

## SUMMARY

This article considers the meaning of 'mistake' in the rectification clause of the Land Registration Act 2002. It examines specifically whether omissions may ever constitute a mistake. It proposes a structure for categorising omissions and presents arguments for whether or not to recognise each category as a mistake.

## CORRECTION OF THE REGISTER AND MISTAKE BY OMISSION

**Simon Cooper\***

### 1. Introduction

The English land registration system allows the register to be corrected if it turns out that an entry was wrongly registered or deregistered, while ensuring indemnity will be available for those whose property rights are prejudiced by doing so. These two rules - correction and indemnity - determine the extent to which the state protects and guarantees property rights. It is therefore crucial to understand the scope of their availability. Both depend on the legal criterion of 'mistake.'<sup>1</sup> Despite its fundamental importance in drawing the line between the availability and non-availability of indemnity, as well as the power to correct the register, 'mistake' is not defined for the purposes of correction in the Land Registration Act 2002.

From the way in which case law and statutory reforms have developed, it is possible to build up a principled picture of how some aspects of mistake are to be interpreted and applied in certain contexts. This has already been undertaken in relation to circumstances where there has been a positive act in changing the register - in other words, mistake by commission.<sup>2</sup> Here, the existence of a mistake should be determined by whether the actual change in the register was justified by a valid authorisation or mandate to make that change.

In contrast, there has not yet been any examination of the distinct category of mistake by omission. This would occur when the register has not been changed at all, or not changed to a sufficient extent, when it should have been in order to fully record a right. Mistake by omission brings unique complexities. First is the issue whether omissions should be recognised at all or left to be remedied through indemnity. Second is the issue of the approach to defining omission. Whereas mistake by commission can readily be determined by asking whether the register change in question was justified by a valid mandate for the change, there is no equivalent for

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\* Professor of Law, Aston Law School.

<sup>1</sup> Land Registration Act 2002 (LRA 2002), Sch. 4, paras.2(1)(a) and 5(a) (correction); LRA 2002, Sch. 8, para.1(1)(a) (indemnity).

<sup>2</sup> S. Cooper, 'Regulating Fallibility in Registered Land Titles' (2013) 72 C.L.J. 341. That paper specifically left to one side the issue of mistake by omission: p.366.

mistake by omission. It would therefore be necessary to accept the challenge of crafting a scheme which identifies whether mistake by omission should be restricted to occasions where somebody was under a pre-existing responsibility to act, and if so, which participants, how their duties might be determined, and what standard of conduct should be required.

Mistake by omission has not been accepted as a general basis for correction in Torrens systems.<sup>3</sup> Its acceptance under the LRA 2002 would make the English system a world leader. The editors of Megarry & Wade assert that at least some mistakes by omission are already included within correction and indemnity,<sup>4</sup> but nothing substantial has been written to justify or contest that approach, nor to elaborate on the scope of mistake which it implies. This article argues that there is nothing to restrict mistake to commissions and puts forward a model for the possible recognition of mistake by omission. It proposes a structure for categorising various types of omission and considers the extent to which various failures to change the register should be treated as ‘mistake’ so as to be capable of redress through correction. In doing so, it explores the division of responsibilities for making register entries amongst the participants in the registration processes and reflects on a question of fundamental importance for any registration system: what are the roles of rightholders, the registry and others in relation to the maintenance of the register?

## 2. The Approach to Omissions

### A concept of omission

This article is concerned with understanding the circumstances, if any, in which correction proceedings can be used to obtain relief due to a failure of the land registry or other person to protect a right through registration. The purpose is to look at the potential roles of the land registry and others in making or procuring a change to the register and how this might relate to the idea of mistake.

The concept of omission cannot simply be equated to the absence of a right from the register. It is certainly possible that a right may be absent from the register due to an omission to change the register, but equally it may be absent due to some positive action, such as an unauthorised deletion of a valid entry. If the land registry changes the register by making a deletion without authorisation, then there is undoubtedly a mistake<sup>5</sup> but it is a mistake by commission. The more challenging question is the extent of any responsibility on the part of the land registry or others to

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<sup>3</sup> Modern schemes elsewhere would generally restrict register correction to registered rightholders who lose through mistake by commission, leaving mistakes by omission to indemnity, if available: T.W. Mapp, *Torrens' Elusive Title* (Edmonton 1978), pp.64-67, 162-170 and Joint Land Titles Committee, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (Edmonton 1990), pp.23-26; Land Law Review Committee of the Northern Territory, *Guarantee of Torrens Title in the Northern Territory* (Darwin 1990) pp. 3-4.

<sup>4</sup> C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property* 8th ed. (Sweet & Maxwell, 2012), para.7-133. The inclusion of mistake by omission signified a departure from the previous edition which was current when the first draft of this article was prepared.

<sup>5</sup> It follows that if the registered rightholder is warned by the registry that his entry will be deleted unless he objects to a proposed change, then the ensuing deletion would be (if unauthorised) a mistake by commission. See e.g. *Baxter v. Mannion* [2011] EWCA Civ 120, *Johnson v. Shaw* [2003] EWCA Civ 894, *Sainsbury's Supermarkets Ltd v. Olympia Homes Ltd* [2006] 1 P. & C.R. 17. These were unauthorised deletions and not mistakes by omission.

take action to protect a rightholder who has not yet got onto the register (or not to the full extent of his right), and what should trigger that responsibility. That is what is answered by investigating the possibility of mistake by omission.

It follows that the crucial concept for this article is not the absence of a right from the register - which could be due to either changing or failing to change the register - but rather the omission to act in a way which ensures that a right is fully protected on the register. That focusses attention on what triggers the responsibility of the land registry and others to make or procure a change to the register. The concept of omission as used in this article must be designed to reflect that, and so it will be restricted to the failure to make or procure a change in the register that reflects a rightholder's entitlement.

### **The legislative position**

In relation to correction, the Land Registration Act 2002 declares, 'The court may make an order for alteration of the register for the purpose of- (a) correcting a mistake...' <sup>6</sup> There is no statutory definition of mistake in this context. From that text alone it appears not to preclude mistakes by omission. The underlying law reform papers preceding the Act <sup>7</sup> do not resolve clearly the question of whether mistake generally extends to omissions in the sense described above and there are few other aids to interpretation.

There is, however, another reference to mistake in relation to indemnity. It is available to a person who 'suffers loss by reason of- (a) rectification of the register, [or] (b) a mistake whose correction would involve rectification of the register...' <sup>8</sup> The 'rectification' mentioned here is a subset of correction which arises when correction prejudicially affects the title of a proprietor. <sup>9</sup> In the indemnity context, mistake does have the benefit of an interpretation section: 'references to mistake in something include anything mistakenly omitted from it...' <sup>10</sup> This section applies to the interpretation of mistake as used in the indemnity provision but there is no equivalent for the correction provision. Its impact on mistake as used in the correction power is inconclusive. On the one hand, the explicit mention of omissions in the indemnity clause could be taken to imply that they are not to be included in the correction clause. On the other hand, it would be a significant step for the indemnity grounds to diverge from the correction grounds; there was no suggestion of any such divergence in the reform papers where it might have been expected had it truly represented the reformers' intention.

