not consider that the mere fact that Ms. Rees may have to pay £1.8 million or so more to acquire a new lease makes it unjust not to order rectification of the register.

80. In passing, and for completeness, I should mention two other related factors which HHJ Gerald addressed only very briefly, but which Mr. Rainey submitted bolstered his argument why rectification should be refused.

81. The first was the potential availability of indemnification or compensation in relation to the mistake by the Land Registry. The second is the point that Ms. Rees did not challenge the Land Registry's rejection of her unilateral notice in 2011 by further correspondence or ultimately by judicial review proceedings.

82. Without going into any detail, I regard those points as essentially neutral. If rectification is not granted, it seems likely that Ms. Rees would have a potential claim for an indemnity under Schedule 8 to the 2002 Act against the Land Registry, coupled with a potential claim against her former solicitors (DKLM) which might make good any reduction in the indemnity if it were held that the solicitors had not exercised proper care (as to which I express no view). Conversely, if rectification is granted, it is reasonable to suppose that the Defendants would have claims against the Land Registry for an indemnity under Schedule 8.

83. On the limited materials before me, and without attempting to conduct what would be a necessarily impressionistic assessment of two other proceedings (the indemnity claim and an action in solicitors' negligence) I cannot form any views as to the likely outcome of either process. In particular, I cannot judge whether Ms. Rees would be likely to end up being less fully indemnified or compensated for her loss than the Defendants.

84. Since ultimately the burden is on Ms. Rees to show that it would be unjust not to rectify, the fact that I cannot reach a conclusion on this point simply means that I cannot take these matters into account in her favour, and I therefore do not regard HHJ Gerald as having erred in not doing so either.

Conclusion

85. For these reasons, which in essence track those given by HHJ Gerald, I dismiss the appeal.