As a further possible aid to interpretation of mistake, it should be noted that in the prior legislation replaced by the 2002 Act, the correction power explicitly admitted omissions. <sup>11</sup> To interpret the 2002 Act as departing from the old law on such a significant point without any mention in the reform documents would be surprising. That would be especially so in the light of the general comment that the alteration provisions were recast in the 2002 Act 'to reflect the current practice in relation to

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<sup>6</sup> LRA 2002, Sch. 4, para.2(1)(a). A similar power is conferred on the registrar by para.5(a).

<sup>7</sup> Law Commission & HM Land Registry, *Land Registration for the Twenty-First Century Law Com. 254* (London 1998); Law Commission & HM Land Registry, *Land Registration for the Twenty-First Century Law Com. 271* (London 2001).

<sup>8</sup> LRA 2002, Sch. 8, para.1(1).

<sup>9</sup> LRA 2002, Sch. 4, para.1.

<sup>10</sup> LRA 2002, Sch. 8, para.11(1).

<sup>11</sup> Land Registration Act 1925, s.82(1)(b) and (h).

rectification and amendment of the register.<sup>12</sup> This might encourage the view that mistake by omission has been retained, although the inference is far from compelling.

Taken together, the interpretative aids do not unequivocally point to the rejection of mistake by omission. Not being summarily ruled out by the legislation, the remainder of this article will explore how mistake by omission could be given shape.

### 3. Omissions within the Legislative Structure

#### Omission and the heads of alteration

Given the limited value of the aids to interpreting the legislation, this section will examine the desirability on policy grounds of recognising mistake by omission. It is crucial to divide this into two phases. The first phase deals with an omission which has not yet been followed by a purchaser for value taking a transfer of the registered estate; the second phase deals with an omission which has been followed by precisely such a transfer.

To illustrate the policy reasoning in the first phase, imagine A has a right enforceable against the registered proprietor, B. A submits to the land registry the documentation for the entry of a notice. The bundle is lost by the registry. That alone is not a good reason to prohibit A from ever getting entered on the register. A should be permitted to resubmit an application to register, or, if for some reason he is unable to obtain duplicate documentation, then he should be eligible to obtain his register entry through the provisions for altering the register. Without such an opportunity, A's entitlement would be left unprotected. B, furthermore, is already bound by the right and so has no justification for resisting the entry of A's right on the register.<sup>13</sup> The alteration jurisdiction should therefore be available and this could be achieved by interpreting the correction power to recognise mistake by omission.

Alteration for the purpose of correcting a mistake, however, is not the only basis for altering the register. It is also permissible to carry out alteration for the purpose of bringing the register up to date.<sup>14</sup> If omissions can be placed under this rubric - the updating head of alteration - then it seems that it is not necessary for them to be included within the definition of mistake under the correction head of alteration. The rules governing correction and updating are essentially the same in the first phase before the land has been transferred to a purchaser for value. The primary difference between the heads is that correction is restricted when it would prejudicially affect the title of the registered proprietor; but in the first stage when the land remains with proprietor B who is already bound by A's right, it is unlikely that the entry of A's right would be regarded as causing prejudice to his title,<sup>15</sup> and so this difference between correction and updating may be disregarded for present purposes. The

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<sup>12</sup> Law Commission & HM Land Registry, *Land Registration for the Twenty-First Century* Law Com. 271 (London 2001), para. 10.6.

<sup>13</sup> See S. Cooper, 'Registered Title and the Assurance of Reliability' in W. Barr (ed.), *Modern Studies in Property Law* vol. 8 (Oxford: Hart, 2015) ch. 17, at p.325 which rejects the counter-argument that B might have forgotten of A's right and relied on the clear register before expending money on the land. The only other objection to entry appears to be the registrar's administrative convenience: Law Commission, *Third Report on Land Registration* Law Com. 158 (London 1987), para. 3.18, footnote 42.

<sup>14</sup> LRA 2002, Sch 4, para. 2(1)(b).

<sup>15</sup> S. Cooper, 'Registered Title and the Assurance of Reliability' in W. Barr (ed.), *Modern Studies in Property Law* vol. 8 (Oxford: Hart, 2015), pp.325-6.

conclusion is that, during the first phase, all omissions (as that concept was defined above) could be managed perfectly adequately through the updating head of alteration, and so could be excluded altogether from mistake.

### **Intervention of a third party**

The difficulty with reliance on the updating head to fix omissions would come in the second phase when there has been a transfer of the registered estate to a purchaser for value. Imagine A has a right enforceable against the registered proprietor, B. A submits to the land registry the documentation for the entry of a notice. The bundle is lost by the registry. B sells the land to C who becomes new proprietor. C is protected by the priority rule,<sup>16</sup> although it has been made clear in the case law that the rule does not make C immune from susceptibility to the correction of a pre-existing mistake.<sup>17</sup> At this point, the choice of the head of alteration becomes important since the correcting power and the updating power part company: the correcting power is available against C whereas the updating power is not.<sup>18</sup> This is therefore the crucial test bed for mistake by omission. If it is felt desirable to pursue a policy of potentially allowing omissions to be reinstated as against purchasers, then it would be necessary to include them within the ambit of correctable mistakes. Conversely, if it is felt desirable to shield purchasers from omissions, then it would be necessary to interpret mistake as excluding them and leave them to reside solely in the updating power.

### **Third party impact: policy arguments**

I put forward three arguments to support the position that rightholders suffering loss by omission should not be relegated to indemnity alone but, even as against a purchaser, should be able to claim alteration of the register (necessarily under the mistake head) to redress the omission.

First, the priority rule which protects the purchaser lacks sophistication and subtlety. It relies on a strictly limited number of prescribed conditions: it depends on an entry being absent from the register at the time of a purchaser's acquisition, and on the purchaser paying value and becoming registered under a disposition of the registered estate.<sup>19</sup> All other elements of the case are ignored. Whilst this brings simplicity and convenience to proceedings, it does not allow the nuanced adjudication of claims which occurs in correction proceedings.<sup>20</sup> Most importantly, it does not permit consideration of the reason for the absence from the register. If a rogue employee at the registry maliciously refrained from processing the rightholder's application to enter a notice, enabling a later transferee for value to leapfrog the rightholder's priority, then it would be too shocking if this were to block the rightholder from all proprietary relief by way of correction.

There is a constitutional issue here. Legal rules which lead to the destruction of property should be grounded in a sufficiently compelling reason. This particular

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<sup>16</sup> LRA 2002, s.29(1).

<sup>17</sup> *Gold Harp Properties Ltd v Macleod* [2014] EWCA Civ 1084; *Knights Construction (March) Limited v Roberto Mac Limited* (2011) REF/2009/1459).

<sup>18</sup> Its scope is not entirely clear but there are hints that 'updating' is constrained by priority rules: Law Commission & HM Land Registry, *Land Registration for the Twenty-First Century Law Com.* 271 (London 2001), para. 10.7(2).

<sup>19</sup> LRA 2002, s.29(1).

<sup>20</sup> LRA 2002, Sch. 4, para.3(2) and (3).

illustration of maladministration, it is submitted, fails that test. The legal rules ought to allow more attention to be paid to the *cause* of the loss of priority. That would be achieved by interpreting mistake to include omissions. The court would then be required to order correction unless there were other exceptional circumstances;<sup>21</sup> or, even if the transferee were in possession, which confers a greater degree of statutory protection,<sup>22</sup> the court might nevertheless regard the rogue employee's conduct as an exceptional circumstance sufficient to enable correction.<sup>23</sup> Unlike the priority rule, correction proceedings are able to take account of the underlying cause for the absence of a protective entry.

Secondly, it has already been established in the case law that remote purchasers can be affected by the correction power in analogous situations. Where a rightholder has been the victim of an 'unauthorised deletion' from the register, a subsequent transferee for value will find his title liable to correction even though he had relied on a clear register at the time of acquisition. The party losing out in such a case will, of course, be able to recover indemnity. This sets the balance between rightholders whose rights are absent from the register and purchasers who relied on clear registers. To recognise mistakes by omission as having the same effect on purchasers would simply bring them into line with unauthorised deletions and would not impose a qualitatively different type of risk for purchasers.

Thirdly, there is an counter-argument to head off. It may be objected that providing a correction power against purchasers for the purpose of rescuing the rightholder from the effects of his omission might lead to a relaxing of efforts by rightholders to secure entry on the register. That objection is rejected on the ground that there are already incentives to ensure that rightholders make appropriate efforts to secure entry of their rights. In particular, penalties are incurred if the rightholder is guilty of 'lack of proper care', involving a reduction of indemnity<sup>24</sup> and a potential denial of correction.<sup>25</sup>

Overall, it is submitted that the mere fact that a purchaser has intervened is not in itself a sufficient reason in all cases to preclude the correction of omissions. Following the arguments made above about the reach of the different heads of alteration and their ability to affect purchasers, it is proposed that omissions should be put on the same footing as unauthorised deletion and indeed all other mistakes by commission. While there is nothing in the legislative text to indicate that omissions cannot fall within the updating head of alteration, it is submitted that locating them in the correction head of alteration would achieve the desirable policy effects noted above and would avoid drawing an unjustifiable distinction between failing to register a right and wrongly deleting it.

### **Fleshing Out Mistake by Omission**

Although it is not a foregone conclusion that the courts will recognise mistake by omission in the sense described above, there is enough of a case to justify a fuller

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<sup>21</sup> For court proceedings: LRA 2002, Sch. 4, para.3(3) (rectification) or Land Registration Rules 2003, r.126 (correction). For tribunal proceedings: LRA 2002, Sch. 4, para. 6(3) (rectification), also adopted by *Derbyshire County Council v Fallon* [2007] EWHC 1326 at [28] for correction.

<sup>22</sup> LRA 2002, Sch. 4, para.3(2) (court) or LRA 2002, Sch. 4, para.6(2) (tribunal).

<sup>23</sup> See the references in footnote 21.

<sup>24</sup> LRA 2002, Sch. 8, para 5(2).

<sup>25</sup> LRA 2002, Sch. 4, para 3(2)(a).

investigation into how omissions jurisprudence could and should be developed for the purpose of defining mistake under the correction head of alteration.

The next section will demonstrate how the interpretation of mistake could be regulated in a manner that achieves a balanced resolution of disputes concerning omissions. It will proceed on the basis that the availability of the correction power should harmonise with the roles of the various participants involved in the process of making entries in the register. There is no template of existing standards that can be borrowed for this purpose and so the process has to build on ideal propositions concerning the working of the registration system. The following sections identify four generic roles which encompass many of the omissions likely to be found in registration practice. Taken in turn, they cover: the responsibility of a rightholder to lodge an application for registration; the responsibility of the registry to process applications and exercise its powers properly; the responsibility of other public bodies to communicate with the registry; and the responsibility of the registry for compiling the first register of title.

#### **4. Registration Participants and their Responsibilities for Omissions**

##### **A. Rightholder's Failure to Seek Registration**

This first distinct category for mistake by omission comprises the rightholder's own neglect to lodge an application for registration. It must be acknowledged at the outset that this is the least compelling reason for allowing correction.

Although the omission here is not an omission by the land registry, that in itself should not be an impediment to finding mistake - if we consider mistake by commission, there is no doubt that an unauthorised register change by an outside hacker would be correctable just as much as an unauthorised change by the registry, demonstrating that the registry need not have any involvement to find a mistake.

While there are no compelling doctrinal arguments pointing towards or away from the recognition of mistake by omission generally, there are arguments against recognising mistake by a rightholder's omission to lodge an application to the registry. The first argument derives from the legislative intent as evidenced in the preparatory documents preceding the Land Registration Act 2002. The Law Commission did not set out in explicit terms its view on whether to withhold rectification from rightholders who failed to lodge for registration, but alluded to the issue in this way:

‘Rectification is confined to cases where a mistake is to be corrected. This will not include every case which is at present treated as rectification. It will not therefore cover cases where the register is altered to give effect to rights that have been acquired over the land since it was registered, or where the register was originally correct, but subsequent events have made it incorrect.’<sup>26</sup>

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<sup>26</sup> Law Commission & HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com. No.271), para. 10.7(1). Previous reform proposals had confronted the question directly: see Law Commission *Land Registration: Third Paper* (Law Com. W.P. 45) paras. 73 and 87; Law Commission *Third Report on Land Registration* (1987, Law Com. No.158), paras. 3.6 and 3.9; R.J. Smith ‘Land Registration Reform’ [1987] Conv. 334, 342.

Reading the third sentence of the quoted extract as if it ran on directly from the premise in the first sentence, it appears that the reformers intended that the entry of new and hitherto unregistered rights arising after first registration would be excluded from rectification. It suggests that the neglect to lodge them for entry would not be a cause for rectification and thus would fall outside the definition of mistake. The quoted extract is a slender prop for such a weighty conclusion, but it is reinforced by another comment of the Law Commission relating to *Hounslow L.B.C. v. Hare*<sup>27</sup>, in which there had been an attempt to rectify the register against a buyer where the rightholder had failed to lodge the proper form of restriction on the seller's power to dispose. The report observed, 'Fortunately, the attempt was unsuccessful'<sup>28</sup>, from which it can be inferred that the reformers would not have supported the view that failure to lodge constituted a mistake for the purpose of the recast rectification clause in the LRA 2002.

There is a second argument from policy which stands against recognising the rightholder's basic failure to lodge as a mistake. Rightholders should not be able plead their own failure to lodge as the very reason for rectifying against a purchaser. It would invite an unending parade of rightholders seeking to pass the losses from their own personal failures onto subsequent purchasers. Lodging an application for registration is the archetype of the simple, cheap and speedy step that ought not to be discouraged through the provision of a safety net in the form of rectification or indemnity to an irresponsible rightholder. This can be put on the narrow ground that it is cheaper for society to insist on the rightholder incurring the low cost of lodging in order to avoid the higher cost of resolving disputes through correction proceedings after the event; or on the wider ground that the rightholder ought not selfishly save the insubstantial cost of lodging when to do so could predictably inflict substantial loss on a later purchaser.

Those two arguments suggest that the rightholder's own neglect to lodge a right for registration should not be capable of relief through the correction power. They imply that a mistake by omission should be recognised only where the rightholder's application for protection on the register is thwarted through the agency of another person or institution. They imply that mistake by omission should be restricted to failures by other parties to make or procure a register entry that would protect the rightholder.

Despite the arguments which would exclude a mere failure to lodge from the definition of mistake, a couple of cases seem to stand in the way of that interpretation. The High Court took an opposing view in *Sainsbury's Supermarkets Ltd v. Olympia Homes Ltd*.<sup>29</sup> Sainsbury had taken an option over unregistered land, but failed to protect it as a land charge, and then Olympia took an equitable fee simple<sup>30</sup> and secured its entry as first registered proprietor. Two mistakes were conceded, 'namely registering Olympia as the proprietor of a legal estate, and second registering Olympia as taking free from Sainsbury's equity [the option to purchase]'.<sup>31</sup> The concession that the omission of Sainsbury's option was a mistake came with the court's approval: '...had Mr Gaunt [counsel for Olympia] not made the concession that he did then I

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<sup>27</sup> *Hounslow London Borough Council v. Hare* (1990) 24 H.L.R. 9.

<sup>28</sup> Law Com. No.271, para. 4.3, note 7.

<sup>29</sup> *Sainsbury's Supermarkets Ltd v. Olympia Homes Ltd* [2006] 1 P. & C.R. 17. See M.J. Dixon 'Proprietary Rights and Rectifying the Effect of Non-Registration' [2005] Conv. 447, 455.

<sup>30</sup> Olympia took its interest under a sale made by a charging order creditor holding a vesting order which conferred the power to sell only the equitable interest.

<sup>31</sup> Para.84, *per* Mann J.



would nonetheless still have found that the Land Registry made the mistakes that he conceded.<sup>32</sup> Rectification was ordered on the strength of these mistakes. The case appears to approve the proposition that rectification can be used to remedy a rightholder's neglect to seek entry on the register (albeit under the Land Charges scheme prior to first registration<sup>33</sup>).

A similar point can be made of *Cygnnet Healthcare Ltd v. Pineriver Consultancy Ltd*<sup>34</sup> which was treated by the court as involving a mistake for the purpose of rectification, although it may be regarded as a failure to lodge. Cygnnet and Pineriver entered a contract in which Pineriver promised to create a restrictive covenant over neighbouring land. In fact that land had come to be acquired not by Pineriver, as all parties had originally anticipated, but by Greenswan. It was conceded, however, that Greenswan and Pineriver were under the complete control of the same entrepreneur, that there was 'no meaningful distinction between them'<sup>35</sup>, and that piercing the corporate veil in this way allowed Greenswan to be treated as if it had itself undertaken the obligation to give the covenant.<sup>36</sup> When Cygnnet came to seek rectification so as to enter the restrictive covenant against Greenswan's registered title, the claim was allowed and the court ordered the insertion of the covenant. By basing the claim on rectification, and therefore the correction of a mistake, the judgment appears to be acknowledging that a mistake could be constituted by Cygnnet's failure to lodge its right for entry on the register.

It is submitted that the judgment achieved the right outcome but for the wrong reason. Because of the veil piercing, Greenswan was treated as if it were the original contracting party and bound by Cygnnet's right. Therefore, the appropriate ground for alteration should have been under the updating head to enter the interest which bound Greenswan as registered proprietor.<sup>37</sup> If this is attributed as the proper basis for the alteration of the register, it becomes possible to disregard its controversial implication that a mistake arises from a failure to lodge for registration.

If the concession in *Sainsbury* is not followed, and *Cygnnet* is re-categorised as an updating alteration, then the way is clear to argue that mistake should never follow from a rightholder's own failure to lodge an application for registration. But the problem with that attractive formula is that 'lodging' is not a term of art and if hypothetical cases on the margins are examined closely it can be seen that there is trouble in drawing the line between lodging and not lodging. One typical source of contention would occur when a rightholder lodges an imperfect application. The problem of defining a threshold for lodging is also exacerbated by the different methods by which a request for protection might be communicated to the registry, the nature of the change in the register, and what amounts to a sufficient entry.<sup>38</sup>

Because of the imprecision in the idea of lodging, it could be argued that mistake should encompass all omissions from whatever cause, in order to avoid the problem of defining the cut-off point for what amounts to lodging; a rightholder who failed to make any efforts to communicate with the registry would then fall within mistake but be denied correction under the rubric of exceptional circumstances. But

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<sup>32</sup> Para.84, *per* Mann J.

<sup>33</sup> Land Charges Act 1972, s.2(4)(iv).

<sup>34</sup> *Cygnnet Healthcare Ltd v. Pineriver Consultancy Ltd* [2009] EWHC 1318.

<sup>35</sup> *Cygnnet Healthcare Ltd v. Pineriver Consultancy Ltd* [2009] EWHC 1318, para.49 *per* Proudman J.

<sup>36</sup> *Ibid.* at para.50.

<sup>37</sup> LRA 2002, Sch. 4, para.2(1)(b).

<sup>38</sup> D. J. Hayton, *Registered Land* 3rd ed. (1981, Sweet & Maxwell) p.168. See *Horrill v. Cooper* (2000) 80 P. & C.R. D16; *Bank of Scotland Plc v Joseph* [2014] 1 P. & C.R. 18.

there is a disadvantage to that approach. It would require a special interpretation of mistake which would not fit well with the plain meaning of the word since it would require mistake to include a rightholder's conscious, tactical decision not to seek registration. To avoid this abuse of language and to maintain the integrity of mistake, the concept should be invoked only when the rightholder manifests his will to avoid the risk of postponement. That is achieved by requiring the rightholder to initiate communication of the right to the registry.

It is possible to conceive a satisfactory test for what constitutes 'lodging' along any one of a number of bright-line divisions depending on how much or how little is to be expected of the rightholder in order to gain the necessary traction in procuring an entry. For example, at one extreme, it could require the rightholder to communicate, however informally, any manner of information indicating the existence of a right, provided he supplies an address to which the registry can send further inquiries; or perhaps only when the registry confirms its acceptance, whether conditionally or unconditionally; or it could require a little more, such as the submission of an application which is not 'substantially defective' but good enough for the registry to hold and suspend pending requisitions. At the other extreme, it could require the submission of an application fully 'in order'. Any of these options would create a predictable, rigid rule that would give effect to the rightholder's basic responsibility to lodge.

It is submitted that the best solution is to align the fulfilment of the rightholder's responsibility with the onset of the land registry's responsibility. This would ensure that the rightholder may only claim to have lodged his request for registration by performing acts which suffice to impose a duty on the registry to process the request. Until that threshold is reached, the rightholder could do more and should not be regarded as having discharged his responsibility, and therefore should be denied the opportunity to fall back on a correction claim. To give two examples: the rightholder's submission of an 'in order' application for registration would put the registry under a duty to process it;<sup>39</sup> and the rightholder's communication of a potential fraud might be sufficient to put the registry under a duty in the sense that there might be no lawful basis for refusing to exercise the power to enter a registrar's restriction.<sup>40</sup>

Once such dealings with the registry have begun, the rightholder's subsequent responsibilities can only be understood in the light of the dialogue with the registry and the extent to which the registry should be relied upon to take over responsibility from the applicant. That will be developed in the next section on the registry's responsibility.

## **B. Registry's Failure to Comply with Duties or Restrictions on Powers**

The classic case of the rightholder's simple failure to lodge could all too easily be taken as the paradigm of omission by mistake and used for the proposition that all omissions should cease to be correctable once a purchaser has relied on the clear register. But other categories of omission can be envisaged which are entirely different. One such category occurs where the registry has been informed of a right but has improperly neglected to protect it. Whether this should permit correction should depend on the scope of the registry's responsibility and its interaction with the

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<sup>39</sup> Land Registration Rules 2003, r.16.

<sup>40</sup> LRA 2002, s.42(1).

rightholder's own responsibility. Two alternative legal responses might be considered: either keep the rightholder accountable for the omission until he finally ensures that an entry has been made, or absolve the rightholder at some earlier stage provided that he has at least opened communications with the land registry and perhaps also taken some further steps to pursue the making of an entry. Those two options will be examined under the next subheadings.

(i) Rightholder having responsibility to ensure entry is successfully achieved?

The first model for the allocation of functions between rightholder and the registry would see the rightholder as taking overall responsibility for procuring the ultimate entry of the right on the register. It was argued above that it is already the rightholder's responsibility to lodge the application with the registry, and it would be only an incremental step to add that the rightholder should also take some responsibility to monitor its implementation.

Taken to its furthest extent, this line of argument could suggest that the prudent applicant not only lodge the application for the protective entry, but should also answer any requisitions,<sup>41</sup> ignore any incorrect or incomplete registry advice suggesting that entry is not needed,<sup>42</sup> see off any objections before the tribunal,<sup>43</sup> exhaust the appeal process, safeguard the right in the meantime with a protective entry for the pending land action,<sup>44</sup> and ultimately procure a confirmation of actual entry on the register.<sup>45</sup> Those steps could be regarded as integral components of the rightholder's process for procuring a register entry, so that the applicant who failed to pursue the application relentlessly to a successful entry could then be censured as if he had not lodged at all - in other words, he could not complain of any mistake.

That proposal has the advantage of clarity and simplicity. It imposes a significant burden on the rightholder, but a requirement to achieve actual entry at least identifies a convenient point for a transition in the rightholder's status: registration is a outwardly visible event, the time at which it occurs is precisely identifiable, and it has importance as the moment at which the rightholder is informed that his right needs no further perfecting measures. The moment of actual entry is suitable as a point for transition also because it has other legal significance: any objection before registration is decided according to the validity of the application and the proper exercise of any registry powers, whereas any challenge made after entry is regulated according to the alteration powers which introduce distinct factors.<sup>46</sup>

The obvious drawback of insisting that the rightholder secure actual entry on the register lies in the unfairness of penalising the rightholder for the fault of the registry in failing to process the original submission. Whether or not indemnity would be available in those circumstances, it is submitted that it would be unacceptable to exclude from the rectification power any omissions which were attributable to the registry's failure to process the application. The registry is charged with the legal duty

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<sup>41</sup> For failure to do so, see *Sainsbury's Supermarkets Ltd v. Olympia Homes Ltd* [2006] 1 P. & C.R. 17 (Hughes' application for first registration).

<sup>42</sup> See M.J. Dixon 'Proprietary Rights and Rectifying the Effect of Non-Registration' [2005] Conv. 447, note 5.

<sup>43</sup> LRA 2002, s.73(7).

<sup>44</sup> Deemed to be an interest for the purpose of lodging a notice: LRA 2002, s.87(1).

<sup>45</sup> An official copy is now issued automatically on registration; for the previous position, see Anon., 'Conveyancing Completed' (1980) 124 S.J. 745.

<sup>46</sup> Alteration is subject to exceptional circumstances: Land Registration Rules 2003, r.126(2). Rectification is subject to further regulation: LRA 2002, Sch. 4, para.3.

to process applications and the exercise of any ancillary powers must be in accordance with standards for public body decision making. Those rules create expectations for citizens about the protection of their entitlements which should be fulfilled by the opportunity to be heard in a correction claim. Where the applicant lodges an ‘in order’ application which is not progressed due to the registry’s fault, it is inappropriate for the rightholder to suffer automatic postponement and suffer the same penalty as a rightholder who chooses not to lodge at all.

For pragmatic reasons also, the applicant ought to be able to rely on the registry to process applications properly on account of the technical nature of registry operations. That might not cause problems in a simple case, such as an unprocessed transfer where the registry’s failure to process might be immediately apparent, but in more complex cases they are practically unsupervisable by lay persons. Any efforts to undertake an on-going review the registry’s implementation would, moreover, require the cost of employing a solicitor to seek updates from the registry, demand copies of the register, call up filed copies of the transfer to cross-check for mistranscription in compiling the new entry. Not only would that duplicate the registry’s work in a way that would be better managed by its own internal quality assurance processes, but it would impose another administrative burden on registry resources in answering the information requests.

(ii) Rightholder having limited responsibility for initiating and responding?

An alternative model would be to limit the rightholder’s responsibility so that at some point before entry it is superseded by the registry’s responsibility for ensuring that the application is duly processed. The rightholder would have to pass some threshold for spurring the registry into action, but thereafter the registry’s failure to make an entry might constitute a mistake depending on how the correspondence between the registry and the rightholder unfolds. The registry might respond by communicating its rejection or a suspension pending requisitions. In such a case it would put the ball back into the rightholder’s court; he then have to fix the flaw and resubmit, or comply with the registry’s requisitions, and upon doing so the responsibility would return to the registry to process it. Responsibility could be seen to switch repeatedly between the two as the interaction proceeds. If the rightholder failed to act when responsibility rested with him, then he should not be permitted to allege mistake where it would be tantamount to a failure to lodge. If, in contrast, the registry did not do the right thing when responsibility has passed to it, either by breach of duty or defective exercise of a power<sup>47</sup>, then the correction power should be made available to the rightholder rather than him being automatically and irreversibly punished by the priority rule. That would afford far greater opportunity for individualised responsiveness to the circumstances of the omission, making it the preferred resolution mechanism where the loss is attributable to the registry’s failure to process as opposed to the rightholder’s own default.

That approach might explain the striking decision in *Franks v. Bedward*.<sup>48</sup> Although not actually a decision on the correction power, the case concerned the

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<sup>47</sup> Such as the power to reject and cancel of applications ‘substantially defective’ under Land Registration Rules 2003, r.16(3); to requisition applications not ‘in order’ under Land Registration Rules 2003, r.16(1); to accept a lesser grade of title under LRA 2002 ss.9, 10; to make an entry even without a satisfactory application from the rightholder e.g. LRA 2002, ss.37, 42, 64 and Land Registration Rules 2003, r.128.

<sup>48</sup> *Franks v. Bedward* [2012] 1 W.L.R. 2428.

relationship between the priority rules and another statutory power whose effect corresponded in some ways to rectification.

The Franks had lodged an application to register which was accepted in the day list of pending applications. The adjudicator ordered the registry to cancel the Franks' application, which was duly carried out. The court later set aside the adjudicator's decision. Before any action was taken pursuant to the court's decision, however, two charges were lodged by third parties. The Franks then returned to court to seek the retrospective restoration of their cancelled application to the daylist ahead of the charges under the Civil Procedure Rules.<sup>49</sup> This raised substantially the same issue that hangs over the interpretation of mistake in the rectification provision: whether the particular power in question is constrained by the priority rules. The court asserted its jurisdiction to reinstate the application under the C.P.R. restoration power and made clear that any impact on third parties, such as the chargees, went only to discretion and to terms.<sup>50</sup>

The decision is put forward here as illustrating the approach to omissions proposed in this subheading. The court did not say that it was the applicants' responsibility to steer their application successfully through to actual entry. It was enough that they initiated it and that the registry failed to process it. Those circumstances allowed the applicants to invoke the discretionary restoration power. The case implicitly recognises the dialogue between applicant and registry that may be involved in registering rights. On the facts, although the rightholders failed to lodge further applications that would have protected their position,<sup>51</sup> the responsibility to give effect to the original application had passed to the registry at one or more points in the process. Once it is accepted that the registry's failure to process an application (even though due to an adjudicator's order<sup>52</sup>) is sufficient to invoke the CPR restoration power, it is only a short step to suppose a similar willingness to accept the registry's failure to process an application as a basis for invoking the LRA correction power.

### **C. Public Body's Failure to Communicate with the Registry**

The responsibility for initiating an application for entry in the register normally rests with the rightholder but there are circumstances when others play a role in that process. Any failure by a private agent of a rightholder, such as a conveyancer, can be put aside because their omission to lodge should simply be attributed to the principal and incapable of affecting a third party.<sup>53</sup> The position is entirely different where the failure is by a public body that has come under a legal duty to communicate material to the registry for entry. It has more in common with the registry's failure in its public duty to process applications than with a private agent's failure to lodge. Few

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<sup>49</sup> Civil Procedure Rules 1998, r.52.10(2)(a) (as amended).

<sup>50</sup> *Franks v. Bedward* [2012] 1 W.L.R. 2428, paras. 51-52 *per* Rimer LJ with whom Toulson LJ agreed (Arden LJ dissenting).

<sup>51</sup> The case also involved two circumstances that may be tantamount to failure to lodge: (i) the Franks did not stay the order cancelling their application pending appeal, and (ii) after successfully appealing they did not re-lodge their application to register.

<sup>52</sup> The entry of a subsequently overturned judicial order is a mistake: *Totton and Eling Town Council v. Caunter* [2008] EWHC 3630.

<sup>53</sup> *Prestige Properties Ltd v. Scottish Provident Institution* [2003] Ch. 1, paras. 59-61 *per* Lightman J.

illustrations exist of such a duty to transmit registrable material:<sup>54</sup> rare examples include the First-tier Tribunal's duty to notify the registrar of any direction which requires the registrar to take action,<sup>55</sup> and the court office's duty to transmit certain bankruptcy notifications to the registry.<sup>56</sup> In the event of the tribunal or court office overlooking the notification, there is the prospect that the public body's breach of duty will lead to the loss of property rights if a third party becomes registered. To refuse relief in these circumstances would require a compelling justification. Since no action in damages for breach of duty lies against the court administration,<sup>57</sup> the question arises whether this class of omission could be redressed through rectification of mistake.

The argument for allowing the entry of a right through correction following a public body's failure to transmit is stronger than in comparison to a private agent, because of the public nature of the duty and because the rightholder cannot be penalised for any lack of care in selecting the negligent official. In the competition between an omitted rightholder and a later purchaser, the merits might be finely balanced. Each could have acted carefully and conscientiously, one by justifiably relying on the public body to transmit the application, and the other by diligently searching the register. Instead of applying the priority rules and automatically subordinating the claim of the rightholder who was prejudiced by the default of the public body, the most responsive way to unravel the competing claims would be to invoke rectification of mistake. It is the only regime which takes account of the reason for the omission and permits insertion of the right on a discretionary basis coupled with indemnity for the loser.

The argument in favour of allowing rectification here is to some extent conditioned by the larger picture of the structuring of rights and liabilities between rightholders and public bodies. Where the relevant public body incurs no duty to the rightholder to pay damages in compensation, as in the bankruptcy notification example, then the argument for providing rectification is at its strongest. Had damages been available to the rightholder, the need for rectification would have been much reduced. But that is not to argue against mistake in such situations. An approach which requires an *ad hoc* assessment of compensation from an outside agency in order to determine rectification jurisdiction would be unsatisfactory for diminishing consistency and predictability in the meaning of mistake. If, as recommended here, the rectification power is to be available, then its coverage should extend to all relevant omissions, leaving the possible damages action as a factor in the 'exceptional circumstances' test.

The problem of a public body failing to transmit a notification is given added complexity by the fact that in these cases the rightholder will also have had the opportunity to apply for registration in person. It might therefore be argued that the case ought to be categorised as the rightholder's simple failure to lodge. But it is submitted that that argument is founded on unreal expectations about peoples'

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<sup>54</sup> The transmission of information at first registration from the land charges department to the land registration department is, perhaps unexpectedly, regarded by the land registry as the applicant's responsibility: see form FR1, panel 12, and Land Registry Practice Guide 1 *First registrations* (16/3/2018) para. 4.4.5. The registry nevertheless has the power to make land charges searches: Land Registration Rules 2003, r.30.

<sup>55</sup> Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, r.40(1).

<sup>56</sup> Insolvency Act 1986, r.6.13.

<sup>57</sup> *St John Poulton's Trustee in Bankruptcy v. Ministry of Justice* [2011] Ch. 1.

behaviour. The point was addressed in *St John Poulton's Trustee in Bankruptcy v. Ministry of Justice* by the Court of Appeal in these terms:

‘...professionals experienced in dealing with insolvency matters would know that it was the court’s duty to give notice under rule 6.13 [Insolvency Act 1986] or its predecessors and would therefore be likely to leave it to the court to do so, at least in the first instance. If it came to light later that the court had not done so the creditor might give its own notice, but I agree that creditors and their advisers might well not do so as a matter of course because the court was under the duty to do so forthwith and could be expected to have a system for doing so.’<sup>58</sup>

To categorise these cases as the rightholder’s failure to lodge would also ignore modern characterisations of the legal relations between citizens and public bodies in other property contexts. Two points may be raised. First, a claimant may rely on a public body’s assurances as to his rights, even though making good on the assurance might adversely impact the rights of others. This broader principle is suggested by *Rowland v. Environment Agency*<sup>59</sup> in which the Court of Appeal recognised the potential for public law redress in favour of a rightholder following a public body’s erroneous representation, even though relief might impair the exercise of rights by others. Secondly, a claimant may rely on a public body’s assurances as to his rights, even though he should have known from other sources that he was not entitled: this is implicit in the observation in *Kingsalton Ltd v. Thames Water Developments Ltd*<sup>60</sup> that proprietors are entitled to rely on the land registry’s representations about title as embodied in the land register, and no less so because they knew that there had been doubts about the title before its registration.<sup>61</sup> The cases are not directly on point but they do lend support to the argument that a rightholder’s reliance on the public body in circumstances such as *St John Poulton* should be capable of being made good through proprietary protection, such as that embodied in the correction power, and not necessarily lost because of the alternative means available to the rightholder.

It is submitted that there is a good argument that a rightholder should not suffer a deprivation of property due to a failure by a public body which the legislature has appointed to look after the rightholder’s interests on his behalf, unless given the opportunity to review the circumstances in correction proceedings. The argument could be given effect by accepting that the omission arising from a public body’s breach of duty in failing to communicate a protectable right to the registry does fall within the definition of mistake.

#### **D. Failure in Comprehensively Compiling the First Register**

A final variety of omission occurs when a right is overlooked at the opening of a new register at first registration. This category of omission is quite different from the others because of the transition from unregistered to registered title. On the one hand,

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<sup>58</sup> *Ibid.* at para.43 per Lloyd LJ.

<sup>59</sup> *Rowland v. Environment Agency* [2003] EWCA Civ 1885. See also *Stretch v. United Kingdom* [2004] 38 E.H.R.R. 12.

<sup>60</sup> *Kingsalton Ltd v. Thames Water Developments Ltd* [2002] 1 P. & C.R. 81.

<sup>61</sup> *Ibid.* at para. 57 per Sir Christopher Slade. See also *Dougar Properties Ltd v. Keepers of the Registers of Scotland* [1999] S.C. 513 (full indemnity though claimant had known land register was inaccurate).

it seems wrong to penalise the omitted rightholder for failing to register if he acquired the right at a time when dealings were not subject to compulsory registration and the effect of converting to the prejudicial priority rules of registered land might not have been anticipated and so he might not have been advised of the future need to register. On the other hand, the position of the first registered proprietor must be considered. The proprietor whose acquisition of unregistered land precipitates its first registration does not merit the same protection from absent rights as a purchaser buying registered land who relies on a clear register. Because of these characteristics, it is submitted that the holder of any right which is absent from the register at first registration should be able to invoke a power to alter the register.

The postponement of rights at first registration, simply because they have been overlooked when compiling the register, cannot in itself be a goal of land registration.<sup>62</sup> While the destructive effect of such a policy might create public awareness of the need for rightholders to participate in the first registration process, there are compelling arguments against wholesale suppression of property rights in this way. It would severely test the public confidence in the registration system, it would create incompatibility with constitutional guarantees for the protection of property, and it might stimulate the registry to undertake an overly cautious and uneconomic examination of titles at first registration.<sup>63</sup> Furthermore, the triggering events for first registration do not justify the destruction of earlier unregistered rights as they are not limited to protecting market purchasers but include transfers to donees and administrators, and in circumstances when the acquirer could not have relied on any register.

Far from destroying rights, the goal of first registration<sup>64</sup> should be quite the opposite. It should be understood as taking a snapshot of the totality of the registrable interests affecting the title from which the first register's entries will be assembled. This explains the legal provision for a centralised, inquisitorial process at first registration which is generally aimed at securing protection for all detectable rights affecting the owner whether or not they would override first registration. Preservation of the interests pre-dating first registration is not simply left to the initiative of the interest holder, who may be unaware of the triggering event and of the first registration application, but is aided by the potentially broad-ranging searches, inquiries and advertising undertaken by the registry directly<sup>65</sup> and indirectly by co-opting the buyer's conveyancer.<sup>66</sup>

True it is that there is no inquisitorial land court, that the registry's title examination processes are relatively light touch, and that the legal criterion is pitched at the low level of 'safe holding title',<sup>67</sup> but these features were designed for the

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<sup>62</sup> C.T. Emery, 'The Chief Land Registrar's Power to Approve of a Good Holding Title' (1976) 40 Conv. 122, 129.

<sup>63</sup> See S. Cooper, 'The Versatility of State Indemnity' in M. Dixon *Modern Studies in Property Law* 5th ed (Hart, 2009), p.35.

<sup>64</sup> First registration refers to the initial compilation of a register, and not to the emergence of one register out of an antecedent register (such as the opening of a leasehold register out of a freehold register, or the opening of a separate register on subdivision) from which any absences would be treated as unauthorised deletions.

<sup>65</sup> Land Registration Rules 2003, r.30(1)(c).

<sup>66</sup> LRA 2002, s.71. The conveyancer must furnish 'all deeds and documents relating to the title that are in the control of the applicant' by Land Registration Rules 2003, r.24(1)(c), as well as certifying as to the existence of known interests by Land Registration Rules 2003, r.28(1) (see Land Registry form FR1, box 12).

<sup>67</sup> Land Registration Act 2002, s.9(2), (3).



practical purpose of promoting efficient examination and not because of any policy of suppressing valid rights. The potential adverse effect on undiscovered rights was appreciated at the dawn of modern registration, with indemnity and correction being acknowledged as instrumental in mitigating the dangers to rightholders resulting from abridged title examination procedures.<sup>68</sup> This balance continues to be relevant under the LRA 2002. It should therefore remain the case that mistake be interpreted to include any failure to enter a right on the register at first registration so that the rightholder has the opportunity to claim correction and indemnity.

This makes omission at first registration quite different from other forms of omission. The only question at first registration is whether the register reflects the title as it stood immediately beforehand. If not, a mistake exists. Mistake at first registration must be determined exclusively by comparing the two positions. Unlike the other classes of mistake by omission, there is no inquiry into fault, causation and responsibility. This justifies a minor legislative reform to segregate the correction of mistake at first registration into a distinct alteration head of its own.

Before leaving first registration, it is necessary to note two facilities which enable a rightholder to secure protection before title to the land has become registered: voluntary first registration and cautions against first registration. Failure to invoke them could be described with semantic accuracy as a rightholder's failure to lodge. The important issue, however, is not the descriptive label but whether the failure is of a type that ought to be sheeted home to the rightholder. There is nothing in the two legislative provisions to suggest that should be the case, since the epithet 'voluntary' in relation to the first registration indicates that there should be no penalty for omitting to register, and as the caution against first registration exists merely to alert the cautioner himself to an opportunity to object and has no other effect on validity or priority.<sup>69</sup> The absence of a penalty makes good practical sense when the rightholder may have acquired his right in circumstances where there was no solicitor advising or at a time when the land was not within a compulsory registration district. The failure to protect a right through the use of those two mechanisms should not therefore jeopardise the rightholder's claim to correction after first registration.

The voluntary nature of these facilities for pre-emptive entry indicates that fault and responsibility - or at least sole responsibility - are not to be attributed to the rightholder who fails to make use of them. That view has been implicitly accepted in *Horrill v. Cooper*<sup>70</sup> and *Rees v. Peters*.<sup>71</sup> The court in each case ordered rectification to insert rights that had been overlooked at first registration even though the rightholders did not protect their interests by cautions against first registration for which they were eligible.

## 5. Conclusion

The quality of the register information - its comprehensiveness and its exclusivity - are critical to the guarantee of title to registered land. The need to reassure purchasers

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<sup>68</sup> C.F. Brickdale, *Registration of Title to Land* (Stanford, 1886) p.47; C.F. Brickdale & J.S. Stewart-Wallace, *The Land Registration Act 1925*, 3rd edition (Stevens, 1927) p.274. See S. Cooper, 'Removing Title Blemishes as a Function of Registration' in A. Wudarski, *Das Grundbuch im Europa des 21 Jahrhunderts* (Duncker Humblot, 2016), ch.4.

<sup>69</sup> LRA 2002, s.16(3).

<sup>70</sup> *Horrill v. Cooper* (2000) 80 P. & C.R. D16.

<sup>71</sup> *Rees v. Peters* [2011] EWCA Civ 836.

dictates that its information be reliable, an objective which is achieved through the priority rules which clear off unregistered rights.<sup>72</sup> But reliability does not necessarily have to be achieved by making good the information disclosed to a purchaser: in many cases it would be sufficient to give indemnity to the disappointed purchaser, leaving the omitted right intact. The priority rules alone are unable to offer that protection to the omitted rightholder, not even in the worst case where a diligent rightholder has suffered by the registry's wrongful failure to process. Such loss should not be automatically imposed on the omitted rightholder merely to pursue a specious neatness in the priority rules. After all, the omitted rightholder might have been just as careful and faultless as the purchaser, he might be the party who would suffer most greatly by the loss of the land rights, and he might have been powerless to prevent it. The resolution of these disputes is best left to some rule that brings greater refinement to the law's discrimination between the omitted rightholder and the purchaser. The statutory power of alteration is able to play precisely that role by adjudicating on quite different grounds from the priority rules.

This article proposes that the statutory criterion of mistake at the core of the rectification power is capable of supporting that burden. Currently there is a deplorable vagueness that surrounds the meaning of mistake, but that vagueness at least offers a platform on which to project a coherent scheme for the redress of omissions. Mistake by omission should be understood not as the undifferentiated fact of an absence from the register, as the impoverished priority rule would, but rather as including a diverse variety of flawed processes in the system of managing rights, some of which are aptly labelled as correctable mistake, and some of which are not, according to the responsibility for the omission.

This paper has isolated several conceptual categories, each dealing with a distinct typology of omission. Within that framework, the paper has advocated certain patterns of responsibility which can be used prescriptively to guide the availability of the correction power. They suggest that mistake should not extend to the rightholder's failure to lodge, but it should include the absence of a right from the register by its unauthorised deletion (a mistake by commission), as well as the following mistakes by omission: the registry's failure to process a lodged application, the registry's failure to compile the register comprehensively at first registration, and potentially also the failure of an external public body to transmit an application for entry. These go beyond the *Megarry & Wade test*<sup>73</sup> which is arguably too narrow as it relies on the actions of a hypothetical registrar and thereby precludes cases in which fault lies outside the registry.

The power to correct mistakes should be seen as an integral part of the land registration system and not something that undermines the land registration agenda. It is the registration system itself which creates the entirely new source of risk that a rightholder might lose a property right by its absence from the register at the time of a registered purchase. If that absence is caused by the breach of duty of the registry or a public body liaising with it, then far from equating that to the rightholder's own default (as the priority rules do), a subtler differentiation between the respective responsibilities of rightholder and registry is required to acknowledge the singular legal significance of the register and its procedural apparatus. Attention should be paid to the practicalities of the process of lodging, the destructive power of a competing registration, the registry's failure to do its duty, and the need to sustain

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<sup>72</sup> LRA 2002, s.58(1), s.29(1) and s.30(1).

<sup>73</sup> C. Harpum, S. Bridge, M. Dixon, *Megarry & Wade: The Law of Real Property* 8th ed. (Sweet & Maxwell, 2012), para.7-133.

vested rights against deprivation when public bodies fail in their responsibilities. Those features are uniquely pertinent to the registration system and the resolution of property disputes over registered title should reflect them. The proposed model of mistake does so. It merits the label of 'registration-mindedness' more than adhering to a priority rule in which so many of the peculiar and identifying characteristics of registration practice are disregarded.